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01F The Art and Romance of Deploying and Employing Staff Abroad

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THE ART AND ROMANCE OF DEPLOYING AND EMPLOYING STAFF ABROAD
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As academic, research, and humanitarian programs grow internationally, we see mounting attention to foreign employment law compliance. There's nothing new about university faculty and staff living and working abroad. But increasingly evident is the interest of foreign regulators and employees in labor and related enforcement action, including in the nonprofit and academic sector. Accordingly, the question—How exactly do we lawfully deploy or employ university staff based abroad?—merits close reflection by university leadership and lawyers. Counsel increasingly is asked to evaluate a remarkable variety and number of structures and considerations entailed in foreign postings.

Long experience notwithstanding, universities, like others global enterprises, often struggle with the same U.S. and foreign legal issues that multinational corporate conglomerates find challenging in the international employment area. But universities are distinct, having interests and fiduciaries unlike any other organization, and demanding solutions that account for the institution's unique structure and mission.

This manuscript offers observations on (i) why institutions pursue international employment; (ii) host nation employment law; (iii) practical strategies for staffing a foreign location; (iv) benefits for expatriates and foreign nationals; (v) international employees under sponsored projects; and (vi) terminating foreign employees. The observations expressed are based on the authors' experience working on many international initiatives for higher education institutions. But we do not exhaust, even remotely, the legal particulars and peculiarities that arise in international employment.[1]

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[1] Several important subjects are beyond the scope of this paper, including union issues; U.S. tax matters; employment contract drafting techniques; U.S. employment and anti-discrimination laws that apply extraterritorially; accreditation standards; scientific and medical regulation regimes; bilateral treaties that cover tax and labor; human rights

I. Why Institutions Consider International Employment

Before delving into why institutions employ personnel abroad, consider what is meant by "international employment." On its face, this phrase suggests that an employment relationship can be mobile, involving multiple jurisdictions. It suggests further that an employee may move freely across borders while engaged to do specific work for an organization or company. But these relationships do, in fact, tend to have a home base, and the determination of that home base renders it a local relationship rather than an international one, notwithstanding mobility or multiplicity of locations. Adding a layer of complexity is the question of when certain U.S. laws touching on the employment relationship have extraterritorial application.

If the home base is not the U.S., issues arise related to the social contract of employment in the local jurisdiction.[2] While U.S. entities usually may, through means discussed herein, employ personnel in other jurisdictions, they cannot fully export the "at-will" nature of U.S. employment relationships.[3] Consequently, U.S.-based organizations must adapt to relationships in which employees may have a recognized "right to work" once employed[4], and other rights that fundamentally shape every aspect of the relationship, from the romance of finding the right person to do the work, to the ordeal of eventually breaking up and separating from the relationship.

To determine whether the organization must employ personnel in a jurisdiction other than the U.S., first consider the proposed scope of work. A clear picture of the work will help to properly categorize the type of engagement that might be necessary, and if employment is warranted, what category of employment will apply, and perhaps which collective bargaining agreement.

In addition to the opinion of local counsel as to whether a particular scope of work would warrant a full employment relationship, another factor to consider is the degree to which your organization wants to control the performance of the duties and be associated with the person performing those duties. For example, in a crisis, how important will it be for this person to execute coordinated instructions to minimize risk and maintain health and safety of participants? If your worker is employed by a third party or local partner organization, there may be situations where your organization's instructions and needs are secondary to those of the local employer.

Another institutional question to consider is the extent to which the organization is committed to operating in a particular location and at what scale. The menu of hiring options differs depending on the envisioned contours of the footprint in a location. Hiring decisions for a short-term faculty-

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conventions; export control; and powers of attorney. We encourage readers to consult the legal resources available via NACUA's member website.

[2] U.S. Based Multinational Employers and the "Social Contract" Outside the United States," Donald C. Dowling Jr., Fall 2009 Volume 43 No. 3, The International Lawyer: A Quarterly Publication of the ABA/Section of International Law

[3] Id.

[4] Id.

led program would likely differ from staffing options for a calendar year array of undergraduate semesters where there is an expectation that the site will persist for multiple years or semesters.

To add a layer of complexity, under many kinds of university projects it is not possible to rely entirely on a foreign collaborator or sub-recipient to handle all the local work and employment. For example, under sponsored projects, universities that are prime recipients of grants and contracts for work abroad may encounter sponsor and regulatory prohibitions on outsourcing to foreign collaborators all employment functions under the award. On this basis, many U.S. universities have amassed hundreds of employees outside the U.S. to advance large sponsored projects. Moreover, the bidding process involved in obtaining these grants and contracts sometimes necessitates the ability to get staff on the ground very quickly after winning a project. This means that universities do well to set up systems that can hire local personnel swiftly.

Another consideration for discussion where employees potentially are based abroad includes this: An underlying rationale for studying abroad involves cultivation of respect for other cultures and societies, and this necessarily includes their legal framework. If an organization becomes a local employer, remember that (a) non-exploitation of foreign labor is expected from an institution of higher learning, and (b) local staff members may be subject to conditions that put them at risk if university programs deliver information or stir sentiments that are unpopular with governmental agencies.

II. Host Nation Legal Considerations

Consider two scenarios:

1. An institution encountered a dispute in a foreign country with more than a dozen foreign nationals employed there on a long-standing study-abroad program. The dispute centered on whether, under local law, employees were entitled to fixed-term versus indefinite-term contracts, pension contributions, payment for extra hours worked, and local trade union rights. Litigation ensued, with the tribunal awarding damages to local staff for the employer's omissions to respect employer-related HR duties in the host country. Litigation continues.

2. An institution learned that its foreign banks accounts were frozen and its offices inspected by local tax authorities. The allegation: employer omission to properly payroll U.S. physicians and staff who have been posted to the country for many months or years. A significant fine resulted, and neither diplomatic nor judicial intervention mitigated the fine.

