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**Employment Agreements and Cross Border Employment –
Employing “Ex-Pats” Outside the U.S.:
What Obstacles Are Presented and How Do You Overcome Them**

Essential Elements of Negotiating Expatriate and Secondment Agreements

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I. Introduction

Negotiating employment agreements for U.S. citizens going abroad or foreign residents employed in the U.S. and seconded to a third country is far from simple. Thinking globally about the work assignment and at the same time understanding local rules and customs is essential to drafting and negotiating these employment agreements and assignment letters. Attorneys drafting or responding to these agreements must think holistically about the process while, at the same time, thinking locally.

Human resource manuals, codes of conduct, confidentiality agreements, restrictive covenants, and other expatriate provisions may be included or referenced in these agreements or made exhibits, depending on the laws of the host country and the company’s policy. Stock option agreements and intellectual property agreements may need to be drafted separately to be enforceable abroad. Even translating these documents into the host country’s language can be a factor in a Company avoiding liability during the employment relationship or when it ends. Most important, being able to spot the issues and know when and how to reach out to foreign counsel for advice on foreign law is the first lesson in dealing with these agreements.

II. Definitions

- (a) Expatriates—Employees who work on foreign assignments and have an undetermined return date to their countries, regardless of their citizenship.
- (b) Secondment— A temporary movement or ‘loan’ of an employee to another part of an organization or to a completely different organization.
- (c) Home country— The country in which the expatriate worked permanently before being assigned to work in a host country.

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(d) Host country— The country to which the expatriate is being assigned and sometimes given local status, i.e., no expatriate perquisites.

III. Business Points to Negotiate: Checklist for Inclusion in the Expatriate or Secondment Package

1. Assignment and Responsibilities: The employee must make sure that any employment agreement, offer letter and/or expatriate agreement describes his or her specific position in the foreign organizational structure, work location, duties, and reporting line.

2. Tax Equalization: Every expatriate agreement should provide for the employer to pay for tax advice and tax equalization and should make an employee financially “whole” in going abroad. Tax equalization ensures that an employee does not suffer an additional tax liability due to working abroad, and tax assistance ensures compliance with the U.S. expatriate tax laws as well as the tax laws of the host country.

In many instances, employees are paid via their home country payroll to their home country accounts.

3. Cost-of-Living Allowance: Usually, an employer provides employees with additional compensation to help offset cost differentials for living in the host country and provides for this in an agreement. This extra compensation, determined using the employee’s base salary, often changes due to fluctuations in costs in the home and the host country and in the exchange rate. This “cost-of-living” compensation usually is paid once the employee moves into permanent housing in the host country and is discontinued when she moves out of that housing at the end of the assignment. Such cost-of-living allowances typically end if an employee changes from expatriate to local status.

4. Housing Allowance: The employer typically rents a residence for the employee or reimburses the employee for a residence she secures herself. In any case, the employer usually sets a limit on the amount that will be reimbursable or paid for housing and utilities. House hunting trips, home purchase, broker’s and closing fees should be reimbursed by the employer and included in a package.

5. Relocation Allowance: Usually the employee and her family receive a miscellaneous relocation allowance for some of the expenses incurred during the trip to the host country. This allowance, usually a percentage of the employee’s monthly salary, typically sets a limit per person traveling. An agreement however may state that, the employee is expected to repay the relocation allowance if his or her assignment ends in a shorter time than anticipated (usually in cases where the employee voluntarily terminates her employment and assignment earlier than the initial assignment or contract term).

6. Shipment/Storage of Household Goods and Personal Belongings: Employees are customarily reimbursed for shipment costs to cover sending personal belongings to the host country. But policies vary, and some may contain unreasonable limits on the

amount that will be reimbursed. At times, employees are also reimbursed for miscellaneous moving costs.

7. Ground Transportation: In secondment arrangements the employer usually leases a car for the employee and her family to use during the foreign assignment and often pays for the car's maintenance and gas.

8. Vacation: The employee usually qualifies for the same number of vacation days/weeks that she would be entitled to in the United States or any other home country. Nonetheless, during the time of assignment, the host country's holiday schedule applies. Thus, allowing an expatriate to use vacation time to return home for U.S. holidays that are not celebrated in the host country is often negotiated.

