



# Labor & Employment Law Strategic Global Topics

Fall 2016 edition

Employment Law  
Challenges in Mobility and  
Posting of Workers



In this issue, we focus on ...

## Employment Law Challenges in Mobility and Posting of Workers

<b>Editorial</b>	3	<b>Costa Rica</b>	14
<b>EU update on posting of workers</b>	5	▸ Employment mobility law: aspects to consider	
▸ The new 2014 Directive		<b>Cyprus</b>	15
<b>Angola</b>	6	▸ Worker mobility	
▸ Work visas: a closer look		<b>Czech Republic</b>	16
<b>Argentina</b>	7	▸ International employee mobility	
▸ Migrant workers and the social security system		<b>Estonia</b>	17
<b>Australia</b>	8	▸ Employment law issues in mobility	
▸ Global Mobility Update September 2016		<b>France</b>	18
<b>Belgium</b>	9	▸ Employment law challenges in mobility	
▸ Employment law issues with posting workers		<b>Georgia</b>	19
<b>Brazil</b>	10	▸ Choice of law in employment agreements with international connections	
▸ Employment law and mobility		<b>Germany</b>	20
<b>Bulgaria</b>	11	▸ Employment law issues in mobility	
▸ A trend toward greater protection of posted workers		<b>Greece</b>	21
<b>China</b>	12	▸ Employment law issues in mobility	
▸ How employment law influences mobility		<b>Hong Kong</b>	22
<b>Colombia</b>	13	▸ Employment law issues in mobility	
▸ Employment law issues in mobility			



<b>India</b>	23	<b>Serbia</b>	33
▶ Employment of expats: legal aspects		▶ Employment law issues in mobility	
<b>Italy</b>	24	<b>Singapore</b>	34
▶ New constraints for assignments under Italian law		▶ Employment law issues in assignments	
<b>Japan</b>	25	<b>Slovak Republic</b>	35
▶ Regulations for expatriate employees		▶ New Slovak rules for posting workers	
<b>Netherlands</b>	26	<b>South Korea</b>	36
▶ Dutch employment law challenges with the posting of workers		▶ Effective integrated strategy – focusing on South Korean law	
<b>New Zealand</b>	27	<b>Spain</b>	37
▶ International employee mobility		▶ Assignment of workers abroad	
<b>Norway</b>	28	<b>Sweden</b>	38
▶ The rights of employees assigned or posted		▶ Rules for posting workers	
<b>Poland</b>	29	<b>Switzerland</b>	39
▶ Employment law issues in mobility		▶ Employment law issues in mobility	
<b>Portugal</b>	30	<b>Turkey</b>	40
▶ International mobility – the Portuguese approach		▶ Employment law in mobility	
<b>Romania</b>	31	<b>United Kingdom</b>	41
▶ Labor force mobility – regulations and challenges		▶ Assignment to the UK – employment law issues to consider	
<b>Russia</b>	32	<b>Vietnam</b>	42
▶ Employment law issues in mobility		▶ Employment law issues – mobility	

# Editorial



The traditional mobility model of the 20th Century, where employers were required to coax their employees to venture out into the brave world and take on an international assignment is rare in today's digitalized and globalized world. Indeed, employee mobility is no longer an issue faced by businesses in special cases but has become a key component of their organizational structure and business model. Businesses now seek to benefit from advantages of a more flexible and mobile workforce, and therefore fully optimize their internal HR supply chain. Businesses now need employees to be mobile, on shorter notice, for shorter periods of time, and not only for internal matters but also to serve client project needs and deliver on global contracts. Indeed, in today's competitive landscape, a multinational must be agile and ensure that its workforce is in the right place, at the right place, at the right time, with the right skills.

The use of mobile employees however raises HR legal risks of which employers need to be aware. Employee mobility is a key aspect of the European Union, given that freedom of movement for workers is one of the Union's cornerstones. The European Union has implemented complex regulations and directives, and country specific rules must also be kept in mind in order to avoid legal with respect to the posting of workers and reputational risk. In this edition, we will explore these key challenges and issues.

**Roselyn Sands**

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# EU update on posting of workers

## The new 2014 Directive

Posting of workers is regulated in the European Union by Directive 96/71/CE, called “the Posting of Workers Directive” which was approved on December 16, 1996. The posting of workers Directive aims to protect the social rights of posted workers by providing for core employment conditions that must be applied to posted workers in their host country. These core employment conditions include maximum work periods and minimum rest periods, annual paid leave, health and safety at work as well as applicable minimum rates of pay.

The Posting of Workers Directive has been applied in coordination with other various European Regulations, in particular to regulate the issue of the social security affiliation of posted employees. The most recent EU Regulation on social security is Regulation 987/2009, which provides the currently applicable coordination rules on social security systems.

The coordinated application of both the Directive and the EU Regulation provided for holistic rules on both employment law and social security regulation. However, although the European Regulation has been updated over the years (the most

recent modification was in 2012), the 1996 Posting of Workers Directive had not been updated since 1996 and it was felt that its contents were no longer sufficient in our globalized economy. It is for this reason, and through political pressure from several Members of the European Union that the Directive was reviewed, in order to provide additional protection to posted employees. On May 15, 2014, Directive 2014/67/EU was implemented, modifying the 1996 Posting of Workers Directive. The deadline for the transposition of this new Directive by Member States was June 18, 2016. Even if today, this deadline has passed, the following countries have yet to have implement the EU Directive in their national legislation: Bulgaria, Croatia, Czech Republic, Estonia, Greece, Luxembourg, Slovenia and Portugal. Belgium is currently debating the conditions under which the Directive will be implemented in their country. Some countries, like Germany, consider that their local law already takes the new Directive into account and that no transposition is required.

The purpose of the 2014 Directive is to help fight abuse and circumvention of the applicable rules, in particular via the use of “fake” companies, and ensure that specific situations qualify as genuine

posting. The 2014 Directive also provided for additional rights to posted employers in order to increase their rights in the subcontracting chain. Indeed, following the new Directive, Member States must now ensure that posted workers in the subcontracting sector can hold their direct subcontractor, in addition to or in place of the employer, liable for all wages owed. Thus, the business relationship may be at risk if violations occur and customers are held liable.

One of the other main parts of the new 2014 Directive is focused on increasing cooperation between national authorities and administrations in charge of compliance. These changes include time limits for the supply of information between national authorities as well as the implementation of fines for companies that fail to comply with the applicable regulations. Posted workers also have increased protections as they can bring legal action both in the home or host jurisdiction.

On March 8, 2016, the European Commission proposed another revision of the rules on posting of workers within the EU. So this an issue that requires careful legal attention.

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# Angola

## Work visas in Angola: a closer look

### Work visas: requirements and procedures

According to Angolan law, a work visa is required for those undertaking temporary remunerated work in Angola, and its holder can perform only the specific professional activity for which the visa was issued.

### Main characteristics

This visa allows its holder to undertake remunerated activity in Angola for Angolan companies, but it does not allow the applicant to become a resident in the national territory of the Republic of Angola.

### Period of stay

This visa must be used within 60 days of issuance, and entitles its holder to enter multiple times and to stay in Angola until the end of the employment agreement term – a minimum of 3 months and a maximum of 36 months.

### Procedure

Obtaining a work visa can be bureaucratic and, in most cases, time-consuming. In general, the procedure comprises two main phases:

- ▶ Obtaining a favorable opinion on the hiring from the ministry that oversees the sector where the employer undertakes its activity
- ▶ Submitting the visa application to the Angolan Consulate (in the country of origin or residence)

### Obligations and additional rules

#### Quota regime

Angolan companies must comply with a statutory quota in the hiring of foreign citizens – a minimum of 70% of national citizens and a maximum of 30% of foreign employees. Also, only visa applications for

qualified foreign citizens can be approved. An application should be carefully prepared to demonstrate the foreign citizen's qualifications and professional experience.

### Employment agreement

Foreign citizens working in Angola must sign an employment agreement that contains some imperative clauses and that must be registered with the Ministry of Labor. When the contract is terminated, the employer must write to the Ministry of Labor to request cancellation of the foreign employee registration.

The employment agreement will enter into force only after the work visa is issued and the employment agreement is registered with local authorities. To obtain the visa, companies can submit an employment agreement or a promissory employment agreement, both signed. Both will be in force only after being registered in Angola.

Because the employment agreement will be effective only after (a) the visa has been issued, (b) the employee enters Angola with the visa and (c) the contract has been registered, the employee can work abroad for another company during the procedure to obtain the visa.

### Salary

Foreign citizens working in Angola must be included on the local company payroll and be paid in Angola in kwanzas. Upon receiving evidence of a valid employment agreement registered with the Ministry of Labor, commercial banks will allow the transfer of money abroad.

### Taxes and social contributions

Companies hiring foreign employees will always be required to withhold employment income tax on income received in Angola. The social security contribution is required only if the foreign citizen is not paying social contributions in the country of origin and residence.

### Repatriation deposit

The repatriation deposit requirement is set forth in Law No. 2/07 of 31 August 2007 and in Presidential Decree No. 108/11 of 25 May 2011. The granting of a work visa is subject to a deposit made by the employer to cover the costs of a potential repatriation of the employee.

### Declaration of Honor

Foreign citizens wishing to work in the country must sign a Declaration of Honor stating that they will comply with Angolan law and will return to their country of origin after the employment agreement is terminated.

### Registration

The local company must register the foreign employee with the relevant authorities at least 30 days before activities start. Registration should occur in the first month of employment.

### More than one employment agreement

Under Article 9 of Decree No. 6/01, the employee cannot sign a contract with any other employer (domestic or foreign) during or after the termination of the first agreement without complying with specific rules thereby established.

It has been considered that this situation may be ignored if the foreign citizen is working in Angola under a secondment agreement. When a foreign company agrees with a local company on an assignment for the employee, the employee must have two employment agreements – one with the local entity and the other with the foreign entity. However, Angolan law does not foresee this situation, authorities may reject it.

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# Argentina



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## Migrant workers and the social security system

Globalization is one of the main drivers of worker movement: about 60% of the world's migrants are migrant workers, a number that is expected to rise as companies expand to different countries and regions. That's the case in Latin America, particularly Argentina.

International assignments raise numerous concerns, including contributing to social security and maintaining the social security benefits of migrant workers. How can these workers be certain that their social security benefits (especially their retirement pensions) will be preserved?

In Argentina, the territoriality principle guides the social security system, meaning that contributions are obligatory for services rendered within national territory. Considering that employees transferred abroad will perform no activity in Argentina, their compensation from the foreign company will generally not be subject to employer or employee contributions to the Argentinean system.

If the individual is assigned to a country that lacks a ratified social security agreement with Argentina, the assignee's benefits may suffer because payments to the Argentinean social security system will be suspended. The main concerns are related to health insurance (*Obras Sociales*) and retirement benefits.

The negative effect on retirement benefits might be mitigated if the employee is assigned to a country that has a social security agreement with Argentina. The employee can compute the period worked in the other country for retirement in Argentina. Nevertheless, no social security contributions would be paid in Argentina during the assignment, lowering the average estimated pension amount.

Argentina has nine ratified social security agreements, with Chile, France, Greece, Italy, the Mercosur region (which includes Brazil, Uruguay and Paraguay), Belgium, Portugal, Slovenia and Spain. Because Argentinean employees are spread around the globe, these agreements do not help in every assignment. Employers may have to consider alternative solutions.

To help lessen the negative effects of discontinued contributions, companies can take two actions:

- ▶ Buy private insurance to cover contingencies with no equivalent coverage in the country of destination
- ▶ Ask the individual to register with the federal system of self-employed workers

Other recommendations include making voluntary contributions to a private pension plan or paying cash to the worker as compensation for the lack of retirement contributions.

Another market practice is to keep the assignee on the Argentinean payroll. However, this is not recommended because it increases the costs for the employer and the employee, and it indicates that the employment relationship in Argentina has been maintained.

The company should consider these concerns when planning the assignment, because the success of expatriation is deeply connected to the actions taken on social security themes. To help reduce the negative impacts on social security, employers can speak with potential assignees and consider their age, how close they are to retirement and whether they plan to retire in their home country.

Human resources should also become more connected to the company's strategic goals. A well-planned assignment can benefit the employer in many ways, from costs and employee satisfaction to company reputation.

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# Australia

## Global Mobility Update September 2016

Australian Federal employment law has an inherent but rarely exercised extraterritorial applicability. Australian employees serving abroad may benefit from rights under the *Fair Work Act 2009 (Cth)*. Equally, Australian employers may be subject to obligations set out in that Act.

However, a more fundamental issue is most often at play in the interaction between Australian employment law and a globally mobile workforce: the applicability of Australian contractual terms and conditions of employment overseas. An Australian Federal Court case from 2012 is illustrative of the care that must be taken by Australian employers in sending employees overseas. The case remains good law.

This was a case where the uncertainty in relation to the employing entity of a regionally mobile employee gave rise to considerable and unforeseen accumulated entitlements.

Between 1988 and 2000 a senior employee (we shall call him **Dr X**) was employed in Singapore by numerous entities that were acquired by an earlier manifestation of a group of companies which we shall call the ABC Group in 2000. The ABC Group had changed its name several times since its floatation on the Australian Stock Exchange in 2000. For the sake of convenience we shall call all these entities collectively **ABC**. In 2000, ABC employed Dr X under a three-year Australian employment agreement which granted Australian terms and conditions, including entitlements to annual leave and long service leave, as well as a 6 month notice period. As it happened the

employment continued beyond the three years term. To add confusion to the factual matrix, Dr X's salary was paid by a related Singapore company which we shall call **DEF** for the purpose of this article. DEF had been his employer prior to 2000.

Between 2000 and 2011, when his position was terminated, Dr X moved to a number of locations throughout the Asia-Pacific region. With each move ABC issued Dr X with various letters purporting to constitute fresh employment "agreements" on local (not Australian) terms which were variously described as "an addendum" to "your original contract with DEF, and an "expatriate assignment". As it transpired, a number of these letters included wording to the effect that his original terms of employment remained in full force, such as:

*"This letter is an addendum to your original employment contract with...[DEF]...dated 15 February 2000. The terms of your employment with...[DEF]...are amended as follows..." [2006 "agreement"]*

*"I am pleased to be able to confirm... [DEF's]... terms and conditions for the continuation of your current Expatriate Assignment for a further period of 24 months." [2008 "agreement"]*

*"All other terms and conditions of your employment remain unchanged." [2009 letter regarding changed compensation]*

Throughout these documents the employing entity was referred to, among other things as DEF and variations of that name. The issue before the Full Federal Court in the matter was whether or not Dr X was still employed by ABC (his contention) or by another regional member of the ABC Group (ABC's contention). Dr X sought payment of accrued leave, annual leave, long service leave (a unique

Australian and New Zealand entitlement), an amount equivalent to notice of termination and an implied redundancy entitlement.

Critically, the 2000 employment agreement was professionally drafted. Subsequent letters, agreements, secondment arrangements (variously described) were not professionally drafted. The court found that after the 2000 employment agreement there had been no discussions or negotiations regarding a change of employer. Whatever the intention of the parties (and there was dispute in relation to this), the documentation pointed to the abiding relevance of the 2000 employment agreement. The court found that the post-2000 agreements were merely additions to the 2000 employment agreement, effectively supplementing its terms with further local terms. Having found largely in Dr X's favour, the court ordered ABC to pay Dr X almost AUD600,000 by way of back-payment of entitlements in addition to paying Dr X's legal costs.