Such scenarios are a major distraction from the academic and scientific aims of these programs. But to university counsel, regrettably the foregoing scenarios strike close to home. International programs often require university staff to live and work overseas. Study abroad programs and large scientific and medical research initiatives may involve university personnel sent or hired overseas to manage and administer operations. In the current economic environment, some institutions are poised to review, reduce, or eliminate positions overseas, or undertake reductions

in pay or benefits. Attention to local employment law is critical in any of these activities. A few broad-brush considerations follow.

A. Host country employment law

As a general rule, host country employment law applies to the employment of foreign nationals and U.S. expatriates assigned to positions overseas. Unless an exception applies, the core employment relationship—compensation, minimum wages, benefits, work hours, income tax withholding, vacation, workplace health/safety, dismissal, severance pay—is subject to foreign law. Some countries, such as China, allow in certain circumstances different employment standards to apply to local nationals versus foreigners. A few countries will exempt expatriates from the application of local labor laws—the so-called "expat" exemption—but only under specific conditions. Temporary business visits typically do not result in application of foreign employment law.

In general, foreign law is substantially more protective of employee rights than U.S. employment law. Some examples include the following:

- As noted above, local workers often enjoy certain automatic and inherent rights that make it very difficult for employers to make substantive changes to the employment relationship.
- Reductions in salary/wages often must be justified and subject to employee consultation and consent; pay cuts or a reduction in workload may permit an employee to sue for "constructive termination". Pay cuts are practically illegal in some countries.
- Procedural requirements, such as a right to a hearing, often apply to the termination of any employee, even in cases of suspected misconduct. In some jurisdictions, the labor court must approve a dismissal for it to be fully effective.
- Fixed term employment contracts, if renewed back-to-back more than once can transform into indefinite employment relationships regardless of signing annual contracts.
- Collective bargaining agreements pertaining to specific types of workers carry benefits and rules governing the relationship in addition to any written employment terms.
- Some elements of compensation may not be discretionary. In Brazil, for example, there can be mandated annual pay raises. Vacation pay, and 13th or 14th month payments also figure.

Although U.S. employment law tends to be more employer-friendly than the law of many foreign jurisdictions, a U.S. governing law clause in an employment contract often cannot override the law of the host country, regardless of whether the worker is a foreign national or a U.S. expatriate. This is because many employment laws in foreign jurisdictions are treated as "mandatory rules" and a choice of law clause cannot override. Examples of mandatory rules include minimum wage, working hours, requirement of employment contract, notice before termination, permissible reasons for termination, paid holidays, health and safety, protections against discrimination, and

labor rights.[5] Some jurisdictions' courts will allow the employee to *choose* the more protective law—local employment law or the law set forth in the governing law clause.

In some circumstances, U.S. law may apply as well as the foreign country's law. Some U.S. antidiscrimination statutes, such as Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, protect American citizens (and certain others) who work abroad for U.S. employers, or for an entity controlled by a U.S. entity, and the host country's antidiscrimination laws are equally applicable. Indeed, some U.S. organizations have had to defend dual foreign and stateside discrimination claims for years. State laws such as those on workers compensation also may apply overseas in certain circumstances, such as when an employee typically based in the U.S. is on assignment to a foreign country. In recent years, U.S. institutions also have had to contend with tricky issues that arise when foreign law compels measures that allegedly violate U.S. antidiscrimination or other law.[6]

B. Independent contractors abroad?

It may seem convenient to hire overseas staff, especially foreign nationals, as "independent contractors" or "consultants" as opposed to employees, in order to avoid involvement with host country employment laws, overseas payroll, and foreign income tax withholding. However, just like in the U.S., most countries will look to substance over form and disregard the independent contractor or consultant designation if the arrangement between the parties suggests that an employer-employee relationship exists. Generally, the analysis used to distinguish between employees and independent contractors is similar to the well-known but open-ended U.S. analysis. Independent contractor arrangements are more likely to be suspect where, *inter alia*, the putative contractor is subject to significant control from the putative employer (*e.g.*, subject to consistent oversight/supervision, must adhere to a personnel manual or similar policies), receives employee-like benefits, such as paid vacation, is engaged for a lengthy or indefinite period, or performs the same duties as employees (or used to be an employee and is converted into a contractor while still performing the same or similar duties). To misclassify employees as contractors exposes an institution to host country liabilities such as payment of back taxes and social security withholdings, retroactive local benefits, vacation and holidays, and penalties.

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[5] There are limited rules where a choice of law clause is less likely to conflict with "mandatory rules," such as social security, tax treatment, pension schemes, 401(k) match, and, in some circumstances, restrictive covenants. A university should consult local counsel to determine which terms are mandatory. In certain circumstances, it may be appropriate to include a selective U.S. choice of law clause that applies only to certain subjects of the agreement, while applying local law to others.

[6] In certain circumstances, an employer defendant can raise a defense to the conflicting application of U.S. and foreign law. The defense is narrow, however, and may only be raised where, *inter alia*, compliance with U.S. law would *require* the employer to violate a foreign law of the country where the employee works. For example, the EEOC has stated that this defense would apply where an employer, which was sued for refusing to hire women to work overseas, provided "authoritative" evidence that foreign law restricted employment of women, and the employer demonstrated that it had taken all possible steps to process the plaintiff's application despite foreign restrictions. Employers should seek legal counsel before relying on this narrow defense.

Note: Even where an independent contractor designation is appropriate under local law, it's increasingly evident that this designation does not necessarily free the institution from foreign tax and filing obligation. For example, an organization may be required to withhold taxes for independent contractors who earn more than a specific local currency amount annually; the organization also may need to apply certain labor rules or make filings related to the contractor. Labor tribunals or courts abroad work hard to find an employment relationship to prevent exploitation of their citizens by foreign employers and to avail citizens of their right to work and receive benefits from employment. Accordingly, university counsel increasingly consult with local counsel even where the independent contractor status appears reasonable and justifiable under the applicable independent contractor tests.