9. Home Leave: Generally, the employee and her family are eligible for one or two home leaves per year. The Employer may recommend that these trips be combined with business trips back to the home country so it should be specified if these are to be considered vacation days. The employee and her family are generally reimbursed for actual and reasonable transportation costs in accordance with the employer's travel policy during a home leave but the employee may be responsible for living expenses.

10. Personal or Emergency Leave: In the event of the death or any serious illness or injury involving a member of employee's family in the home country, the employer reimburses the employee for the cost of round-trip transportation.

11. Children's Education: The employer often pays for the cost of the private education of an employee's children.

12. Social Security: The rules concerning Social Security are different from country to country but employees should be protected in expatriate and secondment agreements from duplicative coverage.

U.S. Rules: Coverage under the U.S. Social Security system is based on (i) employment within the U.S. without regard to nationality of the employee or the employer, or (ii) employment outside the United States if both the employer and the employee are U.S. persons, i.e., a U.S. corporation, a U.S. citizen, or a U.S. resident. Further, under a special irrevocable election ("3121(l) agreement") a US employer can elect to include in the Social Security system a foreign subsidiary that is at least 10 percent owned by a U.S. entity. The arrangement treats the foreign subsidiary as a U.S. employer and includes in the Social Security system all U.S. citizens and U.S. residents employed by the subsidiary. Non-citizens who are nonresidents of U.S. are covered by Social Security only for services actually performed inside the U.S.

Foreign Rules: The U.S. has entered into bilateral Social Security Agreements ("totalization" agreements) with other nations that prevent duplicative coverage. The bilateral relationship allows an individual who is temporarily in two systems at the same time to get a certificate of coverage from one system and to use that certificate and the totalization agreement to avoid coverage in other systems. In general, if an assignment

abroad does not exceed five years, the individual may elect to remain in the home country's social security system and will be exempt from paying tax into the local system. But if the assignment to the host country will exceed five years, host country coverage will apply. Totalization agreements avoid only duplicative coverage; they do not grant coverage where it does not exist by statute. Consequently, the exemption from the local system will depend on the employee producing proof of coverage under his or her home country system. This is usually done by obtaining a letter from the home country system certifying the employee's ongoing coverage. In the U.S., the Social Security Administration will require a commitment from the U.S. parent or affiliate to pay the U.S. social security taxes on the employee's behalf.

Individuals may have participation in both home country and host country social security systems. In those instances, the amounts paid from both the U.S. and the treaty partner's social security system are adjusted, and they "totalize" each system's benefits to better approximate full benefits. For example, if an employee works in the U.S. system for 20 years, then in the French system for 6 years, and then returns to the U.S. system for 8 years, his or her benefit is granted based on total years of service (34 years) and then it is pro-rated based on the fraction of service worked in each system (28/34 for the U.S. and 6/34 for France).

The following countries have entered into bilateral Social Security agreements with the U.S.: Italy, Germany, Switzerland, Belgium, Norway, Canada, United Kingdom, Sweden, Spain, France, Portugal, Netherlands, Austria, Finland, Ireland, Luxembourg, Greece, Australia, South Korea, Chile, and Japan.

13. Reassignment/Repatriation: Most US employers reimburse employees for relocation expenses so long as the employee is still employed by the employer in the home country. Beyond that, employers should make an employee "whole" by paying all relocation and repatriation expenses even if the employment is terminated, so long as the termination was without cause and the employee is returning to her home country.

14. Health Benefits: Employees should be provided with at least the same benefits that would be available to them in their home country. Some international plans may not guarantee that a US citizen or resident will, upon return to her home country, be entitled to COBRA. If that is the case, an employee may want to negotiate continued coverage.

15. Immigration Issues: If necessary, the employer will hire immigration counsel to assist the employee in obtaining necessary documents and licenses to work abroad. In addition, the employer will usually obtain counsel for immigration issues related to the employee's family and their ability to work/live abroad. These arrangements should be made prior to departure and the job should not be conditioned on immigration approval "after the fact".