Despite being over three years old, the case remains a salutary lesson to employers in Australia to ensure that all agreements "speak to" one another. When dealing with a globally mobile employee chief among an employer's tasks should be to ensure clarity of intention regarding:

- ▶ continuity of employment,
- ▶ applicable entitlements, and
- ▶ the proper employing entity.

While the criticality of these elements is demonstrated in this Australian case, global employers will recognize these as common themes across the world.

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# Belgium



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## Employment law issues with posting workers

Using employees seconded from a foreign employer to perform work or services in Belgium is complex from an employment law viewpoint. If the employer is in the EU, such arrangements require a close examination of EU legislation on the free movement of services and people, as well as EU directives and the local legislation implementing those directives. These measures seek a balance between the free movement of services, social dumping, and the distortion of competition between local and foreign players.

In response to the European Court of Justice case law on the free movement of services, Belgium has enacted provisions – in the form of the Posting Act of 5 March 2002 – that concern employers who temporarily place workers in Belgium.

This act was introduced to implement European Directive 96/71/EC on the core labor conditions that must be met in the host country, to the extent that they offer better protection than the labor conditions that would normally apply. Belgium has not yet incorporated a second measure, Directive 2014/67, into its law.

The Posting of Workers Directive adds safeguards to protect the social rights of posted workers. Posted workers are those who, on behalf of their employer, are sent for a limited period to work in an EU Member State other than the one where they normally work or have been hired.

The Belgian Posting Act of 5 March 2002, however, goes beyond just imposing minimum standards. From a European perspective, it does not comply with the basic principle of the free movement of services in certain ways.

The general rule is that each employer must respect the conditions for work, pay and employment prescribed by Belgian laws, administrative law provisions or conventional provisions (such as relevant collective bargaining agreements) – non-compliance is sanctioned by criminal law statutes. Therefore, it has a broad application.

Foreign employers who are not subject to the Belgian social security system and who comply with the mandatory Limosa declaration to the social security administration (or are exempt from the requirement) enjoy certain benefits – but only for 12 months. They no longer have to draw up certain Belgian social (workforce) documents for the relevant assignment: internal working regulations, the personnel register and the regulations for monitoring the work schedules of part-time employees. These employers also no longer have to prepare individual (salary) accounting and salary slips for each pay period according to Belgian standards, provided that – if asked by the social inspection – they can submit similar salary documents drawn up in accordance with the origin country's law. This will avoid double salary administration.

Triangular employment relationships – when an employer hires out an employee to another company (the “user undertaking”) – are strictly regulated. Under Belgian legislation, hiring out employees by transferring part of the employer's authority is forbidden in principle.

If a prohibited hiring-out occurs, the user undertaking is considered to have created an indefinite employment contract from the start of activity.

Measures from 2013 introduced a stricter definition of “transferring part of the employer's authority” with respect to what instructions can be given by the user undertaking.

Only the following instructions are no longer part of the employer's authority:

- ▶ Instructions on health and safety regulations
- ▶ Instructions given in the framework of a written agreement between the employer and the user undertaking on the condition that:
  - ▶ The agreement itself also contains an explicit and detailed description of the instructions that the user undertaking can give.
  - ▶ The instructions do not erode the employer's authority; the legal employer should still determine the job content, end the secondment, determine a salary increase or change of function, impose sanctions and control absences due to, for instance, incapacity to work.
  - ▶ The factual execution of the agreement between the user undertaking and the employer is fully in line with the details of the agreement on the instructions.

If the user undertaking does not comply with these conditions, the arrangement will be deemed an illegal hiring-out. As a result, the user would be legally regarded as the employer and, together with the original employer, would be jointly liable for paying the required salary and making social security contributions.

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Brazil

## Employment law and mobility

The employment legislation now in force in Brazil was created in the 1940s and does not take account of a more mobile workforce. As conflicts on the applicability of the legislation emerge, the Government continues to adapt the regulations to accommodate multinational companies with subsidiaries in Brazilian territory.

In Brazil, as in most countries, the rules differ for sending an employee abroad or receiving someone from outside the country. Therefore, it is important to examine the legislative treatment of inbound and outbound professionals to highlight the difficulties.

### 1. Inbound

The type of work permit will define the rules applied to an inbound expatriate on different levels, such as tax, employment law and immigration.

Although there are several types of work permit, the most common visas that allow their holders to perform professional activities in the country are permanent, temporary and technical services.

The holder of a technical services work permit maintains an employment relationship with the home country, so the Brazilian employment legislation does not cover these professionals.

The permanent work permit holder will be treated as a local employee, with the same rules and challenges for budgeting purposes.

The temporary work permit requires more time and effort to manage. For Brazilian employment law purposes, these expatriates should be treated as local employees. Nevertheless, because of a set of specific employment rules now in force, most companies struggle to forecast the costs for expatriation to Brazil. Here are some examples:

- ▶ Monthly payments – in most countries, salaries are annual and are divided into 12, 13 or 14 installments throughout the year. In Brazil, salaries and taxes are calculated monthly, but every employee is entitled to a 13th payment (a Christmas bonus) proportional to the number of months worked throughout the year.
- ▶ Vacation – for every 12 months worked, the employee is entitled to a 30-day paid vacation. This time can be divided into two periods, but smaller period cannot be less than 10 days. Every employee is also entitled to a vacation bonus of one-third of their monthly salary.
- ▶ Social security – employer contributions vary from 20% to 31%, levied on the payroll, or from 1% to 4.5% on gross revenues (depending on the company's activity). For benefits, Brazil is a signatory to about 19 international social security agreements with different countries and regions (such as Québec and Mercosur). Therefore, every situation should be treated differently.
- ▶ FGTS (the unemployment severance fund), is a monthly 8% contribution by the employer on behalf of the employee

with a hybrid social security-tax nature. The contribution is deposited in a savings account and can be withdrawn by the employee under specific circumstances. These include treatment of disease, the acquisition of real estate or three years without an active employment agreement in Brazil. As this contribution is unique, companies usually do not take it into account in the assignment letter or for forecasting purposes.

### 2. Outbound

Law 7.062/1982 regulates the rights of employees transferred abroad by companies to perform activities for more than 90 days. This legislation establishes that the transferred employees should remain under the Brazilian legislation umbrella, including aspects of social security and FGTS, apart from protecting the employee's rights to a mobility package (flights, expenses, insurance, etc.).

Transferred employees will maintain an employment relationship in Brazil, so employers should prepare shadow payroll calculations to comply with the mandatory contributions to FGTS.

In conclusion, the biggest challenge for mobility programs is forecasting the correct amounts for labor rights of employees protected by local legislation, whether it is an outbound or inbound expatriation.

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# Bulgaria



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## A trend toward greater protection of posted workers

The steadily growing appeal of Bulgaria as an outsourcing services destination has boosted workforce inflow and outflow, particularly in high-tech industries. In posting situations, employers commonly grapple with this question: which country's law governs the employment relationship, and what consequences ensue?

### Posting of workers to Bulgaria

The parties are free to choose the applicable law, as recognized in both EU and non-EU cross-border employment situations. For the term of the posting, the parties can decide to apply the home country's laws or to subdue their employment relationship to the local legislation of the host country (i.e., Bulgaria), which is sometimes the case in long-term secondments. However, this flexibility is limited by mandatory worker protection rules.

The treatment of inbound EU and non-EU posted workers is being developed on a largely uniform basis. Posted workers, irrespective of whether the employer is based in the EU, are entitled to a set of core rights that replicate and even build on those enshrined in Directive 96/71/EC.<sup>1</sup>

However, Bulgarian labor law might envisage less favorable working conditions than the law of the jurisdiction where the employer is established. In that case, the receiving entity must *ensure* the more favorable working conditions for the posted workers and must attest to that before the Bulgarian labor agency. The scope and content of that obligation are not clearly defined either by the law or by the practice of the local labor authorities and courts. But the general view is that it should not extend to covering the difference between the salary levels by the receiving entity, because that remains an obligation of the employer.

<sup>1</sup>Directive 96/71/EC on the posting of workers in the framework of the provision of services.

The tendency toward uniform treatment of EU and non-EU workers is also manifested by the statutory requirement not to afford more favorable treatment to non-EU-posted workers than to EU workers sent to a receiving entity in Bulgaria. The legislative rules do not elaborate on whether the assessment of working conditions should be performed at the receiving entity's level or at a more generalized level. However, the first interpretation should be given more credit because there is no publicly available database at the national or regional level.

### Posting of Bulgarian workers to EU and non-EU countries

The "conflict of law" rules governing the employment relationship between a worker and an employer based in Bulgaria, *irrespective* of whether the employee is sent to work temporarily in an EU or a non-EU country, are fundamentally the same, and they mirror the rules set forth by Rome I.<sup>2</sup> The choice of law made by the parties will be respected. However, employees cannot be deprived of worker protections that, in the absence of choice, would have applied.

Only when the posting lasts more than 30 calendar days does the employer have to afford at least the same minimum working conditions as those applicable to employees who perform the same or similar work in the host country, if it's an EU or European Economic Area (EEA) Member State or part of the Swiss Confederation.

This higher standard of protection, however, does not extend to workers sent to a third country. They are protected only within the boundaries delineated by the applicable mandatory Bulgarian labor law provisions, even though the host country's legislation may be more beneficial.

<sup>2</sup>Regulation (EC) No. 593/2008 on the law applicable to contractual obligations.

## Expected changes in the legislative landscape

A Government initiative toward enhancing worker protections is in motion. Although the bill has not been officially submitted to the National Assembly, the fundamental principles underpinning the forthcoming changes are not expected to shift.

One major change is the removal of the "30-day period" mentioned above – i.e., the granting of more beneficial working conditions in the host state should encompass short-term assignments as well.

The legislative proposal reflects the tendency towards expanding the applicability of the host country's rules (not just the minimum standards). However, that applies only to postings in an EU or EEA Member State or in the Swiss Confederation. Furthermore, an employer sending workers to Bulgaria in the framework of provision of services must comply with additional obligations, including submitting information about the posting to the Bulgarian labor inspectorate before the provision of services begins.

New rules for administrative cooperation and control between the competent authorities of the EU Member states are to be implemented by the end of the year, in compliance with the Directive 2014/67/EU<sup>3</sup>. Another important change is the introduction of joint liability for the main contractor and its subcontractor for unpaid employment-related remuneration owed to workers.

<sup>3</sup>Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

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# China

## How employment law influences mobility

When an expatriate (expat) is assigned from abroad to mainland China – known as mobility – the following employment law issues should be considered.

### 1. Setting up mobility

Ideally, a mobility arrangement should proceed as follows:

1. The expat is hired as an employee by the overseas parent company (normally a direct investor or an affiliate of the local entity established in China), and the relationship is governed by foreign law as agreed by the parties.
2. The expat – in an agreement signed with the parent company – is seconded to work for the local entity, an arrangement that creates no employment relationship with the local entity.

Additionally, in our experience, most labor authorities in China accept the assignment agreement for the expat's work permit, provided that the parent company is responsible for compensation and the agreement includes provisions required by the local authority. In some cities, however, labor authorities may still require an employment contract. In that case, Chinese law will apply to the expat and the local entity, and the parent company and the local entity must consider how to deal with the two employment contracts (domestic and overseas) to avoid dual employment relationship risks.

## 2. Issues during mobility

### 1. Applicable laws and rules

In the assignment arrangement, the expat's employment relationship remains with the parent company and will be governed by foreign law. Whether the existing employment contract will be suspended or modified is subjected to foreign law.

During the assignment, the expat's entitlements will be based on the employment contract with the parent company or the assignment agreement – not Chinese law – except for mandatory items required by China.

### 2. Social security

Foreigners who are working legally in China must participate in the social insurance system and contribute to the five types of insurance schemes, even if they are under an assignment arrangement. Exceptions include workers from some countries (such as South Korea and Germany) that have signed treaties with China providing reciprocal exemptions from social insurance. Some cities may exempt the expat from contributing to social insurance according to local guidelines. Those will be confirmed on-site with the local labor authorities before and during the assignment term.

### 3. Remuneration

The parent company will be responsible for the expat's wages. In practice, the local entity may need to pay the expat first for convenience. To avoid giving rise to an employment relationship, it is crucial to produce evidence that the local entity is merely entrusted by the parent

company to pay wages to – and withhold individual income tax for – the expat. The same goes for the reimbursement of wages. It is advisable to consult tax professionals to devise a suitable mechanism for making reimbursement under the applicable foreign law.

### 4. Other working rights

Although foreign law governs mobility, the expat in fact works in China and may be subject to local rules governing working hours, rest, vacation, safety and hygiene.

### 3. Issues at the end of mobility

The assignment agreement should stipulate the terms of termination. Because foreign law governs, the expat is not entitled to the statutory severance payment in China. To avoid disputes, the local entity should certainly not produce any document regarding the assignment termination. However, the case will be different in cities that mandate a local employment contract.

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# Colombia



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## Employment law issues in mobility

### Repatriation

Companies face many challenges with repatriation because of the complexities of Colombian regulations around mobility services. In this section, we will discuss four specific topics.

### The labor and social security perspective

According to the principle of territoriality (Article 2 of the Colombian Labor Code), employment relationships are governed by Colombian labor law when the services are rendered in Colombian territory, regardless of the employee's nationality, the place where the contract is executed or the place where the salary is paid. Therefore, independent of a labor agreement in the home country, the relationship with the host country should be terminated as it is ruled by local labor laws.

At the end of the assignment, regardless of the method of termination and the employee's nationality, every employer should pay:

- ▶ Outstanding salaries
- ▶ Fringe benefits (applicable only for ordinary salaries: legal services bonus, severance and interest on severance)
- ▶ Vacations

Indemnities would apply if the employer unilaterally ends the assignment.

Employers must also report the termination of the labor relationship in Colombia to the social security system operator to cease liability for health, pension, labor risk and payroll taxes.

### The immigration perspective

Within 15 calendar days after termination, the company must inform the Special Administrative Unit Migration Colombia of the expatriate conclusion of activities – in writing or through authorized electronic means (Article 5 of Resolution 714 of 2015).

The employee has 30 days after termination to request a new visa or leave the country.

### The repatriation perspective

During the 30 calendar days after the contract ends, companies must pay to repatriate the worker and their family.

If the employee does not use the repatriation expenses, the company must inform the Special Administrative Unit Migration Colombia in writing within five days of the term mentioned above expiring. In this case, the expatriate will assume the relocation expenses. This obligation ceases when a foreigner has a resident visa or a TP-9 visa (refugee).

The departing expatriate must have paid all housing and utility bills due, and leave deposits for those that are outstanding.

### The individual tax perspective

For tax purposes, residents are those “who remain continuously or discontinuously in Colombia for more than 183 days (including days of arrival and departure), during any period of 365 consecutive calendar days” (Tax Law, Article 10).

According to Law 1607 of 2012, individuals (including foreign nationals) considered tax residents are subject to taxation on their worldwide income from their first year of tax residency in Colombia. Individuals

(including foreign nationals) who are not considered tax residents are subject to taxation only on Colombia-sourced income.

Pursuant to the Colombian Tax Law, the 183-day test does not determine the obligation of an expatriate to file an income tax return. This test is intended only to establish tax residency for defining what portion of an individual's income will attract taxation in Colombia and the applicable tax rate.

The applicable tax rates in Colombia are:

- ▶ Progressive rates of 19% to 33% on net taxable income for individuals classified as tax residents. Alternative income tax systems (IMAN and IMAS) also apply. Individuals must compare their income tax obligations under both the regular tax system and the alternative tax systems and apply the higher of the two taxation liabilities.
- ▶ Thirty-three percent on net taxable income for individuals classified as nonresidents for tax purposes.

When an assignment ends, it is important to determine whether the expatriate will be a tax resident for that fiscal year to see what rate will apply and how much income will be subject to Colombian taxes.