C. Overseas employment and legal presence

Engaging staff overseas, or sending U.S. expatriates abroad for extended periods commonly triggers foreign law requirements for the institution to undertake some form of official legal presence in the host country. Establishment of even one position in the host country may trigger the requirement, including related "permanent establishment" concerns in the tax area. When a legal presence is required or implied under local law, the type and structure of the presence may influence employment arrangements. For example, legal presence may involve registration of the institution as a local branch or representative office, incorporation of a new local entity or subsidiary, or establishment of a memorandum of understanding or other agreement with the host government. Other sections of this paper will address structural options for the employment relationship, but immediate issues often include:

- Should U.S. expatriates posted overseas be "seconded" to a new in-country entity, for local compliance or other reasons? Can they lawfully remain on U.S. payroll?
- Should overseas employees be on the U.S. payroll system, or is a separate foreign-compliant payroll system necessary? Who will run a foreign payroll system?
- Can/Will a host country partner organization hire and employ all foreign nationals on behalf of the U.S. university?

In many countries, institutions need to register and apply for various local business licenses before employment may proceed. Moreover, in many African nations, such as Kenya, an organization may be subject to penalties for employment of individuals on charitable or research activity without formal registration with the government. South Africa law makes it difficult for anything but a locally registered corporate entity to fulfill employer-related obligations to local employees. These and other countries can be very slow to approve a branch office or entity registration. Therefore, it is critical to explore both legal presence and permanent establishment tax implications at an early juncture if the university expects to establish positions overseas.

D. Overseas employment tax issues

As a general principle, an institution that has employees that perform services in a jurisdiction overseas is required to withhold taxes for the jurisdiction in which the services are performed. The

U.S. is one of the few countries that tax its citizens on worldwide income; therefore, for U.S. citizens and U.S. permanent residents, the U.S. employer is obligated to withhold U.S. income taxes unless the country in which the services are performed has a tax code that requires local tax withholding for that country's taxes. Normally, a U.S. citizen or U.S. permanent resident should be able to credit any income taxes paid to the foreign country against his or her U.S. income tax liability. U.S. citizen employees also may be eligible for the "foreign earned income exclusion" under section 911 of the Internal Revenue Code, which allows an amount of foreign earnings to be excluded from an individual's taxable income in the U.S.

To determine foreign income taxes for both U.S. expatriates and foreign nationals, to file foreign tax returns, to calculate tax credits, and to pay into local social security regimes, is a complicated task for any international employer. If host country nationals are employed, any registered legal presence established by the university will likely also need to file for a tax identification number and establish a bank account to route program funds and salaries. Tax treaties and social security conventions also must be considered. Among other matters, social security conventions may allow employees to continue on U.S. social security and to be exempt from host country social security contribution. For local employees, contributions to social benefit schemes need to be determined, and in some jurisdiction the number of employees in a location could trigger additional retirement fund contributions.

E. Entry permits and work permits

In many jurisdictions, U.S. expatriates may lawfully enter a country and stay for up to ninety days before a special visa is required. However, the fact that a person's entry is lawful does not necessarily mean that the person may work in the country. Proper work authorization, such as a work permit or other nonimmigrant visa, often is required, and both developed and developing countries take assertive approaches to immigration-related requirements, through imposition of fines, airport detention, local office inquiries, deportation bonds, and no re-entry conditions for immigration violations.

For example, in Mozambique a citizen of foreign nationality cannot work there without obtaining a residence card in Mozambique, which entails:

- Obtaining from the Ministry of Labor approval of the employee's employment contract, in order to receive a work permit.
- Obtaining a work visa at the Mozambican Consulate in the employee's country of origin.
- Obtaining a residence card at the Immigration Services office in Maputo.

This is a multi-month or even multi-year process, requiring a trove of documents (e.g., a certificate of completion of university studies detailing the subjects studied and the respective qualifications obtained, everything translated into Portuguese by a sworn translator and certified by the Mozambican consulate and foreign ministry of the country of origin of the employee), regulatory clearance from police, and attention to quotas on the number of foreigners permitted to work in the country.

Many faculty and staff find these immigration-related requirements especially difficult to accept when, over the course of many years, no immigration-related difficulties have arisen in the host country. Recently, however, nonprofit organizations that operate "as they always have" were fined and nearly barred from reentrance to a foreign country because local staff did not hold appropriate work permits.

F. Other issues

The foregoing items, and the discussions of each, hardly exhaust overseas employment issues. Examples of other frequent issues in international employment include faculty appointments to individuals outside the U.S.; remote and telework situations across borders; travel and liability waivers for staff; participation in U.S.-based retirement and welfare plans while abroad; international health, safety, and security; equity between U.S. and foreign employment policies and benefits; dual employer relationships; and application of collective bargaining agreements at foreign locations.

International employment demands careful attention. Until advice of local counsel is secured, institutions normally should avoid these activities: offers of employment to overseas staff; engaging a long-term independent contractor; registration for a foreign employer identification number or tax number; elimination of positions or implementation of a pay or benefit reduction; reprimands, dismissal, or threats to dismiss an overseas employee; and issuance of a local personnel manual.

G. An Illustration: Mexico Labor Law Considerations

Many institutions have programs in Mexico. Therefore, as one illustration of the distinction between U.S. and foreign law, we offer here a sketch of Mexico employment law fundamentals:

According to the Mexican Federal Labor Law ("FLL"), any individual who renders a "personal subordinated service" to another in exchange for compensation is considered an employee. The main element of any labor relationship is subordination (defined as the employer's legal right to control and direct the employee and the employee's duty to obey the employer). Once an employment relationship exists, all the rights and obligations under the FLL automatically apply.

Employers must set out in writing the employment terms and conditions to which employees will be subject during the performance of the job. The omission of this requirement does not prevent employees from exercising their labor rights. In addition, the employer is held responsible for the absence of an agreement.

Employment relationships can be terminated at any time, and without incurring any liability, *if* there is a justified cause of termination under the FLL. In case of termination with cause, the FLL requires the employer to give written notice to the employee at the time of termination setting out the cause and the facts giving rise to the dismissal, or to give notice to the appropriate Labor Court within five days of the termination requesting that notification of the termination is given to the employee. The failure to give the notice to the employee as required is sufficient in itself to make

the dismissal unjustified. In case of termination of employment without cause, employees are entitled to the payment of statutory severance.

