A Special Repeat Performance from IBIS Academy 2016 for the American Benefits Council

Legal Issues in the EU
“Conflict of Laws” and the “EU Posted Workers Directive”

Trent Sutton, Littler Mendelson
Alexander Bartz, Littler Global
Sofie Van de Steen, C&A


Premier Sponsor: Cigna
**History:**
- C&A is founded in 1841 by 2 brothers, Clemens and August Brenninkmeijer in The Netherlands. As from 1911 the international expansion started.

**Current:**
- C&A operates close to 2,000 stores in 21 countries with more than 60,000 employees.
- Online-shops in Europe, Brazil, Mexico and China.

**Philosophy:**
- Providing high quality affordable fashion for the whole family, for every occasion and every style.
- Taking initiatives and actions around corporate and social responsibility.
Polling Question #1

We want to Know Who You Are!

- Are you primarily
  A. Legal?
  B. Benefits?
  C. Human Resources?
  D. Merely an interested observer who finds benefits fascinating....?
Legal Issues for Multinational Transfers: “Conflict of Laws” and the “EU Posted Workers Directive”
Managing Cross-Border Employment Transfers
Background Considerations
Polling Question #2

- Have you ever.....

A. Put together an expatriate compensation package?
B. Wished you got assigned to that quiet office in Hawaii?
C. Terminated an expatriate during the assignment?
D. Experienced a lawsuit or threat of a lawsuit involving an expatriate?
What Laws Drive the Structure?

- Employment
- Immigration
- Cross-Border Assignment Structure
- Tax
Common Structures

Secondment
- Temporary Assignment
- "Loaned" to Host Company
- Home Country Contract Maintained

"Permanent" Transfer
- "Localization"
- Home Country Contract Terminated
- Used for longer-term assignments

Dual Employment
- "Split" time between entities
- Two "Home Country" Contracts
- Often used for executives
The Secondment

From US To EU
• Structure?
• Pros/Cons

From EU To EU
• Structure?
• Pros/Cons

From EU To US
• Structure?
• Pros/Cons
Some Other Considerations

1. Beware the ‘standard’ memorandum of understanding
   – (i.e. list of benefits only and no discussion of legal implications with regard to employment, repatriation, etc.)

2. What about Consultants and Directors?

3. What about Commuters or “Remote Workers”?
Managing Cross-Border Employment Challenges
A Case Study to Illustrate the Issues
OMG International (OMG) is a luxury goods company headquartered in New York. They have operations in Belgium, India, Germany, Mexico, China, and Switzerland.

Their current long-term foreign assignment letter (1-5 years) is a secondment and US-based. It provides the following:

a. New York choice of law
b. At-will employment
c. Maintenance on the home company annual leave policy
d. Waiver of host country law
e. Worldwide non-competition provision for one year in exchange for full pay
Polling Question #3

Which of these provisions, in your experience, are the most problematic when sending a U.S. employee temporarily to a non-U.S. location?

- a. Choice of law provisions?
- b. At-will employment?
- c. Annual Leave?
- d. Waivers of host country law?
- e. Non-competes?
In EU, Some Determinative Rules

- Which law governs in employment situations?
  - Rome I Regulation
  - Foreign Posted Workers’ Directive

- Which court has jurisdiction over an employee?
  - Brussels I Regulation
Some Common Issues: Background

- OMG has an employee, Mr. Smith, who is a UK citizen on a 3 year assignment in Germany.
- He is the head of OMG’s European Division.
- Mr. Smith has a standard UK employment contract which he signed in 2006. It provides for 90 days’ notice prior to termination and standard UK benefits for an individual at his level.
Some Common Issues:
Annual Leave Benefits

• Mr. Smith’s assignment letter provides:
  – He will stay on the UK annual leave policy (28 days per year, including public holidays)
  – He will stay on the UK sick leave policy, which is the minimum entitlement (28 weeks of Statutory Sick Pay (SSP) in a three-year period which is paid at the rate of GBP 87.55 per week)

• In his third year of assignment, Mr. Smith complains that he should be able to observe all German holidays without reducing his 28 day annual leave in the UK

• They come to you and ask what they should do?
Some Common Issues: Sick Leave Benefits