It is also mandatory to establish whether expatriates must file an income tax return for the year that the assignment is finalized, depending on their labor-related income or the value of their assets in Colombia according to amounts specified by law every year.

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# Costa Rica

## Employment mobility law in Costa Rica: aspects to consider

Costa Rica has seen exponential business growth and development, with a high rate of economic opportunities thanks to local and international investment. Foreign companies that establish ties in Costa Rica have a chance to achieve development and stability.

This success hinges on the company's own organization and its commitment to following local migratory labor provisions.

Many companies disregard key aspects when importing their human capital to Costa Rica. Here, we highlight the important issues to consider.

### Immigration

The organization or company should clearly understand the immigration status of its employees. Their status could be temporary or permanent, each of which must be previously established and properly planned. Their profession is also a vital consideration. Foreign employees who work in jobs with high unemployment rates in Costa Rica – such as business

administration or administrative personnel – are less likely to be granted work permits. The Ministry of Labor has taken this action to give preference to local professionals.

### Labor rights

Generally, local legislation will govern the labor rights of employees, independent of their immigration status, unless an explicit previous arrangement states otherwise and is more favorable to the employee. The work contracts of many foreign companies often don't take this into consideration. Legal advice from experienced Costa Rican attorneys is important: they can verify that the contract reflects the applicable legislation.

### Social security

Another important matter is the fulfillment of all social security requirements. This is the foundation of any Costa Rican employment contract, and is so important that it has primacy over any condition or status of the employee. The company should meet all social security requirements, including registering as the legal employer with the Costa Rican Department of Social Security, providing

a complete and accurate list of company employees (including salaries) and keeping up to date on all social security contributions. These are fundamental requirements, regardless of their employees' immigration status.

### Other considerations

Employees can stay in the country and begin work, but their permanent presence is subject to the resolution of the immigration process, which can take considerable time.

Alternatives to the work permit include a temporary visa, which requires a less complex process and takes a shorter amount of time. This option suits employees who are visiting the country for a specific, temporary project.

These aspects are a small sample of what a company must carefully consider within the Costa Rican labor immigration scheme.

Proper legal advice on employment mobility is invaluable to the success of a foreign company operating in Costa Rica.

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# Cyprus



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## Worker mobility

The rules applicable to worker mobility in Cyprus depend on whether the nationals are from a Member State of the EU or from outside of it.

### (i) Employment of EU nationals in Cyprus

#### (a) Freedom of movement

The free movement of workers is a fundamental principle enshrined in Article 45 of the Treaty on the Functioning of the EU and developed by EU secondary legislation and Court of Justice case law.

Law 7(I) of 2007 – the right of EU citizens and their family members to move and reside freely within the Republic of Cyprus – is the main legislative instrument regulating the free movement of EU nationals working in Cyprus. When employment requires EU nationals to remain in Cyprus for more than three months, the statute requires them to register with the competent authority, i.e., the Ministry of Interior, and calls for registration with social insurance authorities.

#### (b) Social insurance

The rules for determining which Member State's legislation applies are set out in Articles 11 to 16 of Regulation 883/2004,<sup>1</sup> and the related implementing provisions are set out in Articles 14 to 21 of Regulation 987/2009.<sup>2</sup>

The guiding principle is that EU nationals are subject to the legislation of a single Member State for the purposes of social insurance. For employees, the legislation of the Member State where the activity is carried out usually applies (*lex loci laboris*). People receiving certain short-term cash benefits based on their employment or self-employment are also subject to the legislation of the Member State of activity. Any other person is subject to the legislation of the Member State of residence.

#### (c) Posting of workers

Posting Directive 96/71/EC, concerning the posting of workers for the provision of services, as amended (PWD), aims to facilitate aspects of the freedom of movement of workers. The Enforcement Directive of 2014 (yet to be transposed in Cyprus) supplements the PWD by addressing shortcomings related to implementing existing rules. Cyprus transposed the PWD into the Cypriot legislation in the form of the Posting of Workers in the Framework of the Provision of Services Law of 2002, L. 137(I) of 2002 (PWL).

Under PWL, a worker is any person working for another person – either under an employment contract or under circumstances from which the existence of an employer-worker relationship can be inferred, irrespective of that person's title in the country of origin.

This could be seen as encouraging attempts to circumvent employment or social security legislation. A Cypriot subsidiary could be used to post EU nationals of one country to another, with a view toward saving on wages. These issues are expected to be addressed through the transposition of the 2014 Enforcement Directive.

### (ii) Employment of third-country nationals

The Constitution guarantees equal treatment rights to non-nationals. The main legislative instrument regulating the employment of third-country nationals is the Aliens and Immigration Law, Cap. 105 of the laws of Cyprus. Moreover, Cyprus has adhered to Article 19 of the Revised European Social Charter (i.e., the right of migrant workers and their families to protection and assistance).<sup>3</sup>

Third-country nationals can apply to obtain an immigration permit (temporary or permanent).<sup>4</sup> If no particular circumstances exist for special adjustments or an ad hoc policy, the basic precondition for granting a permit for employment of third-country nationals is the absence of Cypriot or EU candidates to meet the employer's specific needs. That determination will be made after an investigation by the competent authorities.

Subject to exceptions, third-country nationals can remain for employment for a maximum of four years.

<sup>1</sup> Regulation (EC) No. 883/2004 of the EP and of the Council of 29 April 2004 on the coordination of social security systems OJ L. 166, 30.4.2004, corrigendum OJ L. 200, 7.6.2004, amended by Regulation (EC) No. 988/2009 OJ L. 284, 30.10.2009.

<sup>2</sup> Regulation (EC) No. 987/2009 of the EP and of the Council of 16 September 2009 laying down the procedure or implementing Regulation 883/2004, OJ L. 284, 30.10.2009.

<sup>3</sup> In terms of alignment with international legal instruments on labor and employment, Cyprus is a signatory to the International Labor Organization Migration for Employment (Revised) Convention (1949), the Migrant Workers (Supplementary Provisions) Convention (1975) and the Discrimination (Employment & Occupation) Convention (1958).

<sup>4</sup> On the basis of one of the categories referred to in Regulation 5 under Cap. 105.

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# Czech Republic

## International employee mobility

Generally, a Czech employer can assign its employee to work for another company abroad based on temporary assignment or agency employment. Another option is to suspend employment with the home employer and conclude an employment contract with the host company.

Basic issues to be addressed when foreign employees are assigned to the Czech Republic are mentioned at the end of this article.

## Assignment from the Czech Republic

In a common scenario, a Czech home employer assigns an employee to perform work for the host employer. The employment contract with the home employer continues, and no direct relationship arises between the employee and the host employer. The host employer can assign work to the employee and supervise it, but can take no legal action toward the employee. The home employer pays the salary.

For assignments within the EU/EEA that do not exceed 24 months), the A1 form may be applied for at the Czech Social Security Administration. With that form, the employee can remain in the Czech social security system. For assignments not covered by the A1 form or for assignments outside the EU/EEA, the home employer must generally pay social security contributions in the host country.

The salary and working conditions of the employee during the temporary assignment may not be worse than those of a comparable employee of the host employer.

If the employment contract is subject to Czech law, it should continue to apply during the assignment period.

After the assignment, the employment with the home employer continues.

Czech law regulates two types of assignment (both subject to the above rules), depending on whether the purpose of the assignment is profit for the home employer:

## Assignment without profit

An employer does not need an employment agency license, under the following conditions:

- ▶ A written temporary assignment agreement is executed between the employee and the home employer.
- ▶ The agreement is executed no less than six months after employment commences.
- ▶ The host employer pays no consideration to the home employer for the assignment, save for direct costs such as salary or travel expenses.

## Employment agency assignment

Hiring out labor-for-profit is subject to an employment agency license, and an employment agency cannot assign an employee who is subject to a work permit.

The agency can temporarily assign employees under the following conditions:

- ▶ The employment contract includes a clause enabling agency employment.
- ▶ A HOLA agreement is concluded between the home employer and the host employer; essentials are stipulated in the Labor Code.
- ▶ The home employer issues written instructions to the employee; essentials are stipulated in the Labor Code.

## Dual contracts

Under this alternative, the employee is engaged by the host employer, who also pays the salary and related fulfillments. The employment contract with the Czech home employer may be suspended, if agreed without any limitation.

This scenario is normally connected with obligatory participation in the host country's social security system. If the assignment exceeds six months, employees may deliver a written statement to their Czech health insurance company that they will be covered by health insurance abroad. Otherwise, social security does not have to be paid into the Czech system for the period of unpaid leave.

During the work for the host employer, the employee is subject to the law of the host country, including eventual clauses on choice of law.

After employment with the host employer is terminated, the employee returns to the home employer. The employee's Czech health insurance company must receive a confirmation of health insurance concluded abroad and its length.

Under Czech law, an employee can also perform work in parallel for the home and host employer under two contracts. The rights and duties arising from both employment relationships, as well as social security contributions, are treated separately.

## Assignment to the Czech Republic

The assignment of employees of foreign employers to the Czech Republic is possible without an employment agency license if it is not done for profit. With intragroup assignments, some consideration is acceptable if required by transfer pricing regulations.

The Czech host employer must notify the Labor Office of any assignment on a prescribed form.

Czech core working conditions, such as minimum wage or maximum working hours, must be provided to employees seconded by EU employers within a transnational provision of services as follows from Directive 96/71/EC, even if the foreign law remains applicable. In addition, the pending implementation procedure of EU Directive 2014/67 in the Czech Republic will impact these rules. It should enable trans-border cooperation of labor authorities when identifying "assigned employees" as well as ensuring their rights to the minimal/guaranteed wages. Czech host employer will be held liable if he knew that the assigned person did not receive the minimum/guaranteed wage and could have known under

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# Estonia



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## Employment law issues in mobility

As a general rule, each time an employer assigns an employee to perform work outside what's specified in the employment agreement it constitutes a business trip ("töölähetus" in Estonian) under local legislation.

Without an agreement, an employee cannot be sent on a business trip for longer than 30 consecutive calendar days. A pregnant woman or an employee raising a child who is disabled, or who is younger than three years old, can only be sent on a business trip with the employee's consent. If the employee works in a foreign country for more than one month, the employer must notify them of:

- ▶ The length of time to be worked abroad
- ▶ The currency in which the wages are paid
- ▶ The benefits related to the employee's stay in the foreign country
- ▶ The conditions for returning from abroad

Estonian employment law calls for no additional noteworthy restraints and does not define the length of a business trip in any way. The local employment law is scarce on business trips: essentially, the parties are free to agree on the terms.

Estonia has also locally enforced "Working Conditions of Employees Posted to Estonia Act" which is enacted specially for the purpose to ensure the protection of the rights of employees from a foreign state who have been posted to Estonia for the provision of services. Given that EU Directive 2014/67 has yet not been implemented into the local legislation and hopefully the implementation process will be completed before the year 2017, the implementation brings also some changes into the local legislation (included into the "Working Conditions of Employees Posted to Estonia Act").

## Dual employment contracts

An Estonian Supreme Court decision (No. 3-2-1-80-15) determined that two valid employment contracts can exist at the same time – with both the home company and the host country's company. This means that the agreement can be terminated through either country's legislation. Depending on the contract type, the employer might also face additional obligations (e.g., to pay compensation).

In practice, if there is no grounded need (from a legal or tax standpoint) to conclude a local employment agreement, and if a valid employment contract with the home country's company already exists, concluding a local employment agreement should be carefully considered.

## Format requirements

Estonian employment law states that the employment contract, notifications, consents and other agreements between an employer and an employee that have (or might have) a legal effect must be in written form. Disregarding this rule does not void the contract but, in practice, difficulties will occur when collecting evidence if a dispute arises.

## Disputes and the applicable jurisdiction

Disputes will generally be resolved in the country specified in the contract. As an alternative, jurisdiction will be determined by the court of the country where the employee performed the duties.

## Social security issues

If the host country requires a separate employment agreement, legal difficulties arise for Estonia (as the home country) to put an employment agreement "on hold." Estonian employment law does not set regulations for suspending a contract, although, according to the general principles of law, parties can establish any agreements

that are, in principle, not contrary to law. From a legal perspective, the suspension of an employment contract constitutes unpaid vacation for the employee, obligating the Estonian employer to make minimum social security payments on the employee's behalf. Social security issues may also arise due to, for example, a change in tax residency of the assigned employee. The social security of assignees within the EU is normally covered by European Council Regulation No. 883/2004. A few totalization agreements with third countries might result in the loss of social security coverage. For example, payments into a mandatory pension can be made only when the employee retains Estonian tax residency. As a solution, the employer and employee should agree on supplementary pension contributions.

## Tax equalization

Applying tax equalization principles for assigned employees is common practice among international groups. Implementing tax equalization rules can be complicated, as the law requires wages to be set at a gross rate. However, because tax equalization is intended to minimize the extra tax burden – i.e., provide beneficial treatment of the employee sent on an international assignment – agreement on such internal policies should be possible.

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# France

## Employment law challenges in mobility and posting of workers

France has always been very attentive to providing protection to employees working in its territory, which is why it has always had a “best in class” approach regarding the application of EU Directives concerning posting of workers. Indeed, France was the first country to implement the most recent EU Directive (EU Directive n°2014/67/UE of 15 May 2014) less than 2 months after its entry into force (Law n° 2014-790 of 10 July 2014). Moreover, additional legislation increasing administrative controls and burdens for employers and customers, as well as sanctions, were voted in August 2016.

Posting of workers, is viewed in France as a potential means to avoid the application of French employment law and therefore as a potential source of “social dumping”. Therefore, employers sending posted workers to France should be attentive to applicable rules to ensure full compliance.

The French rules focus on:

- ▶ the posting employer must be a legitimate foreign employer
- ▶ the posted workers have reinforced protections
- ▶ the posting employer has enhanced reporting and monitoring requirements
- ▶ the legal administration has increased powers to monitor and sanction non-compliance

In cases of posting of workers into France, the employer must comply with special labor and employment law regulations. The employer must ensure compliance with

certain rules provided by the French labor code regarding, notably, equal treatment, non-discrimination, wage and hour law, health and safety, termination of the employment contract and training.

In addition to potential immigration requirements, the employer is subject to reporting obligations to the Labor administration prior to the posting including information on the duration and conditions of the posting, its purpose as well as the employee’s remuneration. The employer must also appoint a representative in France to facilitate control and monitoring by the French authorities.

It is not only the employer that is under tight scrutiny from French authorities, but also the subcontractor. In order to increase the efficiency of its rules, French law has also increased the obligation of control and reporting of subcontractors and customers benefiting from the work of the posted worker as well as their liability in case of failure of the employer to comply with its obligations. Indeed, the subcontractor liability provision can create risk for customers as well, thus jeopardizing the business relationships.

Posted employees are further protected in that they will now be able to sue the employer directly, either in their home country or in the territory of the Member State in which he is posted. This will allow employees to forum shop by finding the most employee friendly country in which to litigate.

French rules have developed a large range of sanctions including fines, which can reach up to EUR 500,000, as well as the possibility

for the Labor administration to stop the project on which the posted worker is working on. These sanctions are increasing on a regular basis.

Lastly, beyond potential fines provided by French labor law, non-compliance could have unforeseen consequences on immigration issues, reputational issues and even corporate tax issues. Indeed, failure to satisfy employment rules with regards to posting employees of workers may undermine complex corporate tax rulings by, for instance, the recognition of a permanent establishment in a country where the company did not so intend. Non-compliance can also raise social security issues, in particular tied to co-employment risks.