The Mexican Federal Constitution provides that equal work should receive equal pay, while the Federal Labor Law prohibits the creation of distinctions between or among employees on account of race, gender, age, health, religion, political affiliation, migratory condition, opinions, economic or social status, among others. In addition, recent amendments include rules to prevent discrimination. Other laws also regulate and prohibit discrimination.

In Mexico, the minimum wage is determined by the National Minimum Wage Commission. This is adjusted each year. The Commission also establishes the minimum wages for certain specific professions; this wage is named "professional minimum wage".

Employers are legally required to register their employees with the Mexican Social Security Institute ("IMSS") and to pay the corresponding social security contributions according to the Social Security Law ("SSL"). The IMSS will provide sick employees with medical, surgical, pharmaceutical and hospital attention for illnesses not related to work. In addition, the IMSS will pay a monetary subsidy to sick employees subject to certain requirements. Employees who are sick for work-related causes or occupational hazards also are protected under other specific provisions. Additional health insurance for employees is not required; nevertheless, it can be granted to employees as an additional benefit.

Women are entitled to 12 weeks maternity leave, with six weeks prior to the child's birth and six weeks after; these periods are flexible as four of the weeks prior to birth may instead be applied after birth if authorized by the doctor and the employer. During the leave, the IMSS will pay the mother 100% of her daily integrated salary for social security contributions (capped to a maximum of 25 times the minimum daily wage). In the case of adoption, women are entitled to a maternity leave of 6 weeks after adoption. The employer must pay this leave.

Male employees are entitled to a paternity leave of five business days with paid salary in the event of their child's birth or adoption of a child. In addition, the IMSS also provides medical attention to the employee's spouse, children, and economic dependents under specific requirements.

In accordance with the FLL, work shifts should not exceed eight hours for day-shifts, seven hours for night-shifts, and 7.5 hours for mixed-shifts (a combination of day and night shifts). The night hours in a mixed shift should not exceed 3.5 hours; otherwise the shift will be considered a night shift. The employer should also give the employee at least one day of paid rest, calculated at the daily wage, for every six working days. The parties may agree to allocate maximum weekly work shifts in fewer days per week to allow additional rest time for employees.

Vacations that an employee is entitled to take are determined by their seniority according to the following table:

Years of service	**Vacation days**
One year	6 working days
Two years	8 working days
Three years	10 working days

Four years	12 working days
Five to nine years	14 working days
Ten to fourteen years	16 working days

The law provides for the payment of an additional statutory benefit called vacation premium.

The Constitution and the FLL grant employees (except "confidential employees") the right to decide whether they want to join a union. An employee should be affiliated with a labor union to be able to participate in collective bargaining activities with their employer. There are specific industries in the country in which the applicable terms for unionized employees are collectively bargained by multiple employers and unions in that industry.

The FLL does not cover work councils or co-determination rights. Nevertheless, the FLL requires the employer and employees to form mixed committees for: (i) Productivity and Training (mandatory for companies that have more than 50 employees), (ii) for the elaboration of the Internal Labor Regulations, (iii) to determine Profit Sharing, (iv) to determine the employee's seniority, and (v) Health and Safety.

Organizations often want basic "rules of the road" on employment in foreign countries. To that end, the following website offers an overview of basic employment considerations in 21 countries: http://limegreenemployment.com. Topics range from payment, to termination, leave, and antidiscrimination.

III. Practical Strategies for Staffing an International Location

A. Some Staffing Options

Schools operate abroad through several varieties and numbers of staffing structures. As a starting point, many institutions will apply a series of questions to any proposal to place/hire staff abroad. The answers to these and other questions will inform the staffing strategy:

- In what country/countries is the primary work location?
- For how long will the individual filling this position be required to work in the non-US location, and is it a temporary or indefinite assignment?
- How will the position be funded, and what is the funding source?
- What is the proposed compensation level?
- Is this a permanent or temporary position?
- Who will supervise the position?
- Are there other university employees already in the country?
- Where will the person physically sit? (Office space, home office, partner space?)

- Will the employee have a position with the home country employer after the assignment ends?

Some of the more common foreign staffing structures include those below (discussed only at a high level).

- Reliance on a "partner" organization in the host country to employ local staff. This model often is attractive where the "partner" organization is reputable and aligned with academic and scientific goals and objectives of the U.S. institution. In some cases, the U.S. institution may "second" its personnel to the foreign organization or accept a dual employment and/or split payroll scenario, where the foreign organization primarily is responsible for host country labor and tax compliance. However, these options are often not practical. For example, under sponsored projects that fund host country activities, sponsors often expect the awardee (the U.S. institution) to have its own people on the ground managing and implementing the academic and scientific aims of a project; relying on a collaborator to employ these people can undermine project dynamics and lead to conflicts of interest, personnel allegiance issues, competing policies and benefit/compensation regimes, termination difficulties, and financial compliance challenges. According, reliance on a partner organization may be feasible where the U.S. institution needs only minimal staff stationed abroad, and even then, challenges persist.

- Limiting foreign personnel to independent contractors. This model can be relatively inexpensive and straightforward where it is lawful and viable. The primary risks – which regularly dash even the best-intentioned contractor arrangements – are described in Section II.B. above. Independent contractors that operate more like employees of the institution (usually over a long period time) have generated myriad headaches and penalties for institutions operating abroad. Additionally, a true "independent contractor" is not subject to the type of close oversight and supervision that may be necessary to successfully achieve the desired objective of the overseas activity.

- Direct employment abroad. Where personnel are on temporary business visit from the U.S. to locations abroad (usually 90 days or less) then typically they remain employed directly by the U.S. institution. Any period longer than that may trigger significant employer and employee obligations in the host country (e.g., licensure, registration, permanent establishment issues, tax withholding). Direct employment usually is unachievable where the goal is to engage host country employees and local nationals, even for short periods of time, because host country payroll, withholding, and statutory benefits regimes are usually incompatible with U.S.-based payroll systems and employment policies, and such direct employment of foreign nationals invariably triggers local "doing business" registrations in the applicable jurisdiction.