III. Legal Points to Negotiate and Keep in Mind

1. At-will vs. Contract

US: At-will employment is an employment relationship in which either party can terminate the relationship with no liability unless there was an express employment contract for a definite term. When the employment relationship is “at will,” the employer is free to discharge individuals “for good cause, or bad cause, or no cause at all,” and the employee is just as free to quit, strike, or otherwise stop working. There are some exemptions to the at-will doctrine. For example, forty-three U.S. states recognize a public policy exemption under which an employer cannot fire an employee if it would violate the state’s public policy or a state or federal statute. Some states recognize implied contracts and the covenant of good faith and fair dealing (“implied-in-law” contracts) as exceptions to the at-will doctrine. Statutory exceptions include violations of Title VII, the ADA, ADEA, etc.

Outside the U.S: Employment relationships are governed by contract, collective or trade agreements, works council directives, treaties, and or statutes. In many countries, employers can terminate only for just cause, and termination without cause subjects employers to pay severance benefits. In the European Union, directives, treaties, and local law work in tandem to try to achieve uniformity regarding certain employment terms, i.e., jurisdiction, choice of law, salary, term, notice, equity, non-competes, and data privacy.

2. Choice of Law/Governing Law

A single choice-of-law provision may govern all aspects of an expatriate agreement, or different choices of law may govern different clauses in one agreement. This will depend on what the governing law is in the host country in terms of an individual issue, as well as under what circumstances the host country will recognize a choice-of-law provision in a U.S. contract. It is essential in reviewing and drafting these provisions to look ahead to the end of the relationship and consider the enforceability of certain provisions, such as restrictive covenants, notice provisions, or even the termination provision itself, after the employment ends.

In certain foreign jurisdictions, statutes and treaties can supersede pre-determined and agreed upon choice-of-law provisions. While choice-of-law provisions are enforceable under most European legislation, some major exceptions apply:

(i) The Rome Convention on the Law Applicable to Contractual Obligations of June 19, 1980, also known as the European Contracts Convention, sets out the rules that govern international contracts. Under Article 6(1) of the Convention (governing employment agreements), employers and employees are free to choose applicable law. Thus, generally, European labor courts are bound by the choice-of-law set forth in the employment agreement.

(ii) But the Rome Convention has certain pro-employee protections, under which labor courts are allowed to set aside the law chosen if the applicable provisions of that law are less favorable than the mandatory provisions of law in the country in which the employee habitually performs the work.

(iii) EU's Posted Worker Directive of December 16, 1996 (Dir. 96/71), designed to prevent social dumping, allows protective labor rules of the host country to be applied. As an exception to this rule, however, the contract is governed by the law of the country to which – considering all circumstances of the employment relationship – the contract is more closely connected.

3. Jurisdiction

When drafting a jurisdictional provision, make sure the host country will recognize the laws of jurisdiction you have chosen to govern the employment relationship. Also make sure that the employee has the practical means to meet the jurisdictional requirement in terms of cost, travel and adequate representation. Consider the likelihood of a dispute and when it may occur.

Many countries outside of the U.S. do not accept an employer's choice of jurisdiction even if it was agreed to by both parties because of the disparity in bargaining power between employer and employee.

The Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968 (the "Brussels Convention") and Regulation 44/2001, which superseded the Brussels Convention in March 1, 2002, set forth the European view on jurisdictional issues:

(i) The basic principle is that jurisdiction is exercised by the Member State in which the defendant is domiciled, regardless of his or her nationality.

(ii) Article 17 of the Brussels Convention states that employers can invoke jurisdictional clauses only if they are signed AFTER a dispute has arisen (unlike employees, who can invoke the clause even if it was signed before the dispute).

(iii) Article 2 of the Brussels Convention provides that jurisdiction is conferred on the court of the country in which the defendant employer resides. Thus, the court of the country in which the employer's offices are located has jurisdiction. Nonetheless, courts may recognize fairly bargained for jurisdiction if not manifestly contrary to public policy.

(iv) Contrary to the Brussels Convention, Regulation 44/2001 rules apply differently to employees and employers. Pursuant to Article 19, the employee has a choice of where to sue the employer. It may be in: the courts of the Member State in which the employer is domiciled; the courts of the Member State in which the employee habitually carries out his or her work; or if the employee does not or did not habitually carry out his or her work in any one country, then in the courts of the place in which the

business that engaged the employee is situated. The employer does not have any choice; and pursuant to Article 20, it can only bring proceedings in the courts of the Member State in which the employee is domiciled.