In addition to the transposition of the EU Directive of 2014, France just recently passed further laws with regard to the posting of workers.

Of particular importance, the new French law of August 2016 provided the following additional requirements:

- ▶ Enhanced sanctions for non-compliance
- ▶ The posting employer will be required to finance the costs of legal enforcement of these rules (maximum 50€/employee)
- ▶ The “user”/client must ensure that the posting employer (and its subcontractors) has complied with its reporting obligations prior to using the posted workers.

Based on the foregoing, postings employers need to be more attentive than ever in ensuring compliance with french law on the posting of workers.

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# Georgia



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## Choice of law in employment agreements with international connections

Georgia recently adopted the Law on Labor Migration<sup>1</sup> to establish rules governing contractual relations among immigrant job seekers, intermediate entities, employees and employers residing in different countries. Under the measure, the governing law of the employment agreement between an immigrant employee and a foreign employer will be that of the country where the work is to be carried out.<sup>2</sup>

The measure does not state what law applies to an employment agreement between a Georgian employee and non-Georgian employer. There is some question about whether such an employment agreement could be governed by the substantive laws of the other country if the work is to be carried out in Georgia.

In such cases, conflict-of-law rules would normally come into play – particularly the Law of Georgia on Private International Law (PIL). According to PIL Article 35(1), the parties can choose the law that applies to their contract; however, the choice will be considered void if it disregards mandatory rules in the country most closely connected to the contract (Article 35(3)).

Furthermore, the proof of admissibility of choice of law in such employment contracts stems from PIL Article 38, which stipulates that the choice will be void if it disregards mandatory rules adopted to protect customers and employees from discrimination. This rule also applies to the delivery and financing of movable property, as well as labor and service contracts if they are concluded in a country where customers and employees have their places of residence and where protective rules are in place.

Notwithstanding the above, questions could be raised about the admissibility of choice of law based on Article 1 of the Labor Code of Georgia, which prescribes that the code regulates *labor and its concomitant relations in the territory of Georgia*. Because the Labor Code is above the PIL in the hierarchy of Georgian laws,<sup>3</sup> Article 1 could be seen as depriving parties of choosing applicable law.<sup>4</sup> However, this conclusion should not be regarded as reasonable in the Georgian legal system because the PIL sets forth rules allowing a choice of law in contracts with international connections, which should also include employment agreements. Moreover,

because the PIL and Labor Code have different subject matters and legal natures, their interrelation should not be considered in light of the hierarchy of Georgian laws.

Therefore, it could be reasonably argued that the parties have a right to apply a foreign law to their employment agreement. The parties, however, should take into account that the choice of law might become subject to scrutiny and declared void if the work is to be carried out in Georgia and the chosen law contradicts the country's public order or disregards mandatory discrimination protections.

To avoid such conflicts, an in-depth analysis of the foreign law is recommended.

<sup>3</sup> The Labor Code is an organic law, meaning it originates in the Constitution. According to the Constitution of Georgia, organic law must define the protection of labor rights, fair compensation and safe, healthy working conditions, and working conditions for minors and women. Accordingly, the Constitution grants special importance to organic laws and to matters regulated by them.

<sup>4</sup> Law on Normative Acts (in force from 9 November 2009), <https://matsne.gov.ge/ka/document/view/90052>, accessed on 15 August 2016.

<sup>1</sup> Law on Labor Migration (in force from 1 November 2015), <https://matsne.gov.ge/ka/document/view/2806732>, accessed on 14 August 2016.

<sup>2</sup> Law on Labor Migration, Article 12.

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# Germany

## Employment law issues in mobility

The mobility of employees can be complex, and the following issues must be considered with temporary inbound assignments to Germany.

### 1. Issues in setting up the assignment

In Germany, it is not mandatory to have a local employment contract between the employee and the host company. An assignment agreement, as an amendment to the employment contract in the home country, is sufficient. This agreement should include the period of the assignment; the names and addresses of the parties; a job description; the gross annual salary and benefits during the assignment, as well as the housing allowance, costs for relocation and removal, and travel costs; confirmation that health coverage will be provided in Germany; the period of notice of the assignment agreement; annual vacation; the agreed work schedule; the place of work; social security; and tax regulations.

Unless otherwise specified in the assignment agreement, the employment law of the home country applies for employees temporarily assigned to Germany.

However, mandatory employment rules under German law apply, according to Directive 96/71/EC:

- ▶ Maximum work periods and minimum rest periods
- ▶ Minimum paid annual holidays
- ▶ Minimum pay rates, including overtime (this point does not apply to supplementary occupational retirement pension schemes)
- ▶ Conditions for hiring out workers, particularly the supply of workers for temporary employment
- ▶ Health, safety and hygiene at work
- ▶ Protective regulations for the employment of pregnant women, or women who have recently given birth, and for young people
- ▶ Equal treatment of men and women and provisions on nondiscrimination

In addition, the German Law on Minimum Wages (*Mindestlohngesetz*) applies for assigned employees – €8.50 gross, rising to €8.84 as of 1 January 2017. Some general binding collective bargaining agreements on employment conditions must also be observed. The German Posted Workers Act (*Arbeitnehmerentsendegesetz*) requires applying collective bargaining agreements to minimum wages in specific sectors.

In principle, all employees in Germany are subject to the German Social Security System, which covers statutory pension funds, unemployment insurance, contributions to the statutory care scheme, health insurance and work accident insurance.

Within the EU (including Norway, Switzerland, Liechtenstein and Iceland) EU Directives 883/2004 and 987/2009 apply to an employee assigned to Germany by a home country employer within an EU Member State. The employee can remain in the home country's social security scheme.

Social security treaties have been reached with several countries outside the EU. If an employee is assigned to work in Germany for an employer located in one of the contractual countries, the employee may, on application, be exempt from German social security, in total or in part, and remain in their home country's social security scheme.

Citizens of EU countries are, basically, free to start working in Germany, without any special notification or registration obligations.

Note, however, that everyone must register at the local Residents' Registration Office within one week of moving into a room or an apartment. Most local registration laws stipulate exemptions for foreigners, e.g., if they do not stay longer than two months. Exceptions depend on the local laws of the place of work or residence and need to be verified.

In principle, non-EU nationals need to obtain a visa from the German Consulate before entering Germany for professional activities.

### 2. Issues during the assignment

During the assignment, the employee should remain an employee of the home company and work under the instruction and supervision of the home company to avoid having the German Act Regulating the Supply of Temporary Workers (*Arbeitnehmerüberlassungsgesetz*) becoming applicable. The supply of temporary workers requires special permission in Germany.

An important consideration, particularly with an assignment extension, is how long an employee can remain in the home country social security scheme – up to six or eight years.

### 3. Issues at the end of the assignment

At the end of an assignment, employees might have a claim to payment in lieu of holiday if their contractual holiday entitlement is less than 20 holiday days – the minimum entitlement under the German Federal Paid Leave Act (*Bundesurlaubsgesetz*).

### 4. Status of Implementation of European Directives regarding posting of workers in Germany

Since the content of the Directive 2014/67/EU is already covered by previous regulations in German Law on the posting of workers (*Arbeitnehmerentsendegesetz*, *AEntG*), there is no further need for new legislation in Germany. As the reformed Directive 2014/67/EU represents an enforcement directive and implementation guidelines (i.e., a general liability of contractors is regulated), this is already laid down in German statutory law. Further, the Directive 2014/67/EU does not require amendments regarding the change in wage rates of posting of workers in Germany.

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# Greece



Maria Rigaki

## Employment law issues in mobility

An assignment is defined as the transfer of an employee from one work position to another, usually in the same group of companies, for a definite time and for the benefit of all parties involved.

The Greek legal framework acknowledges assignments through Article 651 of the Greek Civil Code: "Subject to any different conclusion that may result from the contract or the circumstances, an employee shall be bound to perform personally his obligation and the employer's claim for work to be performed may not be transferred."

Based on case law, and in conjunction with Articles 361 and 648 of the Civil Code, an agreement in which an employer assigns the services of an employee to another employer is valid and legal as long as the employee consents (a "genuine employee lending agreement"). The lending agreement is a three-party relationship between the employee, the initial employer and the employer using the services. Employees can give consent either explicitly or implicitly – for instance, when they go to work and provide services to the assigned employer.

In this case, the employment relationship with the initial (direct) employer is not terminated, and the third party also acquires the capacity of the employer (indirect employer). As a result, an allocation of the employer's duties between the direct and indirect employer takes effect. The direct employer has all the obligations arising from the employment contract, e.g., payment of salary and benefits, holiday benefits and social security contributions. This employer is the only one entitled to terminate the contract. The indirect employer exercises managerial rights (directing the employee) but always within the limits of the contract.

Although relevant court decisions accept that the employee's consent can be implicit, the absence of a written agreement may expose the indirect employer to liabilities towards the labor or social security authorities in the event of a random audit.

Under this legal framework, the international assignment of an employee to Greece is feasible; however, human resources functions should consider specific constraints before initiating any relevant procedure.

The assignment of an employee from an EU country to Greece is feasible under Presidential Decree 219/2000 which implemented DIRECTIVE 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers. These rules have been updated by the provision of services and Presidential Decree 101/2016 (enacted on 26 September 2016) which implemented Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

Before initiating a secondment, the direct employer is obliged to make an official announcement to the Greek labor authorities, including details on the employee, the specific employment terms (working hours, salary, annual leave, etc.), the direct and indirect employers, and their respective legal representatives.

For the assignee's social security coverage, Greece follows rules set by EU regulations that an individual is subject to the social security system of one EU country only.

The basic rule stipulates that assigned employees are subject to the social security system of the country where they actually work unless special circumstances apply. The competent social security

authorities can grant an exemption (the A1 Certificate) that allows seconded employees to remain subject to the system in their home country.

Finally, EU nationals face no immigration procedure constraints, since employees don't have to meet any residence permit prerequisites before starting work in Greece.

As long as relevant EU and Greek laws are respected, the secondment of an EU national within the EU is a standardized procedure.

The secondment of an employee from outside the EU to Greece is more challenging due to immigration constraints.

Before assuming employment duties, a non-EU employee must have a Greek residence permit. Because of immigration law prerequisites, this is not feasible unless the employee establishes a direct employment contract with a Greek entity and is subject to the Greek social security system (except in cases of bilateral social security agreements). Directive 2014/66/EU, which facilitates the conditions of entry and residence of third-country nationals under an intra-corporate transfer, is scheduled to be incorporated into the Greek legal system by November 2016. The major amendment anticipated (but not confirmed yet) is that a direct employment contract between the non-EU employee and the Greek Entity shall not be necessary.

As of now, however, a third-country national can be seconded through an intra-corporate transfer only if the employee and the indirect employer have a direct employment relationship.

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# Hong Kong

## Employment law issues in mobility

Because Hong Kong (a Special Administrative Region of China) is one of Asia's leading financial hubs, local companies often transfer their employees to different countries to fulfill business needs. Dealing with mobility issues requires special care in examining the laws of both the home and host country.

When assigning employees to other countries, employers should carefully consider the contractual arrangement in place. An employee's overseas assignment can normally be managed in three ways:

1. **Secondment** – when an employee is sent (or “loaned”) to provide services in another local or overseas company (host employer) while remaining employed by the employer in Hong Kong (home employer)
2. **Dual contract** – while remaining employed with the home employer, the employee enters into a separate employment agreement with a host employer
3. **Direct hire** – when employment with the home employer is terminated and new employment begins with the host employer

### Considerations before assignment

Before an assignment, employers should review the current employment contract to understand whether the assignment is legally possible (i.e., whether the employee can be assigned, or, if the contract does not cover mobility issues, whether a new or supplemental contract should be executed).

When deciding on the type of contractual arrangement, employers should consider the purpose and duration of the assignment, as well as the nature of the employee's job, benefits and pay package. They should also seek foreign legal and tax advice on issues that might arise from the transfer.

Secondment arrangements are usually adopted when the home employer intends to maintain the employment relationship, monitor the employee's performance and facilitate their return. These arrangements would be desirable only if they are structurally and commercially feasible.

If a secondment is undesirable, an employer can consider a dual contract, splitting the employee's duties and entitlements between the home employer and the host employer, which is particularly useful if the employee is expected to carry out duties for both.

When workers remain employed by a Hong Kong employer through a secondment or dual contract, employers are still responsible when their employees are injured or die in the course of employment inside or outside Hong Kong (regardless of whether the employee was at fault or negligent or whether the host employer has assumed the duty to keep the employee safe).

If the two abovementioned arrangements are not preferred, a direct hire is the most straightforward method for duty demarcation or risk delegation. Should employers choose this type of assignment, they should take care when terminating employment with the home employer and ending related contractual obligations.

### During the assignment

If the employee remains employed by the home employer, both the home and host employers should make certain they comply with contractual and statutory employment obligations. The arrangement must be structured and maintained carefully to avoid discrepancies in legal and contractual duties between the home and host employers.

Under Hong Kong law, employers are obliged to take all reasonable steps to protect employees from injury, victimization or harassment. Employers should assess such risks by considering factors including the nature of the assignment; the experience of employees; the capability of the host company to protect the employees; the steps taken to protect the employee; and the degree of control of employers.

If the worker remains employed by the home employer, the home employer may be held liable if the employee commits tortious acts inside or outside Hong Kong if they are authorized or carried out in the course of employment.

### After the assignment

If the employment with the home employer is to be terminated during or after the assignment, employers must do so in accordance with their contractual obligations, which should not fall short of Hong Kong employment laws. If employees are to resume their services solely for the home employer, employers should terminate the assignment with the host employer accordingly.

### Assignment to Hong Kong

While overseas companies can decide the governing law of the employment contract, the legal position in Hong Kong depends on the facts of each case, and Hong Kong employment laws might be applicable. When dealing with foreign employees assigned to Hong Kong under a foreign employment contract, Hong Kong companies should take care in drafting their employment contracts and secondment letters so as not to reduce or extinguish the employee's statutory rights under Hong Kong law.

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# India



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## Employment of expats in India: legal aspects

The fast-paced growth of the Indian economy has caused a large number of foreign nationals to choose India as a preferred destination to work. This section examines key aspects of expat employment that the employer and the employee should keep in mind.

The entry, stay and exit of foreign nationals in India are governed primarily by the Passport (Entry into India) Act (1920), the Foreigners Act (1946) and the Registration of Foreigners Act (1939). The Ministry of Home Affairs (MHA) oversees implementation of these acts, and the type of visa issued to a foreign national depends on the purpose of the visit.

Employment visas are granted to highly skilled or qualified professionals engaged by an entity in India on a contract or employment basis. They are not granted for secretarial or other routine jobs for which large numbers of qualified Indians are available. Further, foreign nationals sponsored for an employment visa should draw a minimum salary of US\$25,000 per year (including all allowances paid in cash). Certain categories, such as ethnic cooks and language teachers, are exempt from this requirement.

Foreign nationals with visas valid for more than 180 days must register with the relevant office of the Foreigner Regional Registration Office within 14 days of arrival. Foreign nationals cannot change employers during the tenure of the visa unless the change is between a holding company and its subsidiary, or vice versa, subject to conditions stipulated by the MHA. Failure to comply attracts punitive actions, including potential deportation. An employment visa can be extended to a total of five years from the issue date – on a year-to-year basis – subject to good conduct, continued employment and legal compliance.

