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LEGAL ISSUES RELATING TO
SECONDMENT AND CROSS BORDER
EMPLOYMENT IN THE EU

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I. Introduction

Only 10% of the law that is applicable to employment terms and conditions in the EU is originated at the transnational level. This means that, generally speaking, different rules apply within the Union's 27 member states.

U.S. lawyers are used to working with different laws in different jurisdictions. One of the techniques to create legal certainty is to explicitly determine the law that will govern the employment contract.

A lot of countries consider their national employment protection to be a matter of public policy, applicable to all employees regularly employed on their territory. To enforce their system, many countries will also enforce their employment rules through fines and jail sentences.

These national employment rules will therefore become applicable if the terms and conditions that have been agreed to between the employer and the employee under a foreign law are less generous for the employee who is employed in that specific member state.

Tens of thousands of U.S. employees are working in the EU. Some of them are working on local contracts, paying local taxes and social security. Others are seconded by their U.S. employer to execute special assignments that may take several years.

They are sent to the EU on the basis of contract and corporate policies that do not always take all of the different local laws into consideration. Because of the general protective nature of employment laws in many member states, U.S. employers, often to their own financial detriment, discover employment issues that they were totally unaware of.

In this paper I would like to, without having the pretense to be totally inclusive, increase the U.S. practitioner's awareness of the issues that may come up with expatriates in the EU.

II. The structure of expatriate employment

In order to let an employee originally in the service of a U.S. company (U.S. Inc.) perform activities in the EU, the U.S. employer can theoretically use three different agreement structures.

a. A new agreement

First, US Inc. could terminate the employee's original employment contract, after which the employee enters into a new contract with U.S. Inc.'s affiliate

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in Europe. However, using this structure entails different negative consequences:

- there would no longer be a contractual relationship between U.S. Inc. and the employee concerned. Thus, in the event the employee's employment in Belgium is terminated, he is no longer in the service of any U.S. Inc affiliate;
- irrespective of the chosen applicable law, this contract might be governed to a large extent by the EU Member State's employment law (article 6 and 7 of the Treaty of Rome of June 19, 1980 regarding the law applicable to contracts), involving, amongst others, that in the event of termination of the employee's employment, a considerable termination indemnity computed in accordance with local statutory provisions would be due;
- the employee concerned would be subject to the EU Member State's social security scheme for employees, which means that U.S. Inc may end up having to pay very expensive social security contributions on top of the employee's gross salary;
- in some member states, for example Austria, Germany and France, the works council must be informed and, in some instances, consulted when a foreign employee is hired; Foreign employers will cringe at the idea of having to inform the local members of the works council of the terms and conditions by which they have offered to avail themselves of the services of a foreign expatriate.

b. A suspension of the existing contract

Secondly, U.S. Inc could suspend the execution of the employee's original employment contract while the employee enters into a new employment contract with U.S. Inc.'s European affiliate. The agreement suspending the original contract could provide that, in the event of termination of the contract between the employee and U.S. Inc.'s European affiliate, the original contract would regain its full effect.

This structure involves the same issues as the first mentioned structure, except for the fact that in this second structure there would still be a contractual relationship between the employee and U.S. Inc., meaning that, in the event of termination of the foreign employment, the parties would still be able to activate the original, suspended agreement.

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c. The secondment by U.S. Inc.

There is another, third agreement structure through which U.S. Inc. can let one of its employees perform activities in Belgium on behalf of U.S. Inc.'s European affiliate, without European (Member State) social security contributions being due and without the employee being entitled to a termination indemnity in the event of termination of his employment in Europe.

The employee can simply remain in the service of U.S. Inc. while being temporary posted to the Belgian territory (pursuant to special European labor and social security law, posting is the legal appellation of such operation, though we see that in international employment practice people often use the wording 'assignment' or 'secondment').

III. Social security

To create one large single market in the EU there must be free movement of goods, services and workers. To avoid variations of social security systems that would get in the way of the free movement of workers, regulation 1408/71 has been adopted.

Under this regulation, employees in one member state may be temporarily transferred to work in a host country and remain subject to the social security of their original member state. Workers that work "simultaneously" in several member states only have to pay social security in the member state in which they have established their domicile.

The benefit of these two rules is that the individual employee or self employed worker contributes to one social security system, where he will be adequately covered.

The different bilateral social security treaties that the U.S. government has concluded with the different EU member states serves a similar goal. The treaty allows employers to send employees to Europe, who will remain temporarily subject to their specific U.S. social security system.