4. Confidentiality and Trade Secrets

In drafting and negotiating agreements, make sure that this provision does not go beyond legitimate protection of confidential information and trade secrets and become a broader restriction. In the U.S., an employee's duty of confidentiality is governed by common law and is enforceable with or without an agreement. In some countries, confidentiality is not implied and must be agreed to in writing to be enforceable. Confidentiality provisions should be in writing and drafted as narrowly as possible to protect the company's interest in its trade secrets without restricting the flow of ideas or the knowledge of an employee after employment. An over-broad provision could be found by a foreign court to be an unfair and undue burden on the employee that will restrict her from obtaining new employment.

Many international labor courts consider that each employment contract or employment relationship carries with it an implied obligation of confidentiality. This duty usually encompasses the employer's business, technical and trade secrets. Usually, the obligation of confidentiality survives the end of the employment relationship.

5. Restrictive Covenants

If an employer is concerned about competition and the employee could present a competitive threat after employment, then a separate document should be drafted along with the employment agreement and the employer should offer separate consideration in exchange for this type of restriction. Also, many European countries have strict statutory requirements that non-compete agreements must be paid for if they are to be enforceable post-employment. Researching the statutes and opinions in the host country should be done before separation, when both parties are more inclined to agree to a fair and equitable restriction, which is what many foreign courts will enforce. In many jurisdictions, the restriction must be reasonable in time, scope, and location, not unlike New York law and other U.S. state laws. Most important, an employer needs to be prepared to pay for a restriction, as most European and Asian countries require consideration before enforcing a non-competition or non-solicitation restriction.

Enforceability in most European countries often depends on strict mandatory provisions, and courts will set aside choice-of-law provisions. To be effective, a court decision upholding a non-compete needs to be recognized in foreign courts in which the judgment is to be enforced. Usually, no recognition of a judgment is possible if the foreign court enforcing the non-compete is not competent under the law of the foreign jurisdiction in which the judgment has to be recognized or if the defendant was unable to defend himself or herself.

6. Term

To avoid the risk of a foreign court interpreting an agreement to have an implied or indefinite term, companies should include in their expatriate or employment agreements specific terms on the duration of employment. Many companies draft expatriate offer letters with no term of employment, in keeping with the at-will relationship. However, if the expatriate's employment is terminated while abroad, where at-will employment is not the norm, an implied or indefinite term may be implied from other benefits, facts and behavior. Therefore, if the employment is limited to two years, the agreement should say so. Also, the projected duration of the relationship should be considered in addressing stock options and other benefits. Be specific in any document that describes the employment relationship and specifically describe what kind of employment term/relationship is created, i.e., expatriate, secondment, fixed-term, temporary term, etc.

Term can be implied by other benefits and in some countries for life. Under the "acquired rights doctrine," some courts may interpret that the employer, by providing certain benefits, meant to offer the employee an indefinite term of employment. Consider what constitutes valid termination and notice under the laws of each relevant country.

7. Termination/Grounds, Notice and Severance

In every expatriate agreement, both parties must fully understand and define the grounds for termination. If notice and termination are not defined, the laws of a host country can easily supersede, and an implied notice period and term of employment may subject the company to significant notice pay and severance pay. If no severance pay is defined or if it is insufficient given the employee's length of employment and position, this too can subject an employer to liability. Some employers think that they are protected from foreign law if they have obtained a signed release from an employee upon termination. Many jurisdictions will ignore such a release, however, if it should have been translated into the language of the host country and have included foreign laws that were understood to be waived, or if the employee was forced to sign the release to avoid losing repatriation or other benefits in addition to severance.

If the term of employment extends beyond the expatriate assignment, then the employee should be assured that she will return to her position in the U.S., at the end of a specific expatriate assignment unless terminated for "cause". On the other hand, if the expatriate agreement has a specific term abroad, then it is even more important to define the grounds for any termination that may occur while the employee is still living in the host country. Employment agreements and/or offer letters for employees being transferred to work abroad should define "cause" as well as "good reason" resignation.

The notice period should also be defined as well as the employee's obligations during such notice period. Notice requirements are very important and vary by country. Factors affecting notice include the position of the employee, how long the employee has

been in the service of the employer, the employee's age, and other factors that could be outlined in collective bargaining agreements.