Foreign nationals and their employers must also remain aware of tax and social security obligations. India follows a “source rule” taxation basis for foreign nationals, taxing all income arising from employment in India. Some relief is available to employees coming from countries that have signed double taxation avoidance agreements with India, including the US, the UK and France. In deputation scenarios, foreign nationals may have to pay social security to both countries on the same earnings. Social security agreements (SSAs), or totalization agreements, should be carefully evaluated to help reduce the financial implications of employing foreign nationals. SSAs

enable foreign nationals from signatory countries to adjust their social security contributions in India against their social security liabilities in their home countries. They also help fill gaps in benefit protection for workers who have divided their careers between their home countries and India. Foreign nationals from countries that have not signed an SSA with India may have to contribute to social security in both countries. Except for superannuation and retirement due to disability, these foreign nationals would also not be eligible for a lump-sum refund under the Employees’ Provident Funds Scheme (1952). Also, provident fund contributions for foreign nationals employed in India are not subject to any statutory threshold (as is the case for domestic employees). Contributions are calculated on the total wages received by such an employee – the total received in India as well as in their home country.

With labor laws, foreign nationals employed in India and their employers must comply with central and state laws, with no specific exemptions. The employment agreement and benefits must comply with the applicable central and state labor laws.

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## New constraints for assignments under Italian law

In Italy, an assignment occurs when an employer sends an employee to execute a specific work activity for the benefit of a third entity but in the interests of the employer. The assignment – governed by Article 30 of Legislative Decree 276/2003 – must meet the following mandatory requirements:

- ▶ It must be in the interests of the seconding employer, including handling technical and organizational matters and sharing or expanding the employee's knowledge. The assignment cannot be aimed merely at providing personnel, since only a work agency authorized by the Italian Labour Minister can do that.
- ▶ It must be temporary. No labor provisions set the length of the assignment, even if it is indirectly determined by social security rules.

During the assignment, the employment contract with the sending employer will remain valid and unchanged, as will the employer's obligations arising from the contract (e.g., salary, social security and job position). The employee will be inserted into the organization benefiting from the work, usually the same task performed for the sending employer. The sending employer typically delegates organizational and managerial powers to the receiving entity, except for hierarchical authority that can affect the employment relationship.

At the end of the assignment, the employee will return to the same position as before or to a post consistent with the different role that he acquired during the assignment, especially in cases of professional growth. Termination of the assignment is not considered a fair reason for dismissal.

This information is usually contained in a specific assignment letter delivered to the employee and signed by the home company and the employee. It is also advisable for the home and host companies to draft a secondment agreement that contains information on the employee's

assignment period and the recoupment of the employee's costs. The recoupment must be limited to the pure cost of personnel without a markup; otherwise, the agreement might fall under a supply of service.

In this context, the legislative decree no. 136/2016, effective starting from July 22, 2016 and implementing the Directive 2014/67/EC concerning secondment, has introduced in our legal system stricter constraints on secondments to Italy. The new regulations apply to:

- ▶ any company established in a Member State that seconds one or more employees, in the framework of a services agreement, to another company – even belonging to the same group – or to another business unit. This is on condition that during the secondment period the employment relationship between the employee and the home company shall remain;
- ▶ temporary workers staffed by external agencies established in a Member State that send their workers to a user company with its registered office or a business unit in Italy.
- ▶ employees seconded to Italy by extra EU-companies, where new rules apply.

The Decree lists all the requirements for a genuine secondment. Should the secondment be ascertained as not genuine, the seconded employees will be deemed to be actually employees of the host company where they are temporarily working, and the host company, together with the seconding company, will be subject to administrative sanctions.

As a result of the new regulations:

- ▶ the hosting employer shall grant to the seconded employees a treatment equal to that applied to other employees of its in the same host Member State with reference to certain items (i.e., maximum working hours and minimum rest periods, holidays, minimum economic treatment, limits on the employment

of temporary workers, protection of maternity rights and children, health and safety at work and equality of treatment between men and women);

- ▶ the home company and the host company are jointly and severally liable towards the seconded employees up to 2 years after the termination of the posting in relation to salaries, social security contributions etc.;
- ▶ the seconding employer must give notice of secondment to the Ministry of Labor within 24 hours before the beginning of the secondment and any further amendment within the next 5 days;
- ▶ the employment contracts, the payslips and any other documentation related to the salaries – drafted also in Italian – must be also preserved by the home company for a certain period after the termination of the secondment;
- ▶ the seconding employer has to appoint a person to liaise with, as well as to send to and receive documents from, the competent authorities in the host Member State concerning the seconded employees;
- ▶ all the relevant information related to secondments will be published on the website of the Labour Ministry.

Breaches of these obligations will be punished with relevant sanctions and the National Labor Inspection Bodies shall control the employers, in order to ascertain possible breaches of the secondment's rules.

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# Japan



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## Regulations for expatriate employees

### Introduction

As international secondments from a foreign parent company to a Japanese subsidiary or branch become more common, the multinational nature of these arrangements inevitably raise issues from an employment law viewpoint. This section examines some topics surrounding expatriate employees.

### Governing law

If a case is brought to court in Japan and the governing law of an employment agreement is at issue, the court will rule based on the Act on General Rules for Application of Laws (GRALA). This provides that the governing law will be that of the place chosen by the parties at the time of the agreement. However, if a law was chosen other than that of the place most closely connected with the employment agreement, mandatory provisions of the closely connected place should also be applied upon request by the employee. If the employee is working in Japan, Japanese law is presumed to be the law of the place most closely connected with the agreement. In short, a choice of law clause is generally valid, but mandatory provisions of Japanese employment law could apply for expatriate employees. The employer can overturn this presumption by proving that the place most closely connected with the agreement is not Japan but the country from which the employee

is seconded. Although the GRALA does not spell out “mandatory provisions,” employment laws would typically fall under that umbrella.

Further, public law in Japan, as opposed to private law, generally applies, regardless of the governing-law determination under the GRALA. This poses difficult questions in practice because employment laws in Japan can be used both as private law and as public law, and there are no clear-cut rules for determining whether a provision is used as private law or public law in a particular case.

### Social insurance

Regulations on social insurance in Japan are generally applicable to expatriate employees as public laws. As such, whether expatriate employees must be enrolled in social insurance in Japan should be studied on a case-by-case basis under the relevant regulations.

Four types of social insurance are generally provided by employers:

- ▶ Employees’ pension insurance (EPI)
- ▶ Employees’ health insurance (EHI)
- ▶ Employment insurance (EI)
- ▶ Employees’ accident compensation insurance (EACI)

EPI, EHI and EI premiums will be borne by both employer and employee and will be paid by the employer to relevant insurance administrators. The employer

can deduct employee premiums from their salary on each payday. In general, expatriate employees must enroll in the four types of insurance, even if they are not Japanese citizens.

EPI and EHI may fall under a social security treaty between Japan and the country from which an expatriate employee is seconded. As of August 2016, Japan has effective social security treaties with Germany, the UK, the US, Belgium, France, Canada, Australia, the Netherlands, the Czech Republic, Spain, Ireland, Brazil, Switzerland and Hungary. A treaty with India has taken effect on 1 October 2016. If expatriate employees are seconded from one of these countries, they may be exempt from EPI and EHI by following prescribed proceedings, which leave no legal concerns (including immigration) about mandatory enrollment. These treaties vary from country to country, so careful preparation is needed.

When expatriate employees in Japan have been enrolled in EPI, they may receive lump-sum withdrawals from the EPI scheme after leaving Japan if they meet certain requirements.

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# Netherlands

## Dutch employment law challenges with the posting of workers

The posting of workers is an important factor in globalization, which necessitates international assignment of employees. In the last few decades, the free movement of employees has increased immensely. This trend requires a solid international legal system to prevent the unequal treatment of workers – a focus area of governments, international institutes and organizations such as the EU and the International Labor Organization. Despite the involvement of these organizations, legal issues with international assignments remain.

### 1. Issues with setting up assignments

A preliminary question about posting workers is which assignment structure is preferred, the:

1. Assignment approach: assigned employee based on the home employment contract or an addendum.
2. Suspension approach: the employee has two employment contracts, a home and a host employment contract.
3. Termination approach: the employee only has a host employment contract; the home employment contract is terminated.

### Advantages and disadvantages of each approach

1. The advantage of the assignment approach is simplicity. The employee can be easily repatriated after the assignment ends, but the approach cannot be applied in all country combinations.
2. An advantage of the second approach is that the employer will most likely comply with requirements of the home and host countries. A disadvantage is that there may be two active employment contracts on which the employee can rely and it inter alia creates a risk of double payments (e.g., severance and holiday salary).
3. The advantage of the suspension approach also applies to the termination approach. The disadvantages are that standardization

is impossible, repatriation is troublesome and accrued employee rights will not continue.

An inevitable challenge of the assignment approach is the mandatory (objective or protective) applicable law, despite any choice of law provisions in employment contracts. Employers must ascertain mandatory minimum working conditions, employment terms and equal treatment. One frequently asked question is, do we have to comply with all mandatory objective applicable law provisions or only with the more favorable one's? The latter bears the risk that employees will cherry-pick employment terms.

It is imperative to settle each potential issue comprehensively and carefully, up front in the assignment letter. Other important matters to cover in the assignment letter include:

- ▶ The parties' contractual intentions (e.g., concluding one formal and material employment contract).
- ▶ The interrelationship between the employment contract and the assignment letter.
- ▶ The scope of restrictive covenants to prevent an employee from easily joining a competitor through contacts made during the assignment.

### 2. Issues during assignments

If the preparation phase has not been performed diligently, employers may face significant legal issues during the assignment, such as double payment employer liability claims.

Another potential issue is unequal treatment of expats and local employees. For example, Dutch employees assigned to Germany may argue that they remain entitled to the Dutch system of sick pay (104 weeks maximum) instead of the German system (6 weeks). Another issue that may arise is the applicable legal system of maternity leave: host or home country law?

Expats will generally be entitled to benefits set forth in an expat policy. These include applicable insurance for assigned employees and minimum insurance coverage. Another

important matter is participation in a pension scheme of the home or host employer.

The Dutch implementation legislation of the EU Enforcement Directive (2014/67/EU) with regard to the temporary assignment of workers within the EU entered into force as of 18 June 2016. This new act covers, briefly put, four categories of requirements and/or enforcement: (i) minimum mandatory protective employment terms and conditions, (ii) reporting obligation of the assignment activities (will most probably enter into force on 1 January 2018); (iii) administrative obligations; and (iv) imposition of a penalty of maximally EUR 20,500 per violation of the designated obligations. Companies may strategically decide to post employees from non EU countries to the Netherlands to avoid the applicability of the abovementioned new Dutch act.

### 3. Issues with the termination of assignment

As mentioned previously, it is imperative to specify the interrelationship between the home employment and the assignment. If this is not accurate, companies may face legal issues with assignment termination. Assigned employees may successfully argue that besides the home employment contract, they have a material employment contract with the host country, both of which have to be terminated. They may then claim double (statutory) severance payments. Another issue is whether the employee may unconditionally repatriate to their home country and return to the same position with their home employer.

Lastly, a proposal of amendment of the EU Posting of Workers Directive is pending which inter alia proposes to limit the temporary assignment of employees to 24 and to change the 'minimum rates of pay' into 'remuneration', which would expand the definition of minimum wage.

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# New Zealand

## International employee mobility

As globalization becomes the norm, mobility arrangements are increasing in New Zealand’s employment environment. However, businesses should consider a number of employment issues before sending or receiving workers.

Employees become mobile in numerous ways, including:

- ▶ Short-term business travel
- ▶ Short-term assignments (3-12 months)
- ▶ Longer-term assignments (1-3 years)
- ▶ Permanent transfers

Each type of assignment brings its own issues.

## Establishing a transfer or secondment

For short-term business travelers, the employee usually remains on home country terms and conditions throughout the assignment. Common issues include complying with immigration requirements, managing employee expenses and tracking the employee’s time spent in each country to avoid triggering tax residency restrictions.

Short and long-term assignments give rise to slightly different issues. In New Zealand, these assignments normally take place through secondment, whereby the underlying employment agreement with the home country remains, but is varied through a secondment agreement with the host. The secondment agreement should address:

- ▶ Remuneration and benefits during the secondment
- ▶ Leave entitlements
- ▶ Repatriation
- ▶ Conflict of interest (between the home and host entities)
- ▶ Performance management

New Zealand has minimum standards legislation, including minimum wage (currently NZD\$15.25 per hour for an adult), holiday entitlements, the entitlement to a written employment agreement, and entitlements around shift work and availability for work. Some uncertainty surrounds the degree to which these entitlements apply to an employee seconded into or out of New Zealand.

Recently, complaints were raised when Chinese rail workers, sent to New Zealand temporarily, were allegedly paid below New Zealand’s minimum wage. The regulator commented that the workers may not be subject to New Zealand’s minimum employment standards.

Another case currently on appeal concerns pilots flying between Hong Kong and New Zealand who, despite their express choice of Hong Kong law, successfully argued that New Zealand age discrimination provisions applied.

In light of this uncertainty, employers are encouraged to:

- ▶ Draft secondment agreements with a clear choice-of-law clause, noting that the choice of law should align with the surrounding circumstances and any public policy arguments.
- ▶ Consider complying with New Zealand minimum employment requirements. To promote compliance, many employers offer the employee the greater of the relevant requirements in the home or host country.

New Zealand has a minimal social security payments regime. Employees subject to income tax in New Zealand must usually pay an earner’s levy to the Accident Compensation Commission – New Zealand’s no-fault accident compensation scheme – which is also deducted from their wages or salaries. The country also has a voluntary superannuation scheme, KiwiSaver. Most incoming secondees

will not be eligible for the scheme as participants must be permanent residents. Outgoing secondees will continue contributions if they are still paid by their New Zealand employer. Employees may also be able to take a contribution holiday.

## Terminating a transfer or secondment

When seconded employees remain employed by the home country, the home employer is responsible for managing any disciplinary or performance issues. Accordingly, secondment agreements should include provisions on:

- ▶ The manner in which disciplinary matters will be managed, including a requirement by the host employer to provide information or witness statements
- ▶ Confidentiality, intellectual property and privacy, regarding both the home and host employers
- ▶ Any right of return and the position to which the employee may return (if employees have been seconded for a long time, it may not be appropriate to return to their previous role)
- ▶ Continuity of service and how it affects entitlements such as redundancy and long-service leave (if offered)
- ▶ The ways the secondment (and the underlying employment) can be terminated by any of the parties

Employment law considerations form an important part of any global mobility strategy. Employers are increasingly interested in formalizing their mobility offerings and aligning these with wider decisions around risk appetite, employee value propositions and operational strategy.

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# Norway

## The rights of employees assigned or posted

### 1. Introduction

This section discusses temporarily assigning an employee to work in Norway, but it does not address sending a worker from Norway to another country.

For the issues discussed below, the purpose of the assignment is irrelevant. The employer may, for instance, send the employee to work temporarily in a company that belongs to the same group of companies. Or the worker may be sent to Norway to perform services for the employer, acting under the employer's management and control pursuant to a service agreement between the employer and a service user in Norway. The employee may also be sent by a temporary agency or similar organization that makes workers available for assignments in Norway.

### 2. Application of Norwegian employment law to assigned employees; choice of law

Norwegian employment law does not automatically apply to employees temporarily assigned to Norway. The extent to which it does apply will depend on the governing law of the employment relationship. As a starting point, Norwegian law permits the parties to choose the law that will govern the employment relationship, and the country's courts will generally respect an express choice of law in the employment or assignment contract. However, they will not respect an agreement if it deprives the employee of mandatory protections that would have applied in the absence of choice.

If no choice of law is expressed, the employment relationship will be governed primarily by the law of the country where the employee habitually performs their work. Determining that place can be

difficult. For assignments of less than a year, it will usually be the worker's home country. For assignments of more than five years, it will normally be the host country. For assignments of one to five years, it generally depends on a concrete assessment of the terms and whether the assignment has the characteristics of a temporary arrangement.