- Host country "doing business" registration. Registering the institution or a controlled separate entity abroad is a significant undertaking and one that merits close coordination with counsel. The time, expense, and ongoing maintenance obligations pertinent to the foreign registration of a university branch office, subsidiary, or separate affiliated entity (e.g., special purpose entity) are myriad and merit a separate manuscript.

- Professional Employer Organizations and Payroll Providers. A Professional Employer Organization (PEO) is a services firm/vendor that serves as the "employer of record" for purposes of host country employee-related labor and payroll, benefits, HR, and tax administration compliance, while the institution typically retains control over the work and workers. In other words, a PEO arrangement is essentially an "outsourcing" of some or all of an institution's HR functions. PEOs hold themselves out as a faster, less expensive, and a more flexible option for entering new global markets, and a potential alternative to the challenges of host country registration, direct employment, or squeezing individuals into the independent contractor mold. PEOs may recruit local employees, or accept individuals that the institution identifies to them. In some circumstances, a PEO will act as a staffing agency, hiring employees directly and leasing them back to the institution. PEOs also may perform ancillary services, such as entering into local leases and other contracts to facilitate the institution's project abroad. There are dozens of PEO companies with varying reputations and reliability, and some are more expensive than others -- often fees are tied to a percentage of gross payroll that passes through the PEO. Some PEOs don't operate in the far-flung jurisdictions that U.S. universities frequent, and other PEOs are coming under increased scrutiny from host country regulators who view PEOs a means for a foreign entity to sidestep the "doing business" registrations in-country (which can lead to a finding of dual/joint employment between the PEO and the institution, which undermines the reason for hiring through a PEO). Employees also sometimes resist the notion of the PEO as their employer as opposed to the university as their employer. But PEOs remain attractive for many reasons, even if they are not a long-term solution to the institution's staffing needs abroad. Payroll providers are similar to PEOs, but typical they will not serve as the "employer of record" in the host country.

B. Considerations Related to Contracting with PEOs and Payroll Providers

As discussed above, contracting with a PEO has many potential benefits, including to remove the confusion of managing employee administration in a foreign jurisdiction. Nonetheless, choosing a PEO requires a good deal of due diligence on the part of the university. Two key criteria for selection are the PEO's experience and expertise in the relevant foreign jurisdictions, and its financial health. The PEO also must be certified in the applicable local jurisdiction. It is advisable to consult with local counsel, other universities, and other employers to obtain a recommendation. Further, it is advisable to run a search to see if the PEO has been involved in litigation or administrative enforcement actions, particularly in the jurisdiction in question. The university will cede certain operations to the PEO, thus it is imperative to choose a trustworthy, experienced, and solvent partner. Institutions should also confirm, through local counsel, that a PEO arrangement is permissible in the local jurisdiction, and what requirements may exist to form the PEO arrangement. If the PEO arrangement is not permissible or feasible, or if local law does not allow

the university to shift the burden of local law compliance to the PEO, then a PEO arrangement may be futile.

Negotiation of the following clauses with the PEO is critical, and these terms may be included in one master contract and/or individual contracts for each local jurisdiction where the PEO is providing services:

- **Upfront Funding of Payroll**. The PEO typically will not front the cost of payroll. Thus, the university and the PEO will have to negotiate the amount of upfront deposit the university will need to make to the PEO, such as a month or two of payroll. Universities typically insist that the funds be deposited into a specific trust account and not comingled with other PEO assets.

- **PEO's Responsibilities**. The PEO contract should clearly divide responsibilities between the PEO and the university so that there is no confusion. Commonly a PEO contract will state that the PEO is:
    - The employer of record
    - Available to provide guidance to the university regarding implementing employment decisions
    - Responsible for payment of wages and applicable taxes
    - Responsible for providing and administering employee benefits
    - Responsible for providing and administering all employee-related policies, including an employee handbook
    - Responsible for providing employment-law training to employees, including safety and antidiscrimination training
    - Responsible for creating and maintaining employee-related records and satisfying all data privacy and transfer requirements, and agrees to turn over employment-related records to the university at the university's request and in the event of litigation, to the extent such transfer is permitted by law

- **Indemnification, Limitations of Liability, and Insurance**. An indemnification provision with a PEO typically will be negotiated closely. The university often pushes the PEO to indemnify it to the maximum extent possible, particularly with respect to areas of technical compliance with foreign law that are the PEO's expertise and are unfamiliar to the university. In particular, the PEO could indemnify the university against claims arising out of damages caused by the PEO's negligent or willful acts or omissions, and the PEO's breach of provisions under the PEO agreement. The PEO is likely to seek reciprocal indemnification from the institution. (Also take note of potential "limitation of liability" clauses limiting the maximum liability to which the PEO can be liable to the university.) The agreement also should require the PEO to obtain any required insurance coverage, such as workers' compensation insurance, and otherwise maintain adequate Employment Practices Liability Insurance (EPLI) to cover its potential liabilities to the university.

- **Intellectual Property and Confidentiality**. The agreement should provide that any intellectual property created by employees covered by the PEO arrangement shall be the

sole and exclusive property of the university, and not the PEO. Likewise, the agreement must protect confidential information pertaining to the business of the institution and require the PEO to implement appropriate security measures to safeguard any confidential information to which it comes into contact.

- **Termination of Employment**. Although the university will control day-to-day operations, it will have to coordinate carefully with the PEO with respect to major employment changes, such as termination of employment, to ensure compliance with local laws and with PEO employment policies. The PEO should agree to be available to promptly work with the university in any such issues, and the university could rely on the PEO for its expertise in this area.

- **Termination of PEO arrangement**. Universities normally negotiate exactly when the institution or PEO can terminate their relationship and what happens when the relationship is terminated. The university could insist that the PEO agree to undertake an orderly wind-up of the parties' relationship upon termination.

- **If PEO is Serving as Staffing Agency**. If the PEO is actually serving as a staffing agency, and "leasing" employees back to the university, then, in addition to the foregoing concerns, the parties will need to negotiate how much control the university can have over the hiring and termination decisions of each individual employee, such as hiring, firing, discipline, and supervision. The more control exercised by the university, the more likely there will be a joint employment finding.