Finally, the employee should try to insure that the company will bring her and her family home before termination, so she can seek new employment while still employed. If the employee has children that will be attending school in the host country, the expatriation agreement should assure that if the employee is terminated during the school year, the employer will continue to pay housing, school, and other expenses until the end of the school year. Further, the employee's repatriation package should be the same level as her initial package to move abroad. Unless the employee was terminated for cause, gross misconduct, or embezzlement, the employee is generally reimbursed for repatriation expenses.

8. Compensation and Benefit Plans

U.S. compensation programs for employees are generally at the discretion of the employer. The employer can add or delete benefits. Generally, there is no right to future benefits.

Outside the U.S., however, even in a common law country such as the UK, benefits can be considered a contractual obligation and only termination for good cause can void the obligation. Some expatriates and foreign workers can be exempt from these rules either because they are considered temporary employees under local laws or because they are too highly compensated to fall under labor rules.

These contractual obligations and exemptions should be seriously considered when designing compensation programs for employees working abroad. Contracts should be broad enough to anticipate changed circumstances within the organization, or with the individual. A contract should outline the term, specify its temporary nature, if appropriate, and allow for flexibility. If the contract is too general, it risks being uncertain and open to interpretation by a foreign court.

The employer should also be aware of the home and host country's data privacy rules in regard to transferring abroad the employee's private information in regard to personal tax and social security information. In this regard, the employer may seek written consent for the transfer of data abroad. Also, the relevant agencies in the country from which the information is to be transferred should be notified in order to comply with the data privacy rules.

9. Stock and Option Agreements/Plans

Like the benefits area, stock options and other stock incentives are considered a benefit in certain countries and are subject to similar rules as to reporting, acquired rights, and changes. Regarding stock options, employees should use a separate stock option agreement so the terms and conditions of employment are separate from the terms of the stock option grant; certain countries that require reporting of stock option grants, and

separate documents enable the employer to only report the option grant. Sometimes, stock options vest over time, and the period for vesting may be longer than the term of employment. This difference could cause a foreign court to imply a longer period of employment than what was intended by either party. From an employee perspective, it makes sense to match the term of employment to the vesting of equity grants to ensure that the employee has an opportunity to vest in the equity. Further, every equity plan should contain specific information regarding the termination and forfeiture of the equity, plus a waiver and acknowledgment section in which the employee attests to his or her knowledge and understanding of the terms. Finally, the issue of data privacy rules is important in administering equity plans to employees abroad because the employer has to transfer abroad all the necessary data to ensure that the appropriate taxes and social security contributions related to the equity grant are paid. In this respect, every employer should check the specific rules on transferring individual's taxation and social security data abroad for every country involved in the transfer.

U.S.: Stock options and other compensation plans are subject to securities rules and tax laws. The stock options must be registered or fall under an exemption.

Under US tax law, the grant of a qualified stock option is tax free but the spread between the exercise price and the fair market value of the stock is taxable to the employee upon exercise. These rules apply to US citizens or residents. Since the spread is considered income, a US citizen residing abroad could add it to other compensation for purposes of the exclusion from earned income. However, since Section 911 provides that for purpose of determining how much of the option gain is excluded, the entire amount of gain must be allocated over the period from the date of grant to the date the option first becomes exercisable. So, if the option was exercisable when the employee moved overseas, none of the gain is considered attributable to the overseas service and thus none is subject to 911 exclusion. In granting stock options to employees working overseas, employers must also be aware of recent developments in IRC, specifically Section 409A.

Outside U.S.: Foreign laws may also apply in situations in which stock options or restricted stock are granted to employees. Laws differ from country to country. In general, in most jurisdictions, stock options granted to employees will qualify for some sort of exemption under the foreign securities laws as well. At times, because many jurisdictions have more employee protections, the terms of stock options may be subject to approval of the government or the works council; the option program may also become an "acquired right". Finally, some foreign jurisdictions restrict an employee's right to hold the stock or impose exchange controls.

In foreign jurisdictions, options are taxed differently; some tax them at grant, some do not tax at all, and some tax a portion of gains, which are treated as nontaxable capital gains. Many have rules similar to the taxation of options in the US. Because taxation of options differs from country to country, employers must tailor the plans and agreements towards the peculiarities of each relevant jurisdiction.

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