If the circumstances as a whole indicate that the employment relationship is more closely connected with a country other than the one where the employee habitually performs their work, that country's law will govern the relationship.

Because uncertainties can arise in the absence of a choice of law, it is important to agree to the governing law in the employment or assignment contract.

### 3. Minimum employment rights for employees posted to Norway

All employees sent to work in Norway enjoy minimum rights, even though Norwegian law does not govern the employment relationship. These rights are set forth in regulations that implement EU Directive 96/71/EC (the Posted Workers Directive). However, the regulations apply to all employees posted to Norway, not only those from EU Member States. The rights include:

- ▶ A safe working environment
- ▶ Maximum working hours
- ▶ Protection against discrimination
- ▶ Parental leave
- ▶ Protection against dismissal for pregnant women
- ▶ Holiday rights and holiday pay

The catalogue of rights will be extended when EU Directive 2014/67/EU (the Enforcement Directive) is implemented, to include limitations on deductions from salary and holiday pay. Norway is not a member of the EU and is not bound by the transposition deadline of 18 June

2016, but the Norwegian government has indicated that the Enforcement Directive will be implemented as soon as the EEA Joint Committee has approved the requisite amendment to the EEA Agreement. It is not expected that implementation of the Enforcement Directive will have far-reaching implications in Norway, as many of the rights and obligations in the Directive already apply in Norwegian law.

The Norwegian regulations on posted workers do not include rules on minimum pay. In fact, Norway has no statutes on minimum pay, and employees who are assigned there may, as a rule, work for the same salary they receive in their home country. In some industry sectors, including construction, measures have been taken to avoid social dumping, and collective agreements are given general application. That means the wages and working conditions negotiated between trade unions and employer organizations in collective agreements apply to all workers in Norway, including posted workers, irrespective of whether they are party to the collective agreement. Further, when a work permit is necessary, immigration rules require proof that the pay and working conditions in the employment or assignment contract are at least as good as those in the current collective agreement or pay scale for the industry, or at least as good as the norm for the occupation.

The rights specified in the regulations (and the collective agreements) are minimum rights, and they will not apply if the posted employee has more advantageous rights under an employment or assignment contract or under the law or applicable collective agreement in the home country.

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# Poland



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## Employment law issues in mobility

In Poland, mobility of employees has become a widely discussed topic for employers, employees and their professional advisors. This is mainly due to two important changes in Polish employment laws: the introduction of the Act on the Posting of Workers (the Posting Act) and the establishment of a 33-month limit on employment contracts concluded for a definite period. These new regulations impose changes on planning and structuring employee mobility.

Posting an employee from Poland to another EU Member State should be based on an agreement between the employer (including a temporary work agency) and the foreign entity, or it can involve an intragroup assignment. With an assignment – not a business trip, but a posting as defined by Directive 96/71/EC – a Polish employment contract must be amended and adjusted to the business needs and legal requirements of the assignment. This can happen through a compromise agreement or an entirely new contract. If a definite-period contract is executed, the employer should observe the maximum number and time limit of such contracts. However, the employment relationship should be preserved; otherwise, it may not meet the requirements of posting. An assignment letter may also be provided to the employee, but it is not legally required.

The employer should bear in mind that the host country may have labor law provisions that unconditionally apply to the posted employee. These may replace the minimum conditions provided by Polish laws (unless the foreign law is chosen as the governing law for the entire assignment). The employer should also be aware of any additional requirements that may affect the assessment of how well the posting structure complies with the host country's regulations.

Under Polish law, ending the assignment triggers no specific obligations for the employer.

For the posting of employees to Poland, the Posting Act sets three main obligations for the employer:

- ▶ Appointing a person responsible for contacting the authorities
- ▶ Notifying the relevant authorities about the posting
- ▶ Maintaining relevant employment documents

A National Labor Inspectorate is responsible for seeing that the posting structure complies with laws.

For employees outside EU Member States, immigration requirements must be taken into account. Assignees from certain countries, such as Ukraine, the Russian Federation and the Republic of Georgia, have simplified procedures, and they may be hired temporarily – without a work permit – based on an employer affidavit registered by the local labor office.

Under Polish law, the criteria for assessing a posting structure (when an employee is posted to Poland) does not differ substantially from the rules provided under Article 4 of Directive 2014/67/EU.

The practice of public authorities and courts in assessing whether a posting structure is proper has not been established. The recitals to Directive 2014/67 stipulate that the lack of a certificate on the applicable social security legislation referred to in Regulation (EC) No. 883/2004 may indicate that the situation should not be considered a temporary posting to a Member State other than the one where the employee habitually works. In Poland, that is the A1 certificate issued by the Social Security Institution. The requirement for substantial activity and the prerequisites thereof are constructed similarly to the requirement of “normally carrying out the undertaking’s activities,” established based on Regulation (EC) No. 883/2004, Regulation (EC) No. 987/2009 and the European Commission’s practical guide for determining legislation that applies to workers in the EU.

Interpreting that requirement was the focus of numerous court disputes between posting employers and the Social Security Institution. Similar disputes are expected to arise over the assessment criteria introduced by the Posting Act.

Ending the assignment to Poland triggers a two-year retention period during which documents on posted employees must be maintained in Poland.

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# Portugal

## International mobility – the Portuguese approach

The mobility of workers is considered an important means of coping with today's labor market challenges in the enlarged EU. In Portugal, the economic crisis has accelerated the search for new export markets for domestic companies, thereby increasing the posting of workers in new countries and creating a new standard in employment law practice. Previously, the country was mostly a destination for the staff of established multinational companies, not a place that originated international postings in emerging markets.

The main feature of the Portuguese law is a set of minimum standards – under Directive 96/71/EC – for safety, duration of work and rest periods, vacation, overtime, minimum wage and parenting rights. These are mandatory for assignments both to a foreign country and to Portugal. Under the Convention of Rome, to which Portugal is a party, the sides can choose which law will rule the assignment. But when the rules of the law chosen by the parties are less favorable to the worker, the Portuguese minimum legal standards always apply. With assignments to a foreign country, the following aspects are worth considering.

### Before the assignment

Any assignment should begin with a written agreement that sets out the main conditions. Although it's not mandatory, it will protect both parties – to an extent – if a dispute arises over the nature of the assignment. It will also allow for the fulfillment of information obligations regarding work and repatriation conditions.

With social security, there are three distinct legal regimes, depending on whether the worker is assigned to:

- ▶ A country of the EU or EEA
- ▶ A country that is party to a convention with Portugal on the social security aspects of posted workers
- ▶ A country that is not part of any relevant convention

In EU or EEA countries, it's sufficient to submit a form to authorities guaranteeing that the Portuguese social security regime is applicable. In assignments lasting longer than 24 months, the company or worker can ask the social security authorities of both countries to agree on a different regime that suits the interests of the parties.

Although EU Directive 2014/67 has not yet been implemented in Portugal, it is expected to increase control on posting of workers by the supervising authorities, and introduce some modifications on the legal regime, such as:

- ▶ Mandatory assignment of a contact person by the employer to represent the company before the controlling authorities in both countries;
- ▶ Duty to inform the supervising authority in the country of destination regarding the activity of the company, the posting of workers and related information;
- ▶ Duty to keep documentation related to the assignment, including worktime records.

If the country is party to a social security convention with Portugal, or if the worker is assigned to a country that is not part of

such a convention, the assignment requires prior authorization from Portuguese social security authorities. The Portuguese Work Authority (ACT) must also be informed of the assignment, with at least five days' notice, and of all extensions.

### During the assignment

All relevant changes, such as extensions, must be reported to the ACT and, if they affect the social security regime, to the Portuguese social security agency. During the assignment, the employer must continue to make social security contributions for the assigned worker. Temporary returns to Portugal are considered part of the assignment and do not interrupt the employer's duties.

### Upon completion of the assignment

Workers must be reinstated to their previous assignments unless the agreement specifies otherwise. The social security status of the worker remains unaffected.

Overall, the Portuguese legal regime for mobility is very functional and presents no major obstacles. However, certain material issues may arise, such as retribution rates, expenses and benefits, that are better addressed through careful planning and negotiation with the assigned worker.

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# Romania



Nicoleta Gheorghe

## Labor force mobility in Romania – regulations and challenges

Romania's entry into the EU in 2007 brought significant changes to the legal regime, which is applicable when Romanian citizens are posted in EU countries and when EU citizens are posted in Romania. Almost a decade later, uncertainties and practical difficulties remain in managing employment, social security and immigration requirements.

According to a survey published by the Romanian National Council of Small and Medium Sized Private Enterprises,<sup>1</sup> 80% of interviewed private entities consider the EU posting procedures to be bureaucratic, lengthy and costly.

With non-EU assignments, Romanian employers still face challenges on the social security protection of posted employees and the time consuming procedures for obtaining work.

### EU assignments

The principles of Directive 96/71/EC on the posting of workers were transposed in Romania by Law 344/2006.

The law covers:

- ▶ Intragroup assignments
- ▶ Employees posted under service agreements between the home company and the beneficiary of the services
- ▶ Workers posted by temporary work agencies

Its provisions apply to assignments from Romania to EU, EEA States or Switzerland and vice versa.

In both cases, the host country's law governs the assignment unless the home country legislation is more favorable to the employee on maximum work periods and minimum rest periods; minimum paid annual holidays; minimum pay rates, including overtime; the conditions of hiring out workers, particularly the supply of workers by temporary work agencies; health and safety at work; protective measures for pregnant women or women who have recently given birth, for children and for young people; and equal treatment for men and women and other anti-discrimination provisions.

Foreign employers and Romanian host companies must follow certain procedures when posting workers from the EU in Romania, such as:

- ▶ EU home companies are obliged to notify, in writing, the competent Romanian labor authority about the assignment before its commencement date.
- ▶ The host company must keep assignment-related documentation and present it to the labor inspectors upon request.

EU Regulation No. 883/2004 on the coordination of social security systems also applies in Romania. The Romanian National House of Public Pensions issues A1 forms for Romanian workers posted to other EU Member States, and it also recognizes A1 certificates issued by other EU social security institutions. However, Romanian employers have expressed concern over the lengthy terms necessary for obtaining an A1 certificate and over the large number of supporting documents required.

### Non-EU assignments

When posting Romanian citizens in non-EU countries, Romanian employers apply the Romanian Labor Code, which generally holds that assigned employees benefit from the most favorable rights – either those applied by the Romanian employer or those applied by the host company.

During the assignment, the Romanian employment agreement is suspended, and all related employee rights are granted by the host company. Secondments may generate a gap in social security contributions in Romania if no social security agreement is in place with the host country.

For the secondment of non-EU citizens to Romania, Romanian law imposes certain restrictions. Each year, the Government issues a limited number of work permits to non-EU citizens.<sup>2</sup> As a rule, non-EU citizens may be seconded to Romania for a maximum of one year within a reference period of five years and under strict conditions. According to the recent amendments of the Romanian immigration legislation, third-country nationals who are transferred within the same group of companies (ICT workers), may be seconded to Romania for maximum three (3) years.

### Projections for the future

The Directive 2014/67/on the enforcement of Directive 96/71/EC is in process of being implemented under the Romanian legislation by the end of 2016 or within the first quarter of 2017, at the latest.

In its current form, the draft law follows the principles drawn by the Directive 2014/67/EC. It defines more clearly the concept of posting and empowers the Romanian Labor Inspection to collect the relevant information and determine whether the posting is genuine or not.

The Romanian business community expressed confidence that, following the transposition of the Directive, coordination will improve between the relevant authorities, enhancing access to public information and leading to more simplified procedures.

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<sup>1</sup> <http://cniptmmr.ro/2015/03/25/dificultati-in-cazul-delegarilor-transfrontaliere>

<sup>2</sup> The contingent of foreign workers approved to be assigned to Romania during 2016 is 700.



Oleg Shumilov

# Russia

## Employment law issues in mobility

### General overview

Because of economic turbulence, Russia has shifted towards an increase in outbound work assignments rather than inbound assignments, which were widespread in the previous decade. Employers still use inbound assignments to invite foreign nationals to share knowledge and international experience. This section provides an overview of the main considerations of both outbound and inbound assignments.

### Outbound mobility

Russian labor legislation is relatively rigid, and labor relations outside Russia are generally not governed. Therefore, when companies set up long-term foreign assignments for Russian workers, the most straightforward option is to have them sign a new employment agreement with a foreign entity and to terminate the local employment agreement or suspend it through unpaid leave. This option also avoids double taxation on income delivered during the assignment. However, Russian social security would not cover the assigned employees, potentially decreasing their pension payments – a scenario that may not be attractive to the employee. Companies prefer to classify short-term foreign assignments as business trips. That requires payment based on average earnings instead of salary as stipulated by employment law, as well as compensation of business trip expenses, including per diem, sometimes leading to additional onerous calculations and costs for the company.

Russian currency control law should also be taken into account because it imposes additional requirements. Under the current interpretation of the regulations, Russian citizens are viewed as Russian currency control residents unless they continuously spend more than one year outside Russia. Russian currency control residents must notify authorities within one month when they open or close a foreign bank account or change their account details, as well as file cash flow statements on their foreign bank accounts.

### Inbound mobility

Because of immigration legislation, all foreigners working in Russia must have a local employment agreement to obtain a work permit. A foreign agreement is not legal grounds for working in Russia.

Some companies fully shift their payroll to Russia, although it is common to retain some payments from abroad for social security coverage. There are a number of options for structuring such assignments, each with pros and cons.

Although limited by new legislative requirements, secondment arrangements are one of the most common assignment structures. Legislative changes that took effect on 1 January 2016 establish criteria that must be met for one company to provide personnel to another. Further changes introducing more detailed rules are to be adopted by the end of 2016.

The most advantageous work permit regime for foreign nationals is the Highly Qualified Specialists (HQS) regime. One of the most important criteria is the remuneration level that a foreign employee must receive locally from the party sponsoring the HQS permit – currently 167,000 rubles gross per month (about US\$2,574). This permit has a simplified procedure and a beneficial income tax rate for tax nonresidents, i.e., 13% on their earnings in the HQS capacity instead of 30%. HQS income is also not subject to social contributions (except those covering workplace accidents and occupational illnesses).

Generally, income paid in Russia is subject to tax withholding through payroll, while income subject to Russian tax and paid abroad should be declared in a tax return that is due no later than 30 April for the preceding tax year. If the assignment ends, a Russian departure tax return may be required. It should be filed at least one month before the actual departure from Russia.

Since global mobility involves so many aspects, including employment law, taxes and currency control, companies should assess the pros and cons of various assignment structures and choose the best one for their business needs.

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# Serbia



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## Employment law issues in mobility

The global economy has created a need for companies to move workers outside their home countries. Although the Serbian Government acknowledges the need to grant foreign citizens access to its labor market, domestic legislation imposes restrictions intended to protect local citizens. Immigration laws remain the main issue.

### Residence permit

Citizens of the EU or countries that have signed treaties with Serbia can freely enter and stay for up to 90 days within a 6-month period. Citizens of other countries must obtain visas before entering Serbia. To stay beyond 90 days, foreigners should apply for a temporary residence permit.

### Work permit

All foreign citizens must hold a work permit to be employed in Serbia.