The foregoing considerations are potential concerns with respect to payroll providers as well, but payroll providers typically do not employ the staff or set human resources policies and therefore some of the foregoing considerations are not relevant in the payroll provider context.

The use of PEOs to employ foreign staff under sponsored projects presents special issues. Sponsors do not always understand the purpose of a PEO and whether/how such operating model may increase cost under the project, or optically diminish the role of the sponsored institution. Budgeting for employee compensation costs, fringe benefits, and PEO fees raises classic budget structural issues, subrecipient/vendor issues, flowdown challenges, and cost allowability questions. Applying the appropriate policies, procedures, and guidelines necessary to ensure financial, administrative, scientific, and ethical compliance under sponsored projects usually is achievable, but not without close attention to the PEO contract and employee terms of engagement. Further, while the PEO is the technical employer of the university employees abroad, it may be considered a joint employer alongside the university. Thus, the university could still be held liable for the PEO's lack of compliance with local law (although, as discussed above, the university may be indemnified by the PEO).

Additionally, when a PEO facilitates the employment of U.S. citizens abroad, it presents unique challenges. For example, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Americans with Disabilities Act all apply to U.S. citizens employed in a foreign country by either a U.S. employer or a company controlled by a U.S. employer. The PEO in such

a situation should not only be an expert in the law of the host country, but also understand U.S. laws with extraterritorial application.

C. Considerations Related to Secondment of Personnel to Foreign Entities or Affiliates

Secondment is a popular choice for American universities who wish to send an employee to work for a foreign affiliate in a foreign jurisdiction for a short, delineated period of time, while remaining the employer of the employee during the foreign assignment. The chief benefit of secondment is that the university remains the direct employer, so the employment relationship remains undisturbed, which is an approach that employees tend to prefer. This can benefit the employee because it allows for the seamless continuation of incidents of the employment, such as benefit plans. Employees often prefer this option as well, so that their relationship or appointment with the university is not severed.

On the other hand, the secondment arrangement creates certain risks, including (1) depending on the length of the assignment, the university may be seen as creating a "permanent establishment" in the foreign jurisdiction, creating adverse tax consequences; (2) the university may be seen as a joint employer and therefore be directly liable for local employment and tax laws, which can be complicated and expensive; and (3) there may be confusion as to the apportionment of liability between the university and the host institution; and (4) compliance with tax and employment laws in the applicable jurisdiction(s) requires consultation with counsel. Because of these risks, it may make sense to adopt an arrangement other than a pure secondment.

Two major options that may be adopted are as follows:

- Pure secondment: employee is employed by and paid by the university (which is based in the U.S.). This presents the benefits and risks described above.
- Secondment "light": employee is employed by the U.S.-based university, but is paid by the foreign affiliate. This presents a slightly lesser version of the same risks of pure secondment.[7]

In structuring a secondment, it is typical that the employee is kept "whole" by the university. The expatriate relationship contemplates many changes in the employee's life, from tax requirements to where her/his children will attend school. Despite these challenges, in order to induce employees to accept a foreign assignment, employers typically take steps to diminish the chances that employees will incur any significant financial penalty by taking the assignment. Some of the key terms that a university must consider in this context are set forth in the following section.

Documentation of the secondment is setting out obligations and expectations. The U.S.-based institution typically has an agreement directly with a foreign entity or affiliate which sets forth the terms of the relationship between those two entities, and an assignment letter with the employee

[7] Although technically not "secondment," another option to be considered is localization, where an employee resigns from the U.S.-based university and is hired by a foreign affiliate. This tends to minimize risks of a "joint employment" or "permanent establishment" finding, however, it is typically undesirable to the employee in terms of benefits and taxes.

or employees who will work abroad, setting forth their terms and conditions of employment. The agreement between the two entities typically will cover issues such as (1) description of the relationship between the university, the foreign affiliate, and the employee; (2) the financial terms of the arrangement, and the division of responsibilities between the university and foreign affiliate with respect to supervision of the seconded employee; (3) confidentiality obligations between the entities, including data protection requirements, and intellectual property considerations, if relevant; (4) a mechanism for terminating the relationship between the entities and termination of a secondment; (5) indemnification; and (6) dispute resolution.

Likewise, the assignment letter will typically cover issues such as: (1) duration of assignment, how the assignment may be terminated, and what happens upon termination; (2) which entity is the employing entity and which entity is the supervising entity; (3) location of work; (4) compensation and benefits, including leave, relocation expenses, insurance, and retirement; (5) confidentiality and data protection requirements; and (6) agreement to comply with business ethics requirements. Universities also should have a comprehensive expatriate policy covering all issues impacted by the secondment, which is referred to in the assignment letter. FAQs are also useful.

As the university structures the expatriate assignment letter, it is worth considering whether a non-competition or non-solicitation agreement would be appropriate. Depending on the employee's duties, he or she may have access to trade secrets or other confidential and valuable information that is important for the university to protect. Once the university determines the desirability of a restrictive covenant, it must consult with counsel to determine the local law with regards to these agreements, because host country law typically determines whether a restrictive covenant is enforceable. Local law varies wildly on this subject. For example, in Austria and Finland, restrictive covenants may not exceed one year. In Italy, a non-competition agreement is enforceable for up to three years for non-executives, but for as long as five years for senior executives. Additionally, while in the U.S. there is a common law duty not to disclose confidential information, other jurisdictions require that obligation to be set forth explicitly in the employment agreement.

IV. Benefits for U.S. Expatriates and Foreign Nationals

A. Expatriate Benefits

U.S faculty and staff who live abroad to advance institutional programs often expect a competitive package of benefits intended to compensate them, or to at least make them whole, for the long-term nature of their work overseas. But the university community has struggled with the concept of additional benefits that may be afforded to, or requested by, faculty and staff who are either assigned or situated at long-term programs abroad. Some institutions have written expatriate benefit policies; many more institutions have no written policy or have embarked on policy-drafting exercises only to find the issue much more complex and wide-ranging than initially expected.

