Employing workers overseas: key issues

There are many issues to consider for British companies when making arrangements to send workers overseas. In this note we offer some brief tips on some of the most commonly encountered problems.

These have been drawn from our experience of advising on arrangements in many different jurisdictions in collaboration with our established network of overseas lawyers.

What kind of arrangement?

The first issue to consider is what type of employment arrangement would best fit the needs of the business. Is it just a question of a temporary assignment for a limited period, or will the employee be posted abroad for a period of months or years? If the latter, would it be more appropriate for the employee to be seconded, or is employment by an overseas entity the best way forward? Do you rely on an existing employee or do you recruit locally?

The best approach will be dictated by the extent of the employer’s business interests overseas, and the rules and regulations that apply in the overseas jurisdiction under consideration. Options include:

- Travel to the jurisdiction for a limited period, ancillary to the employee’s “home” contract
- Working abroad for a longer period, but without any attachment to an overseas office
- Secondment to an associated company overseas
- Employment by an associated company overseas, already established to do business there
- Employment by an overseas office established for that purpose
- Employment through a third party such as a payroll provider or distributor.
Choice of law and submission to jurisdiction

Having decided on the nature of the arrangement, the next step is to draw up an appropriate agreement. One key issue to decide at the outset is what legal system should govern the agreement, and what kind of jurisdiction clause to include.

The answer will depend on the nature of the arrangement and on the laws of the jurisdiction where employee will be working. In general an employee originally based in the UK will wish to retain the option of bringing proceedings in the UK should things go wrong, and is therefore likely to prefer an English law contract.

However the employer will wish to minimise the possibility of claims both in the UK and overseas, and will probably therefore favour a local law contract which will make it less likely that the employee will be able to bring claims home. There may also be other reasons why a local law contract is preferable, not least for reasons of transparency and consistency.

Employment contracts with an overseas element should include a submission to jurisdiction clause. Typically this will tie in with the choice of law, so that the courts of the chosen jurisdiction will be given either exclusive or non-exclusive jurisdiction to hear disputes arising from the agreement.

The parties' choice of law and jurisdiction is not necessarily definitive. Within Europe, the terms of the contract can be over-ridden by international conventions which establish common ground rules across most European jurisdictions. When dealing with jurisdictions outside Europe, our domestic courts will apply common law rules in the absence of a relevant bi-lateral treaty. These typically produce a similar outcome.

Mandatory local laws

Whatever the choice of law, it is likely that the express terms of the agreement will be subject to the mandatory rules of the local law. For example in the UK, workers from abroad will be protected by British unfair dismissal and discrimination law, even if their contract of employment is not governed by English law. Most overseas jurisdictions have similar rules.

Typical rules of this nature include:

- Restrictions on how a worker can be dismissed
- Mandatory notice periods
- Provisions on working time, paid holidays, sick pay and pension provision
- Discrimination law
- Health and safety

In Europe, EU Directives have resulted some degree of harmonisation in key areas like TUPE, collective redundancies, working time and discrimination. However there are significant differences in the way the relevant directives have been implemented in individual member states.

Mandatory employment laws of each individual jurisdiction in the EU have also been bolstered by the Posted Workers Directive. This guarantees posted workers the same rights as those based permanently in the host jurisdiction in a number of key areas such as national minimum wage and health and safety.
Employers need to ensure that the contracts given to British workers working overseas do not conflict with mandatory local rules. For this and many other reasons it is vital to arrange for the contract to be checked by a lawyer practising in the jurisdiction concerned.

Personal tax and social security considerations
Among the issues to check is the trigger point at which the worker will become resident in the host country for tax purposes, as well as the tax treatment of his or her overseas earnings in the UK. In particular it will be important to agree whether the employee’s salary and benefits will be paid on a net or gross basis.

For longer term assignments it will be also necessary to check what social security coverage the employee will get in the host country, and what the effect will be on his or her contribution history and entitlement in the UK.

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Particular complexities arise in the case of long-term incentive schemes and pension contributions which are outside the scope of this note.

Immigration rules
Having decided on the optimum arrangement and how this is to be documented, is will be necessary to get the worker’s immigration papers in order. Many countries have a number of different routes to entry, and advice should be obtained at an early stage about how best to navigate these.

Broader implications of establishing a business abroad
If the employer has not yet done business in the host territory there are a number of broader issues to consider. Among other things, the following considerations may arise:

- Corporate law issues may be engaged, for example in relation to registering the employing company as a foreign company in the host jurisdiction.

- Property law advice may be required in relation to the leasing or purchasing of office premises. Sometimes local law rules on entering into and surrendering leases can be onerous and inflexible.

- Sending an employee to work abroad may act as a trigger for a number of obligations on the home company. In particular, it might be the trigger for the establishment of a taxable presence in the host country. This can happen in some jurisdictions even without the establishment of a branch office or the incorporation of a local subsidiary.

- It may be necessary to engage the services of a local payroll company, and the legal implications of this should be explored.

Protecting the business if the employee leaves
Particularly when starting a new venture abroad, the employer may be dependent on the expatriate or local worker and be vulnerable if he or she leaves to join a competitor. It is therefore important to explore whether restrictive covenants should be included in the contract from the outset.

Such restrictions are only enforceable in the UK if they do the minimum necessary to protect the employer’s legitimate business interests. The rules on such restrictions overseas can be even stricter. For example a number of jurisdictions require non-compete undertakings to be compensated, often by substantial amounts.

Careful drafting is likely to be required to ensure that these restrictions are enforceable both overseas and, where the employee is likely to return home after the overseas assignment, in the UK too.
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