On the other hand, the Serbian Law on Employment of Foreigners recognizes certain situations that do not require a work permit. Foreign citizens who spend less than 90 days in Serbia within a six-month period can perform the following business activities without a permit:

- ▶ Business meetings
- ▶ Preparatory activities related to establishing a business in Serbia (e.g., setting up a subsidiary)
- ▶ Activities related to delivering, installing or repairing equipment or machinery, or training local employees to use that equipment and machinery

### Types of work permits

The law provides for different types of work permits:

- ▶ Employment permit
- ▶ Work permit for seconded individuals

- ▶ Work permit for secondment within two related entities (mobility within a group of companies)

- ▶ Self-employment work permit

An employment permit can be obtained only if a foreigner has an employment agreement with a company registered in Serbia. To conclude an employment agreement with a foreign citizen, a local company must prove that it has had no layoffs in the previous three months. The local company should also apply for a labor market test with the Serbian National Employment Agency 30 days before submitting the request for an employment permit. The test should confirm that the local company has found no competent individuals in Serbia who are suitable for the position. In practice, the test lacks impact: even if the agency proposes local citizens for the position, the company is not obliged to employ them.

On the other hand, if foreigners apply for a work permit for seconded individuals or secondment within two related entities, they can remain on their foreign employment contract and work in Serbia based only on an assignment letter issued by their employer.

To obtain a work permit, seconded individuals must be employed with the foreign company for at least one year. Individuals seconded within related entities must hold a key position in the foreign company (manager, specialist or director).

Serbian labor law imposes no additional conditions on the assignment letter or the foreign employment agreement, only that it must satisfy the minimum requirements prescribed by law.

In practice, foreign citizens mostly apply for employment permits and conclude employment agreements with the local company.

A work permit can be issued only to foreigners who have already obtained a residence permit, and it covers the same duration.

The work permit ceases to be valid in the following cases:

- ▶ Expiration of the work permit or residence permit
- ▶ Termination of the employment agreement or assignment in Serbia
- ▶ A stay that exceeds six months

Foreigners should notify the Serbian National Employment Agency about why the work permit was terminated. No other requirements are imposed.

### Insurance requirements

Serbia has three types of mandatory social security contributions (SSCs): pension and disability, health care and unemployment. Foreigners can stay in their home country's social security system if they remain employed with the foreign company.

SSCs are mandatory for local employees; for foreigners, it depends on whether their country has a bilateral social security treaty (totalization agreement) with Serbia.

Under totalization agreements, the time when foreigners are exempt from local SSCs is usually limited to one to three years, with possible extensions that generally do not exceed five years.

When work permits are issued, authorities will examine whether foreigners have health insurance that covers Serbia.

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# Singapore

## Employment law issues in assignments

The Singapore city state depends heavily on the contributions of its foreign workforce. Based on figures published by the Ministry of Manpower (MOM), the foreign workforce stood at 1,387,300 in December 2015. To provide some perspective, Singapore's total population was 5,535,000 in 2015.

The terms **assignment** and **secondment** are typically used interchangeably. In both cases, arrangements can be structured in different ways:

- ▶ Employment with the original employer is suspended or terminated, and the individual is employed by the entity to which they are assigned.
- ▶ The worker remains employed by the original employer but is also employed by the other entity – essentially a dual-employment arrangement.

### Issues in setting up the assignment

All foreigners working in Singapore must hold a valid work pass, and the Singapore employer will typically apply for it on the employee's behalf. The employer must take care to include a condition in the assignment letter that makes employment contingent on the issuance of a valid work pass by the MOM.

The MOM has been restricting the flow of foreign workers into Singapore, making it increasingly difficult to obtain passes. We expect this trend to continue in the coming years.

Although it is not legally required, employers should prepare an assignment letter (or local employment contract). The MOM occasionally requests this document when evaluating work pass applications.

The letter should stipulate:

- ▶ The individual's pay and benefits during the assignment
- ▶ The party responsible for managing and supervising the individual
- ▶ The duration of the assignment and whether the local entity has a right of termination
- ▶ Whether employment with the original employer continues during the assignment
- ▶ The individual's confidentiality obligations to the local entity and the restrictive covenants that apply in favor of the local entity

No statutory rules dictate what laws should govern the assignment letter. Please note, however, that it is not possible to contract out of Singapore employment and immigration laws.

### Issues during the assignment

Singapore's Central Provident Fund (CPF) is a mandatory social security savings scheme funded by contributions from employers and employees. Only Singapore citizens and permanent residents can take part, and there is no applicable scheme for foreigners.

Under Singapore law, employees can have dual-employment status, meaning that assigned workers maintain employment with the original entity.

Regardless of what law the parties choose for the assignment, Singapore employment laws may apply, including entitlements such as annual, medical and maternity or paternity leave, and possibly regulations governing termination if it takes place in Singapore. The employer should verify that the assignment terms meet Singapore's minimum requirements.

### Issues at the end of the assignment

The Singapore employer should withhold all money due to the foreign employee at the end of the assignment until obtaining tax clearance from the Inland Revenue Authority of Singapore.

Furthermore, the Singapore employer should make certain that the work pass is canceled within one week of termination.

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# Slovak Republic



Robert Kovacik

## New Slovak rules for posting workers

In recent years, the Slovak labor market has been transformed by global trends toward optimizing costs and effectively using labor, in addition to Slovakia's EU membership and entry into the Eurozone. Executive management is now commonly shared among various regional companies, and worker mobility has become an important topic for employers. Employment legislation has tried to reflect these trends but still lags slightly behind the country's economic and social development.

Beyond traditional forms of mobility, such as business trips and temporary workplace relocation, Slovak law allows for posting an employee who:

- ▶ Temporarily performs work for the economic benefit of a host party
- ▶ Retains a labor contract with the home company
- ▶ Returns to the home company after completing the posting

The employee can also enter into a new labor contract with the host employer while terminating the original contract or putting it to "sleep" by taking unpaid leave. Or the worker can enter into two simultaneous part-time labor contracts.

The rules may differ depending on the country where the employee is posted. Postings outside the EU are subject to a legal regime set forth by an international treaty, if applicable, and by both Slovak and foreign law. Within the EU, postings must comply with the laws of the EU, Slovakia and the other EU Member State involved.

## Posting workers within the EU

As of 18 June 2016, posting has undergone significant legislative changes in Slovakia. The new law implements Directive 2014/67/EU, imposing

substantial obligations on employers who post and receive employees and granting labor inspectors more powers to check compliance with requirements. The Slovak Labor Code distinguishes the following forms of posting within the EU:

- ▶ Posting under the direction and responsibility of a home employer who provides services through posted workers to a foreign recipient
- ▶ Posting within a group of companies
- ▶ Temporary assignment (secondment) of personnel, when an employee works under the control and supervision of a host employer (for objective operational reasons, unlicensed employers may also temporarily assign their employees for a maximum of 24 months)

A Slovak employer who intends to post an employee to another EU Member State must:

- ▶ Fulfill the receiving country's legal administrative obligations
- ▶ Obtain the employee's consent
- ▶ Conclude a written posting agreement with the employee
- ▶ Inform the employee about the essential terms and conditions of employment under the laws of the host state, subject to provisions more favorable to the employee (other issues can be governed by law chosen by the parties)

An employer from another EU Member State sending an employee to Slovakia must:

- ▶ Submit a notification form to the Slovak National Labor Inspectorate before the posting commences
- ▶ Appoint a contact person for document delivery in Slovakia
- ▶ Maintain certain employee-related documentation at the employee's workplace

Concluding a written contract between the home and host employers is obligatory for temporary assignment and recommended for other forms of posting.

Posting terminates when the assignment period ends, when employment with the home employer ends or when the contract between the home and host employers ends.

Even non-employers have certain legal obligations, provided that they receive a service through posted workers. In particular, they may have to pay due wages to the employees of their supplier if the supplier fails to do so, and they may be subject to fines if the supplier illegally employs workers.

## Social security law

As a rule, social security contributions must be paid in the country where employees work. They can stay in the social security system of their home state under exceptions found in Slovakia's international treaties and in EU Regulation No. 883/2004. Under the latter, employees posted within the EU for up to 24 months may remain in the social security system of their home state (extensions are possible). Such an employee must hold an A1 certificate.

In conclusion, Slovakia's new law on posting workers does not specify how it should coexist and interact with the traditional Slovak institution of worker mobility. Authorities are not interpreting the new law consistently, and – for now – employers are at risk of applying it incorrectly. Consequently, they have an even greater need for legal and tax advice, as inspection bodies within the EU have new tools and can enforce cross-border fines more efficiently.

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# South Korea

## Effective integrated strategy – focusing on South Korean law

### Integrated approach

Global mobility involves various types of contracts – whether employers dispatch workers overseas after executing an employment contract domestically or they hire local residents after establishing a subsidiary or branch overseas. An appropriate legal review is required for each type of contract, focusing not only on immigration but also on labor laws, social security, tax and information security.

### Immigration

To be hired in South Korea, foreigners must obtain a valid visa in accordance with the Immigration Control Act. The act allows for 16 types of work visas, depending on the status of sojourn eligible for employment activities.

### Applicable law

If the parties do not choose the applicable law, the employment contract will be governed by the law of the country where the employee habitually provides the service. If the employee does not habitually provide the service within one country, the governing law will be that of the country where the employer's business office is located (Article 28(2) of the Act on Private International Law). Even if the parties agree that Korean law will not govern the employment contract, employees can still obtain protection under Korean employment laws if they habitually provide their service in South Korea (in

other words, Korean law will apply even though the parties agreed not to apply it). Therefore, it is important to choose the most efficient type of employment after considering all relevant Korean legislation, such as employment and social security laws.

### Termination of employment contract

**Retirement benefits:** each employer must establish at least one benefit scheme for retiring workers (Article 4(1) of the Act on the Guarantee of Workers' Retirement Benefits). Under a retirement allowance system, employers pay a retiring worker a prorated amount equivalent to "average wages" earned for 30 days for each year of continuous service. With a retirement pension plan, employers save respective severance pay at an outside financial institution for the term of the worker's employment and operate it pursuant to the instructions of the employer or worker. "Average wages" are calculated by dividing the total wages paid to a worker during three calendar months by the total number of calendar days during those three months. The relevant period for this calculation is the three months immediately before the day that grounds for calculating the average wages occurred.

**Dismissal:** according to Article 23(1) of the Labor Standards Act, an employer may dismiss a worker only with "justifiable cause" – an act by the employee that is so significant that the employment contract cannot continue based on societal expectations. When determining whether

there is "justifiable cause," the court considers factors such as degree of fault, relative seriousness of damage, regular conduct and circumstances after cause for disciplinary action. The employer has the burden of proof, and dismissal without justifiable cause will not be effective.

**Trade secrets:** non-compete restrictions may be necessary when terminating an employment relationship. Employers can seek an injunction to prevent actual or threatened misappropriation of a trade secret pursuant to Article 10(1) of the Unfair Competition Prevention and Trade Secret Protection Act.

### Data privacy

When hiring workers and doing business in South Korea, employers must comply with the Personal Information Protection Act, which regulates privacy and data protection. Employers who do not adhere to procedures could face penalties or compensation for damages.

### Anti-corruption laws

In South Korea, the Improper Solicitation and Graft Act will be enforced from 28 September 2016, establishing strong punishment for improper solicitation of "public officers, etc." – a broad category that includes executives and staff members of mass media organizations, private schools and private kindergartens.

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# Spain



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## Assignment of workers abroad

As borders open and international contracting increases, companies need to expand their businesses and cannot disregard the importance of the human factor.

Proper planning and management of the international movement of workers are essential to any expansion. Employees can be sent to other countries in a variety of ways, and each case requires a different legal approach. In this article, we will focus on the Spanish employment law perspective and the challenges that companies face when temporarily sending employees to another country to carry out a service.

The Directive 96/71/EC supports the freedom to render services across the EU and the respect for the employment rights of workers in the country they are posted to. This Directive was transposed in Spain through the Law 45/1999.

The Directive 2014/67/EU establishes enforcement requirements for a better and more uniform implementation and application of the posting Directive of 1996. The Directive could have a potential impact on certain areas with regards to the posting of workers in Spain. The Directive builds on mutual co-operation information and refers to the availability of information for posted workers. In this sense, Spain should provide all the information and labor conditions of posted workers in a single and official website. The Directive also approaches the need to designate a contact person between the authorities of the home and host country and the necessity of translating all the documentation related to posted workers. Lastly, it introduces a requirement for subcontracting liability in the construction sector and it refers to the sanctions which companies may incur if the law requirements are not fulfilled or an employee is posted on fraudulently.

The Directive 2014/67/EU had to be transposed by June, 18th 2016. Even though directives only take effect once transposed, the Court of Justice of the EU considers that a directive that is not transposed can produce certain effects directly in determined cases and individuals may rely on the directive against an EU country in court.

The Spanish Labor Act defines geographic mobility as the employer's right to unilaterally change the workplace on objective grounds related to financial, technical, organizational or productive causes. The law distinguishes between transferred and assigned employees based on the duration of the assignment.

This would not apply to workers who move to a different workplace under an agreement with the employer or on their own initiative. When the worker changes countries, the employment relationship in the home country may be maintained or suspended. If the labor relationship continues, the parties should sign a letter of assignment that focuses on:

- ▶ The duration of the contract.
- ▶ The terms and conditions for the employee, including working hours, seniority, vacation and compensation for transfer expenses.
- ▶ The applicable law.
- ▶ The applicable social security regime.

If the relationship is suspended, the worker should sign a new employment contract with the company in the country of destination, as well as an agreement of suspension. In this agreement, the employer and the worker will agree on the duration and conditions of the suspension of the labor relationship and will coordinate the suspended contract and the new contract.

Ultimately, the decision between these options depends on which formula suits the circumstances of the company and the employee better.

Generally, workers assigned to other countries are subject to the social security legislation of that country. However, Spain is bound by European Union regulations and bilateral social security agreements signed with several countries. Therefore, employees assigned to work for a limited time in another country may be exempt from contributing in the host country if they keep contributing in Spain. To keep contributing in Spain, the employer or employee must apply for a certificate of coverage. This also applies to employees who are assigned to work in Spain but prefer to maintain contributions in their home countries. The Spanish Labor Authority must be informed about the conditions for rendering services in Spain.

As long as the employment relationship in the home country continues, the country of origin's law applies. However, employees are entitled to the minimum core rights in force in the host country, no matter which law applies.

If employees maintain social security contributions in the home country, the social security law in that country will apply while the corresponding certificate of coverage is in force. Once it has expired, the social security law of the host country will apply. Sometimes, Spanish employees can also apply for the voluntary contribution regime in Spain.

With work assignments in a different country, employers and workers must bear various matters in mind, even if the employee is sent to a European Union country. To avoid problems, we suggest seeking professional advice.

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# Sweden

## Rules for posting workers

Although the bureaucratic hurdles are fairly manageable, certain rules and regulations must be considered when a foreign national comes to Sweden to work. The following information details important issues before, during and after an assignment. It is advisable to seek specific legal advice before posting workers to Sweden.

### Issues in setting up the assignment

The Posted Workers Act (1999:678), primarily an implementation of EU Directive 96/71/EC, applies when foreign entities post foreign workers in Sweden for fixed-term projects. The Swedish rules cover all foreign nationals, regardless of whether they are EU citizens. If the foreign national works for a Swedish entity and has no concurrent employment in another country, Swedish labor law is generally fully applicable.

Citizens from outside the EEA must apply for a residency permit as well as a work permit, irrespective of the length of their assignment. Non-EEA citizens who are permanent residents of another EU country (with at least five years of lawful residency) are exempt from this requirement. A posted worker or a self-employed individual only needs to apply for a residency permit.

When posting workers in Sweden, the employer must notify the Swedish Work Environment Authority and name a contact person residing in Sweden.