Examples of benefits include relocation expenses, living allowances, housing allowances, tax protection or equalization, education allowances for minor children, supplemental health

insurance, local travel and other business expense reimbursements, and return-home travel allowances. A close review is required to determine whether any U.S. benefits programs and plans remain available to expatriates abroad (health, insurance, retirement, leave). Some institutional plans probably are not sufficient to provide coverage or to otherwise apply in a foreign country where someone will be posted for a long period of time.

Some schools with growing ranks of U.S. personnel on long-term projects abroad have instinctively recognized that addressing expatriate benefit issues on an ad-hoc basis is not a sustainable strategy. But defining the objective and work product of a more systematic strategy is itself difficult. Possible objectives include: (i) offering clear and consistent guidelines to management and staff on benefits and allowances that could or should be made available to international assignees; (ii) ensuring equitable and reasonably consistent treatment of all assignees; (iii) providing a competitive level of benefits to assignees; (iv) to define a core level of benefits that assignees would always receive; (v) to facilitate allowability of expat benefit costs to sponsored awards (where applicable); (vi) to maintain appropriate flexibility in individual foreign assignments; and (vii) to comply with applicable law. Stakeholders in this process indisputably include the employees themselves, human resources, finance, principal investigators, risk management, and general counsel.

Another key question is this: Who qualifies as an institutional expatriate or international assignee for purposes of benefits afforded under an expatriate benefits policy? For example, perhaps a policy and the benefits thereunder will cover personnel or staff who are normally based in the U.S. and assigned to positions abroad for at least X period of time, but it would not cover personnel or staff who do not expect to repatriate to the U.S. or faculty on sabbatical or leave.

Other questions abound, such as: What are the U.S. and foreign tax ramifications of expatriate benefits? And how will "expat" status affect faculty/staff promotion or other terms and conditions of employment? Who will pay for the extra benefits? What are we required to offer under foreign law?

B. Employment Policies Applicable to Foreign Nationals Hired Abroad

Where the employment relationship is governed almost entirely by foreign labor law (e.g., foreign nationals hired abroad), reliable local counsel is critical. In addition to an appropriate written contract with the foreign employee, one core component of a multi-year foreign employment operation is a well-drafted host country employment handbook, informed by U.S. and local counsel, and designed to apply to the local employees. Foreign employment handbooks lay out key policies and procedures informed by local law.

Many universities have prepared such handbooks for their long-term operations abroad. By way of illustration, Appendix A offers a sample table of contents for a foreign employment handbook for a program that involves many foreign employees on staff outside the U.S.

Based on the authors' experience, important items to address in foreign employment handbooks include discussion of termination conditions, discipline, currency of payment, conflict of interest, bribery and corruption, rights to bonuses and severance pay, use of the institution's name,

engagement in political activity, data protection, and special considerations under sponsored projects, such as required whistleblower disclosures, human trafficking prohibitions, and intellectual property.

V. International Employees under Federally Sponsored Projects

Many of the largest U.S. university employment operations abroad fall under sponsored projects where the federal government and others sponsors expect a robust on-ground institutional operation in the host country. But beware: federally sponsored projects present uniquely difficult issues in foreign employment, related to compliance with the rules and regulations that govern sponsored projects.

A. OMB Uniform Guidance

The OMB Uniform Guidance—initially issued in 2014 and codified at 2 CFR § 200—is a significant development for research and compliance professionals involved in the day-to-day administration of federally-funded projects with foreign employees, such as research collaborations, public health services, technical assistance, capacity building, and teaching initiatives. The Uniform Guidance, also referred to as the "Supercircular" or "Omni-circular", governs day-to-day management and administration of federal grants and cooperative agreements.

More than former OMB Circulars A-110, A-21, and A-122, the consolidated Uniform Guidance attempts to address some of the unique foreign-activity issues faced by recipients of federal grants and cooperative agreements. There are many positive changes, such as improved guidance on the allowability of foreign taxes and currency exchange losses. But there is variation in how federal sponsors will apply these rules across the scenarios and unique costs that awardees deem necessary to operation at foreign outposts. Highlighted below are some of the more significant Uniform Guidance developments that affect employment in federally-sponsored transnational projects.

1. Costs Related to Individuals Working Abroad

To recruit and maintain talent in foreign countries is a challenge. U.S. expatriates and foreign workers often expect a competitive package of benefits and allowances on par with multinational conglomerates. Institutions that post U.S. citizens to long-term foreign assignments often struggle to maintain clear and consistent guidelines on the availability and accounting treatment of "additional" benefits that expats customarily anticipate. Similarly, foreign nationals hired abroad often demand compensation packages that align not only with local law, but also host country norms and custom. As discussed below, costs associated with housing allowances, personal living expenses, severance payments, and relocation abroad present knotty allowability issues, even under the new Uniform Guidance.

a. *Housing allowances and personal living expenses*

In addition to basic salary, expats and foreign nationals working abroad may receive additional benefits, such as housing, transportation, meal, and education allowances, cost of living

adjustments (i.e., the difference in cost between living in the U.S. and in the host country), utility supplements, and even international tax advice. Circular A-21 deemed unallowable "goods or services for personal use of the institution's employees" and further prohibited "housing allowances and personal living expenses for/of the institution's officers". (Section J.22, J.23). The Uniform Guidance maintains the general prohibition on goods or services for personal use of the institution's employees, but it appears to liberalize the rules on housing and personal living expenses: "Costs of housing (e.g., depreciation, maintenance, utilities, furnishings, rent), housing allowances and personal living expenses are only allowable as direct costs regardless of whether reported as taxable income to the employees. In addition, to be allowable direct costs must be approved in advance by a Federal awarding agency." (Section 200.445.)

Where the awardee can justify a direct allocation of these costs to federal projects (which is no easy analysis in some situations), the new guidance suggests that express prior written approval is necessary to charge these expenses. Query whether approval of a budget that identifies these among many other costs constitutes the sponsor's prior approval, or whether separate and more specific approval is needed. Query further whether an institutional policy – such as an expat benefits policy or a foreign employee handbook – must specify these benefits to support allowability. Sponsors increasingly condition allowability of expatriate benefits on a written institutional policy covering the same. As always, sponsors are not bound by administrative budget approvals where later audits find costs to be unsupported as direct costs or inconsistent with cost accounting principles or institutional policy.