The following treaties have, without being exhaustive, been concluded:

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State	Date	Max. initial duration	Extension	criterion
Austria	1990	5 years	(agreement)	nationality
Belgium	1982	5 years	Possible	Place of work
Finland	1992	5 years	up to 7 years	Place of work
France	1987	5 years	Possible	Place of work
Germany	1976	5 years		Place of work
Greece	1993	5 years	Possible	Place of work
Ireland	1992	5 years	Possible	Place of work
Italy	1973	undefined	Possible	nationality
Luxembourg	1992	5 years	Possible	Place of work
Netherlands	1987	5 years	Possible	place of business employer
Norway	2001	5 years	Possible	place of business employer
Portugal	1988	5 years	1 year	Place of work
Spain	1986	5 years	1 year	Place of work
UK	1984	5 years	Possible	Place of work

In view of the Social Security Treaty between the U.S. and Belgium, the secondment of a worker is, for example, subject to the following conditions:

1. the previous application of the worker to the social security of his country of origin;
2. the posting of the workers must be temporary or for a limited duration
3. the interdiction to successively use the posting of workers to avoid paying social security in Belgium or so called chained posting
4. the maintaining of an organic link between the employer and the worker that is posted abroad

As far as the last condition is concerned, the continuance of an organic link between the worker and the employer can be deduced from all the contractual terms and conditions between the parties. The criteria on which such appreciation takes place are the following:

- the employer that is posting a worker is the only person that is entitled to determine his remuneration as well as his professional career;
- the employer that is posting a worker is the only person that is contractually entitled to dismiss and is the only individual that must bear the financial consequences of the posting;
- no employment contract for a definite or indefinite period of time may be concluded between the posted worker and the company in the country of secondment;
- the employment contract signed between the posted worker and his employer in the country of origin may not be suspended ;
- the employer in the country of origin has to pay the social security

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contribution to the social security administration in the country of origin.

These conditions will obviously have to be taken into consideration when drafting the posting agreement.

IV. Taxes

To attract foreign investment, many member states offer special tax deals to foreign expatriate executives. The purpose of these special tax systems is to make it less expensive for multinationals to second expatriates.

The Netherlands allows employers to pay 30% of the expatriates' gross salary, to be paid free of tax for an initial period of 5 years that can be prolonged to 10 years total.

As a consequence of the 30% rule, the expatriate's normal net salary can be increased with 28.5% as follows:

Netherlands	Ordinary rate	30% rule
Gross amount	100.000 EUR	100.000 EUR
Gross remuneration	100.000 EUR	70.000 EUR
Extra-territorial expenses		30.000 EUR
Net amount	54.595,79 EUR	40.195,79 EUR + 30.000 EUR
Total net amount	54.595,79 EUR	70.195 EUR

Also, Belgium grants tax advantages to expatriate executives that are temporarily transferred to Belgium. These benefits are twofold:

First, these expatriates will only be taxed in Belgium on their income with regard to work performed on the Belgian territory. This means that an exemption is granted for the part of the remuneration which compensates work that is carried out abroad.

Second, the employer will be able to make tax free reimbursements of costs that are incurred as a result of the expatriate's employment in Belgium.

The following allowances may be paid and may be considered as reimbursed costs:

- Non repetitive expenses:
 - Costs of removal to Belgium;
 - Loss due to sale of house and household in country of origin

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- Cost of setting up a household in Belgium
- Moving costs on leaving Belgium
- Repetitive expenses:
 - The difference between cost of living in Belgium and the country of origin;
 - The difference between the lodging costs in Belgium and the country of origin;
 - The costs encompassed by the fluctuation of the currency in which the expatriate is being paid and the EUR (Exchange differential);
 - The cost encompassed by the higher taxes in Belgium (Tax equalisation);
 - The costs incurred because the expatriate's dependent children have to go to expensive, international schools;
 - The cost of traveling on regular intervals back to the country of origin (Home leave)

V. Self-employed workers

Most jurisdictions in the EU distinguish between those who are true employees and those who are self-employed, independent contractors. It is only true employees who have the full benefit of protective legislation, and thus the distinction is important for both the employers and those whom they engage.

Managing directors are always considered employees of the company in the UK, France and the Netherlands. This is not always true in other jurisdictions of the EU.

Managing directors in Finland are considered to be an organ of the company itself, rather than an employee, and thus fall under the protection provided to true employees under the terms of Finnish employment legislation. The same applies in Italy (Dirigenti), Germany (Mitglied des Vorstands), Belgium (Administrateur) and Austria, where directors of companies who by law represent the company, do not count as employees for the purposes of employment legislation.

This may for once be good news for the U.S. employer who second his expatriate.

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VI. Collective bargaining agreements

In most EU member states, except for the UK, collective bargaining agreements are an important source of law.

In Germany and Austria, there are two kinds of collective agreements: works council agreements (Betriebsvereinbarungen); and trade union agreements (Tarifverträge).

A works council agreement only regulates issues which are not covered or usually covered by trade union agreements, unless the trade union agreement expressly permits supplementary works council agreements.

Works council agreements are legally enforceable by the works council and the employer in the employment courts and also by employees, to the extent that they have individual rights under the agreement in question.