Foreign employers who are posting workers in Sweden for less than one year do not have to pay social security fees in Sweden. If the posted workers reside within the EU

or EEA, they must prove that they belong to the health insurance system in their home country (e.g., E101). A self-employed individual must pay special social security fees in Sweden (egenavgifter).

### Issues during the assignment

A posted worker will be covered by core employment rights in Sweden, including:

- ▶ Regulations under the Working Time Act (1982:673). The rules for working hours are an implementation of the minimum standards derived from the Working Time Directive (2003/88/EC).
- ▶ Minimum days of annual leave. According to the Annual Leave Act (1977:480), a worker is entitled to at least 25 days of paid leave per year. Swedish regulations do not apply if the assignment is less than eight days.
- ▶ Minimum wage (if the worker is covered by a Swedish collective bargaining agreement). Please note that Sweden has no statutory minimum wage.
- ▶ Safety and other work environment regulations (in the Work Environment Act). This responsibility lies with both the posting entity and the host entity (as the party responsible for the actual workplace).
- ▶ Discrimination regulations, such as the Discrimination Act (2008:567).

If the worker's status in Sweden depends on work or residence permits, social security certificates and so forth, the worker and the employer should consider any expiration and reapplication dates to avoid complications, such as immigration violations and penalty fees.

### Issues at the end of the assignment

At the end of the assignment, it is always advisable to assess the worker's tax or social security liabilities, that of the posting entity. An international assignment could affect future tax liabilities as well, particularly if the worker has stock options or similar equity bonus arrangements in the employing company.

### New legislation by early 2017

The Swedish government is currently reviewing the implementation of the Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System into Swedish law. By early 2017, it is expected that the government will propose new laws and/or changes in the current legislation with respect to posting workers.

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# Switzerland



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## Employment law issues in mobility

When considering international mobility under Swiss employment law, employers must decide whether to set up an expatriation or an assignment, because the rules differ for each structure.

With expatriation, the employee works on behalf of the host company under a local employment agreement and has no direct subordination relationship with the home company. The employee is no longer part of the home company's staff; the home employment agreement is terminated; and the employee is not maintained under the home country's social security system. The legal framework of an expatriation structure is, in principle, simple and defined.

During an assignment, the employment agreement with the home company is maintained, and the employee is assigned to the host company. The employee has a direct subordination relationship with the home company and, when possible, remains part of the home country's social security system. The legal framework may therefore be more sophisticated.

When choosing a mobility structure, employers should consider employment law, social security and immigration regulations.

### Issues in setting up the assignment

The home company and the assigned employee should conclude:

- ▶ A regular employment agreement
- ▶ An assignment letter detailing the conditions of the assignment

Assignment letters should cover the start date, the assignment duration and extension, compensation and benefits, termination, repatriation conditions,

working hours, vacation, social security, seniority, tax equalization, and the applicable law and jurisdiction in case of litigation. Employers should verify that the letter complies with any rules of public policy in the host country.

The main issue with social security coverage arises when Switzerland lacks a social security treaty with the host country. In this situation, Swiss social security coverage can be maintained in addition to host country social security and pension coverage – but only under strict conditions. (For instance, the employee must have been affiliated with Swiss social security for at least five consecutive years.) Should those conditions not be met, employers have two choices:

- ▶ Change the structure of the mobility, i.e., set up an expatriation
- ▶ Find a contractual way to maintain social security and pension coverage

Immigration rules may also affect the choice of mobility structure. For instance, EU and European Free Trade Association (EFTA) nationals under local contract with a Swiss employer are entitled to receive a work and residence permit. But EU and EFTA workers assigned to Switzerland for more than 90 days per calendar year are subject to a decision by Swiss immigration authorities, who will examine salary and working conditions.

### Issues during the assignment

From a Swiss employment law perspective, we must point out two issues. The first concerns the relationship between the host company and the assigned employee, which may be reclassified as an employment relationship. The second relates to the competent jurisdiction to resolve a dispute.

In theory, the assigned employee should

keep an employment contract with the home company and should not be bound to the host company. In practice, though, we may consider the possibility of an employment relationship with the host company. If Switzerland is the host country, then an employment relationship might exist, particularly when the employee has a subordination relationship with the host company, works on its premises and receives payment from it. Two employers may coexist and may be sued by the employee in case of a dispute.

Most employment and assignment agreements address which court jurisdiction will resolve disputes, but it is necessary to verify the applicability of such clauses. International treaties, such as the Lugano Convention on jurisdiction and the enforcement of judgments, should take precedence over Swiss private international law. These foresee that jurisdiction decisions can be made only after the dispute has arisen.

### Issues at the end of the assignment

If the employee returns to Switzerland and the employment agreement continues to be valid, the worker should be given an equivalent position with equivalent compensation.

In conclusion, before setting up an assignment, employers should examine each situation carefully from an employment, social security and immigration law perspective.

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# Turkey

## Employment law in mobility

### General information

The new Law on the International Labor Force regulates issues involving the employment of foreigners. The law – numbered 6735 and dated 28 July 2016 – was published in the Official Gazette on 13 August 2016, and took effect on the same date. Until the new regulations become effective, provisions of the current Law on the Work Permit of Foreigners and its implementing regulations that do not conflict with the new law will continue to apply.

Foreigners must obtain work permits before performing dependent or independent work in Turkey, unless otherwise specified in treaties. Work permit applicants must have an employment agreement with the Turkish employer. That agreement will be subject to mandatory provisions of the labor code and must include a job description, the salary, working hours, the employee and employer's name. For Turkish employment, any dispute will be settled in accordance with Turkish law by the labor courts. If the employment arrangement with the home country is retained, any dispute may be handled in accordance with the provisions of that agreement as well as the laws of the home country.

### Work permit applications

Before working in Turkey, foreigners must obtain a work permit from the Ministry of Labor and Social Security.

There are three types:

- ▶ Definite-term work permits
- ▶ Indefinite-term work permits
- ▶ Independent work permits

Foreigners who intend to work independently in Turkey must legally and continuously reside there for at least five years.

The new law introduces the "Turquoise Card." Foreigners who have the appropriate education level and experience; who contribute to science and technology; whose in-country activities or investments aid Turkey's economy; and whose academic works are internationally recognized may be granted a Turquoise Card provided that its first three years are a transition period. Holders benefit from the same rights provided by permanent work permits, and their spouses and dependent children will receive documents that substitute for residence permits.

Foreigners can apply for work permits at Turkish Consulates abroad. However, if they have a valid residence permit of six months, they can apply for a work permit in Turkey.

### Foreign applications

A foreigner must submit the work visa application and required documents to the Turkish Consulate in the country where they are a citizen or permanent resident. The Consulate will forward a reference number to the foreigner's employer in Turkey. The employer will use the reference number to apply for a work permit from the Ministry of Labor and Social Security within 10 days. After the work permit is issued, foreigners must revisit the Consulate to complete the application.

### Expatriates sent to Turkey on behalf of a foreign corporation

The legislation mentioned above has similar regulations for expatriate employees transferred to Turkey on behalf of a foreign corporation. To prevent double social security coverage, they can notify the Turkish authorities if they are covered by social security in their native countries. However, it is important to determine which legislation applies to the individual.

### Social security agreements

Along with the EU agreement, Turkey has concluded bilateral social security

agreements (totalization agreements) to prevent double social security coverage.

The 27 agreements provide social security rights to expatriates of contracting parties (and equals), to their dependents and, in case of death, to their successors.

The other parties are Germany, the Netherlands, Belgium, Austria, France, the Turkish Republic of Northern Cyprus, Macedonia, Azerbaijan, Romania, the Czech Republic, Bosnia-Herzegovina, Albania, Luxembourg, Croatia, Serbia, Montenegro, Italy, France, Macedonia, Denmark, the UK, Georgia, Sweden, Switzerland, Quebec, Libya and Norway.

People covered by the social security system of a country that has an agreement with Turkey should take the following actions to receive medical benefits:

- ▶ People who qualify for medical benefits in a contracting country should apply to the local social security offices or the department dealing with non-domestic social security issues.
- ▶ They will receive a medical examination and treatment within a period specified in the health benefit document.
- ▶ They must seek treatment at health institutions with which the Turkish Social Security Institution has an agreement.
- ▶ If the period specified in the health benefit document has ended and treatment is needed, they should apply to the local social security offices or the department dealing with non-domestic social security issues.

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# United Kingdom



Justin Roberts

## Assignment to the UK – employment law issues to consider

As workforces become internationally mobile and employees commonly move from one country to another (either temporarily or permanently), employers need to be aware of the employment law issues that can arise in the UK.

Most assignments or moves have three clear stages, each with its own issues.

### The start of the assignment

Before assigning an employee to the UK from another jurisdiction, employers should consider the structure of the assignment, including:

- ▶ The duration
- ▶ Whether the assignees will carry out all their work in the UK
- ▶ What happens at the end of the assignment
- ▶ Whether the assignees will remain employed by their original employer and be seconded to the host company, or will be employed by the host company under an employment contract in the UK

If the assignee will work in the UK ordinarily, then UK employment law will apply. Even if the assignee’s employment contract or arrangements are said to be governed by the home country’s laws, it will not override mandatory protections provided under UK employment law. Accordingly, when employers are drafting documentation, they should be aware of the employment protections afforded to the assignee in the UK.

When the assignee is seconded to the UK and is not entering into a separate UK employment contract with the host company, the assignment or secondment letter should include protections governing

customer relationships and confidential information. These protections might need to be expanded given that the assignee could have a wider range of clients in the UK. The letter will also need to set out the prescribed information that must be provided under Section 1 of the Employment Rights Act 1996.

Assignees from another EU Member State – even those working in the UK temporarily rather than ordinarily – may be entitled to certain minimum benefits provided in the UK, including those related to holidays and minimum pay rates.

We note that EU Directive 2014/67, which is concerned with the posting of workers within the EU in the framework of the provision of services was published in May of 2014 (the “Enforcement Directive”). Member states were required to implement the Enforcement Directive by 18 June 2016. The UK Government took the view (following public consultation in 2015) that the UK’s existing domestic laws were largely sufficient to comply with the provisions of the Enforcement Directive and so, with an exception for specific enforcement in relation to contractor liability in the construction industry, the UK has not introduced any additional legislation to give effect to the Enforcement Directive.

### During the assignment

Employers should be mindful of the way the assignment has been set up and monitor actual working practices to verify that the reality matches the assignment documentation. Even if the assignment arrangements were drafted carefully, the documentation will quickly lose its value if it stops reflecting what is happening in practice. Key issues to monitor include reporting lines, the work the assignee is doing and the time spent in the UK.

Issues often arise when assignments are continually extended but the assignment documentation is never updated. After a qualifying period of two years of continuous employment, the assignee will gain a number of statutory rights in the UK that could make terminating the assignment more difficult and expensive. Protections related to whistle-blowing and discrimination will apply to the assignee from day one.

### The end of the assignment

Whether UK employment law applies to the assignee will be a key consideration when ending the assignment, particularly if the assignee’s employment is ending because they cannot – or no longer wish to – return to employment in the home country. If UK employment law does apply, the end of the assignment must be handled like any other dismissal or redundancy process in the UK, particularly when the assignee has met the qualifying period.

Employers who have considered what happens at the end of the assignment, and have drafted documentation that reflects this, will be in a much better position to deal with any issues that may arise.

Even if the assignment ends amicably or the assignee will return to employment in the home country, employers should consider entering into a settlement agreement to extinguish any liability that results from the assignment. They should also consider drafting the agreement so that it protects not only the host company but also the assignee’s original employer.

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# Vietnam

## Employment law issues – mobility

### General regulations

In Vietnam, all employment issues are governed by the Labor Code 2012, dated 18 June 2012. The Labor Code, passed by the National Assembly of Vietnam, is the highest-ranking legislation governing this area.

Although the Labor Code provides no clear definition, employment mobility typically entails Vietnamese working abroad and foreign employees working in Vietnam. In this section, we will discuss foreign employees working in Vietnam, particularly updated legislation that deals with the secondment of employees. This updated legislation is an addition to the procedure governing work permit applications for employees who enter the Vietnamese employment market as direct applicants to a new first posting in Vietnam. That topic is not covered in this section.

In early 2016, the Government issued updated legislation<sup>1</sup> – Decree 11 – dealing with work permits for foreign employees under a secondment or similar arrangement. Decree 11, effective on 1 April 2016, clarifies and replaces previous legislation.

### Internal transfers

In general, Vietnamese laws recognize employment mobility in the form of transfers between companies in the same group. Pursuant to Decree 11, a foreigner transferring internally within an enterprise means a manager, an executive director, an expert or a technician of a foreign enterprise who temporarily transfers to the enterprise's commercial presence in Vietnam.

### Qualifications and experience

Only certain foreign employees will meet the requirements for an internal transfer. Decree 11 provides detailed definitions of those employees:

### Definition of manager and executive director

Under the Law on Enterprises No. 68/2014/QH13, dated 26 November

2014, a manager can be an owner of a private company, a general partner, the chairperson or a member of the board of directors, the company president or another managerial position that is authorized to bind the company according to the company charter.

A manager can also be the head or deputy head of an agency or organization.

An executive director refers to a person who is the direct executive operator of a subsidiary unit of any organization or enterprise.

### Definition of expert

Unless an expert is certified by the relevant foreign authority or organization, the transferred employee must satisfy the following conditions:

- ▶ Have a university-equivalent or higher degree
- ▶ Have at least three years of experience in the specialty in which they were trained
- ▶ Have work experience compatible with the position they will perform in Vietnam

### Definition of technician

A technician means a worker who has at least one year of training in their technical specialty and at least three years of relevant experience.

To obtain a work permit, the employee must submit supporting documents to the labor authority demonstrating their qualifications and experience.

### Minimum time spent working at the home organization

Besides possessing the qualifications and experience detailed above, the employee must have been recruited by the foreign enterprise at least 12 months before the transfer or have been employed for 12 months prior to the transfer. In practice, an employee who has worked for 12 months for different companies within the same group may qualify. The employee must submit supporting documents to the labor authority proving the duration of employment with the overseas entity.

### Documentation and rights and obligations

The Labor Code does not clarify whether the law of the home country or the host country will govern arrangements covering the transfer of employees to Vietnam. Therefore, the secondment agreement or appointment letter should make clear which country's law governs the arrangement.

If Vietnamese law is chosen, the worker's rights and obligations set out in the employment agreement should be in line with the Labor Code. These include the term of employment, annual leave and termination-of-employment issues. In such cases, the host employer will be responsible for paying the salary, making compulsory social insurance contributions and obtaining a work permit for the employee. The worker must comply with the host's internal labor rules, collective bargaining agreement and code of conduct, as well as Vietnamese laws.

In another scenario, the home and host entities may agree that the employment agreement signed by the home country and the transferred employee will continue to govern the worker's benefits, rights and obligations while the employee works in Vietnam. The home and host entities may decide which one will pay the salary and other allowances to the transferred employee. Although the home country's law governs the employment relationship, the worker must comply with the host's internal labor regulations and with Vietnamese regulations governing work permits and visas, personal tax income, etc.

### Approvals and other paperwork

Any foreign employee working in Vietnam must have a work permit except for some exceptions that are provided in the laws.

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<sup>1</sup> Decree 11/2016/ND-CP, dated 3 February 2016.

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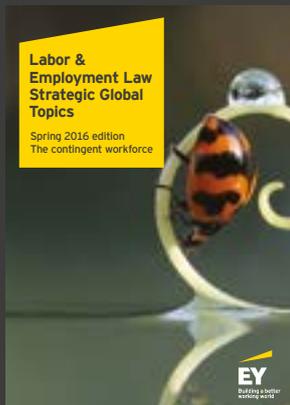
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