- Mr. Smith gets sick and has to go out for surgery. He is expected to be absent for 6 weeks, and his doctor provides a note accordingly.
- The Company pays him the minimum entitlements under UK law (roughly 90 pounds per week) which is much less than his regular pay.
- Mr. Smith calls and angrily demands that he continue to be paid his full wages during the 6 weeks.
- The Company calls you – what do you recommend?
Some Common Issues: Termination

- Assignment letter provides a choice of law indicating that only UK law will govern his employment and his assignment letter.
- Several months after Mr. Smith’s return to work from his illness, the Company decides that he has been ineffective, overall, in his foreign post.
- It offers him 90 days’ pay in lieu of notice, under the UK contract, and terminates him.
- Mr. Smith threatens a lawsuit, but the Company is undeterred since it has followed his employment contract.
- They come to you for advice.
Choice of Law and Forum

- Can you Choose one Law and Forum?
  - EU
  - Latin America
  - Asia
  - United States
Choice-of-law Clauses

• Choice-of-law clause in international assignment agreement is generally enforceable

• On fundamental employee rights, choice-of-law (e.g., NY) must usually grant employee same or better rights than law of place of work (e.g., Germany)
  – Termination? Minimum Benefits?

• Result: Different law may apply to different aspects of the employment relationship
  – Host country law may govern reasons and process for dismissal
  – New York state law may govern terms of contract benefits

• Regardless: Consider deterrent effect, especially where application is unclear (i.e. rotating employees, non-EU assignments)
Some Common Issues: Repatriation

• Before the Company can fire Mr. Smith, he decides that he has had enough
• He requests a transfer back to the UK. He wants to get his former job back. OMG tells him, though, that if he returns, he will be demoted to Under Assistant Vice President and sent to the Company’s new office in Northern Manchuria.
  – Smith consults an attorney, who files an age discrimination lawsuit on his behalf
  – Is the Company required to give his old job back?
Polling Question #4

- How does our company help to protect against unfair competition by international assignees?
  
  a. We don’t....
  b. I’m in benefits.... Unfair competition is the job of that group of lawyers downstairs
  c. We require a global confidentiality agreement
  d. We require several agreements, depending on the countries / positions involved
Mr. Smith’s assignment letter included a 2 year non-compete, which provides that he cannot work for any competitor anywhere in the world for 2 years after termination of his employment for any reason. The Company thinks this is important because of his prior position over Europe and his access to significant confidential information.

Other than his salary, he was not given any additional ‘payment’ for the non-compete.

The Company opted to terminate Mr. Smith and gave him 90 days’ notice. He immediately begins working for a competitor in Germany.

The Company brings a lawsuit in the UK, under UK law, to stop him from competing.
Enforcement Options: Non-compete Strategies

- Exclusive or non-exclusive jurisdiction?
- Get judgment in one jurisdiction, and enforce it in another?
- What about arbitration under the New York Convention?
- Do the employees habitually work in the EU?
  - If so, the Brussels Regulation applies, regardless of the jurisdiction of the employer and contractual choice of law provisions
What About U.S. Expatriates to EU?

- Does the Foreign Posted Workers’ Directive apply?
- What about the Brussels I and/or Rome I regulations?
- At-will employment?
- Consider the extraterritorial application of US discrimination laws
  - U.S. citizens;
  - Employed abroad;
  - By U.S. companies or their subsidiaries (companies controlled by U.S. corporations)
Some Final Thoughts

1. Always consider the laws of the Host Country when determining benefits and potential employment protections
2. Include a Choice of Law or Choice of Forum Clause identifying a jurisdiction reasonably related to the employee’s place of employment or (preferably) where employee habitually works or is domiciled
3. Consider Arbitration under the New York Convention
4. Language should be mandatory not permissive
5. Include a severability clause
Some Final Thoughts (cont’d)

6. Draft forum selection clause broadly enough to cover any and all claims, including statutory claims and not just contractual ones.

7. Include affirmative acknowledgment that employee recognizes his sole rights and remedies under the chosen law/jurisdiction and that, to the extent permitted by applicable law, the employee waives any rights under the laws of any other jurisdiction.

8. Consider the risks/benefits of Including an affirmative representation that the employee will not initiate any claims in any other country and that if he does so he will be liable for attorneys’ fees and costs in opposing such claims.
Questions?
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