The other type of collective agreement is the trade union agreement. Trade union agreements are very common in Germany. They tend to be regional in application, as both trade unions and employers' organizations are organized on a regional basis. Trade union agreements may relate to anything regarding working conditions, salaries, working hours, bonuses, notice periods, holidays, etc.. Trade union agreements are binding if:

- the employer and the employee are members of the respective employers' organization or trade union; or
- the employer agrees to a house or company tariff directly with the trade union, i.e. enters into an agreement directly with a trade union that covers only the employer's company; or
- the employer is a member of an employers' organization which is a party to a trade union agreement; or
- the trade union agreement has been given force of law by the Federal Employment Minister or by the State Employment Minister.

Similar weight is given to collective bargaining agreements in France, the Netherlands, Belgium, Spain, Finland and Italy, where collective bargaining agreements can be extended or declared generally binding by these countries' respective administrations.

These collective bargaining agreements may determine terms and conditions that are applicable to all employees, including expatriate executives, that are employed in that particular industry or region.

Some agreements may for example determine that all salaries are to be linked to the index and/or should be increased with x% after wage negotiations. Such increase and/or indexation will then have to be applied, even if they come immediately after the individual expatriate received a

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merit increase.

Other agreements may determine that the employer must pay at the end of the year an end of year bonus equal to 1 month salary (so called 13th month) or 2 months salary (so called 13th and 14th months). If the employer of the expatriate did not take this into consideration when paying the monthly salary on the basis of the budgeted salary, the employee will end up with 1 to 2 months extra-salary through the application of the local collective bargaining agreement.

VII. Mandatory languages

The lingua franca of business is English; and all businessmen are happy to use Shakespeare's language to sell, buy and draft agreements.

However, employers that employ workers in Belgium and France must, in accordance with the law, address their workers, including their anglo-saxon unilingual expatriates in Dutch and in French, respectively.

Instructions and correspondence that are written in English may, as a consequence, not be used as evidence in court. Also, employment contracts that are not drafted in Dutch or French, respectively, will be null and void.

VIII. Working time

The EU working time directive imposes within the EU a maximum work week of 48 hours.

The following table will demonstrate that differences are still very important within the different member states:

Country	Maximum week	Overtime pay	Compensatory leave
Austria	40 hours	50% or	Time off
Belgium	38 hours	50 % or 100%	Time off
Denmark	48 hours		
France	35 hours	10, 25, 50%	
Germany	48 hours		
Italy	40 hours	10%	Time off
Luxembourg	40 hours	25%	1,5 time off
Netherlands	40 hours		
Portugal	44 hours	25%	Time off
Spain	40 hours		Time off
UK	48 hours		

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This table does not, of course, contain the different working time rules that are imposed through collective bargaining agreements.

The maximum work week is also enforced against executives in Belgium and France. In Belgium, the executive will not be entitled to overtime pay if his contract dictates that his monthly salary will include all time worked over the ceiling of 38 hours.

IX. Restrictive covenants

Important differences exist in Europe with regards to non competition, non-solicitation and confidentiality agreements.

In some member states, these clauses must be limited to a specific territory, and they cannot surpass one year (Austria and Finland). In other countries, like Italy, the non competition agreement can last three years for clerical and blue-collar workers, as well as junior executives (“quadri”), and five years for executives (“dirigenti”).

Other jurisdictions allow judicial review of the reasonableness of the non competition clause (France and Netherlands), whereas others impose the payment of a lump sum indemnity that must be at least 50 % of the individual’s salary over the period of time during which the non competition agreement will last post termination (Belgium, Denmark and Germany).

Enforcement also differs widely from one jurisdiction to another. In some countries, injunctions may be imposed against the employee and the employer, whereas, in others, only damages may be due when a non competition obligation is violated.

X. Unilateral variations to the employment contract

Most Member States consider unilateral variation of important conditions of the employment contract to be an actionable breach of contract. Some jurisdictions allow the employment contracts to provide for flexibility, enabling the employer to change certain terms without the prior consent of the employee. However, such clauses are subject to the scrutiny of the court, which will only uphold the variation as binding if it there is indeed a business rational that has been implemented in a fair and reasonable manner by the employer.

Executives on expatriate packages providing tax free allowances, net guaranteed salaries and bonuses may lose these benefits when they are repatriated to their country of origin.

It is therefore important to write the posting agreements in such a way that

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repatriation can be considered to be a constructive dismissal, allowing the expatriate to claim European termination indemnities from his U.S. employer.

XI. Conclusion

U.S. employment law practitioners should be aware that employment rules are very diverse in Europe, depending on the socio-economic and legal environment of the particular region where the client will operate.

Collective bargaining agreements are very important and impose, in many instances, mandatory terms and conditions.

Social security, tax and local employment law further complicates the jigsaw. From a risk management perspective, all of this makes it impossible to take a one size fits all approach when operating in different jurisdictions.

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