Note also that the Uniform Guidance provision on compensation for personal services makes clear that "Costs which are unallowable under other sections of these principles must not be allowable under this section solely on the basis that they constitute personnel compensation." (Section 200.430). Accordingly, awardees may need to decouple housing and similar expenses from an employee's total compensation package, at least for prior approval purposes.

b. *Severance payments to foreign nationals*

Foreign employment regimes may provide for mandatory or customary severance payments to local workers who disengage from the awardee's employment. The Uniform Guidance repeats Circular A-21's admonition that severance is allowable only to the extent that in each case, it is required by (a) law, (b) employer-employee agreement, (c) established policy that constitutes, in effect, an implied agreement, or (d) circumstances of the particular employment. But Section 200.431(i) of the Uniform Guidance includes new guidance for higher education institutions on severance payments to foreign nationals employed outside of the United States:

(1) Severance payments to foreign nationals employed by the non-Federal entity outside the United States, to the extent that the amount exceeds the customary or prevailing practices for the non-Federal entity in the United States, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.
(2) Severance payments to foreign nationals employed by the non-Federal entity outside the United States due to the termination of the foreign national as a result of the closing of, or curtailment of activities by, the non- Federal entity in that country, are unallowable, unless

they are necessary for the performance of Federal programs and approved by the Federal awarding agency.

Whether and how awardees will demonstrate that severance payments abroad do not exceed "customary or prevailing practices" of the institution in the U.S. remains to be seen. Institutions may need to review their domestic severance policies or be prepared to show necessity to the federal project and take prior approval from the sponsor. Query whether conformance with local law or custom will satisfy the necessity requirement. The new guidance also appears to establish a presumption against severance payments where positions are lost on account of project wind down or change in scope; this could be unwelcome news to many foreign nationals employed abroad who have come to expect some form of disengagement compensation upon federal project closeout.

c. *Relocation costs*

Whereas Circular A-21 made passing reference to relocation costs in the context of new employee recruitment, the Uniform Guidance offers "relocation" as a standalone cost principle, and as part of the recruitment cost principle. (Sections 200.463, 200.464.) Relocation costs incident to recruitment of new employees continue to be allowable to the extent that such costs are incurred pursuant to the awardee's standard recruitment program; if the employee resigns for reasons within the employee's control within 12 months after hire, the awardee must credit the award. (Section 200.463.)

The Uniform Guidance provides for relocation costs incident to "the permanent change of duty assignment (for an indefinite period or for a stated period of not less than 12 months) of an existing employee or upon recruitment of a new employee", provided that (1) the move is for the benefit of the employer, (2) reimbursement to the employee is in accordance with an established written policy consistently followed by the employer, and (3) reimbursement does not exceed the employee's actual (or reasonably estimated) expenses. The obligation to follow an "established written policy" may put pressure on institutions to develop expatriate or international assignee benefits policies and guidelines, or at least to gauge whether and how domestic benefit policies accommodate international postings. (Section 200.464.)

The Uniform Guidance includes a generous list of relocation costs, such as the costs of transportation of the employee, his or her immediate family, and personal effects to the new location; the costs of finding a new home, such as advance trips; closing costs, such as brokerage, legal, and appraisal fees incident to the disposition of the employee's former home (subject to limitations); the continuing costs of ownership (for up to six months) of the vacant former home; and other necessary and reasonable expenses normally incident to relocation, such as the costs of canceling an unexpired lease (limited to three times the monthly rental), and purchasing insurance against loss of or damages to personal property. (Section 200.464.)

As part of recruitment costs, the Uniform Guidance also makes clear that short-term travel visas (as opposed to longer-term, immigration visas) are generally allowable expenses that may be proposed as a direct cost. (Section 200.463.)

d. *Security costs*

Some institutions contract for security services for employees under federal projects that entail travel to such places as Iraq and Afghanistan. Like Circular A-21, the Uniform Guidance allows for necessary and reasonable expenses incurred for security to protect facilities, personnel, and work products. (Section 200.457.) Justifying the need for security services in high-risk locations usually is straight-forward; however, allocating those costs across multiple projects abroad presents a classic challenge.

2. Exchange Rates

In what currency should the institution denominate a foreign employee's salary? For foreign nationals employed outside the U.S., the default rule is that the employee's rate of remuneration always is specified in a contract with that employee in *host country* currency. In most cases, remuneration would be paid to that employee in foreign currency, particularly where the institution employs the foreign person via its in-country affiliate, special purpose entity, or a local payroll provider. In various jurisdictions, stating an employee's rate of payment in USD, or actually paying the employee in USD, would be impractical or unlawful. Nonetheless, many institutions are contending with situations in which foreign employees demand that their employment contracts state a USD rate of pay, on the assumption that the US Dollar will remain strong relative to the local currency, and therefore a USD rate of pay will equate to more local currency as the strength of the US Dollar grows. This is especially the case in countries where the local inflation rate has skyrocketed (e.g., Nigeria, Mozambique).

Payment in local currency presents special issues under federally sponsored projects. Project proposals and budgets usually are developed in USD. The currency exchange rate used in a proposal is not the same exchange rate in effect on the day the award is funded, when funds are transferred to host country bank accounts, when funds are disbursed to local employees, when funds are drawn down from the sponsor, or when financial reports are prepared and submitted. As a result of exchange rate fluctuations, the awardee may wind up with less (or more) foreign currency than it originally anticipated, or the awardee may find that it over-budgeted or under-budgeted in the proposal. Without prior approval from the sponsor, federal awards typically do not allow for currency exchange cost reserves, currency hedging cost items, or direct charging of currency losses to federal awards.

Section 200.440 of the Uniform Guidance allows for "cost increases for fluctuations in exchange rates" subject to the availability of funding and prior approval from the sponsor. The Council on Financial Assistance Reform (COFAR) clarified that prior approval is not required every time the exchange rate changes and an award is charged; approval of exchange rate fluctuations is required only when the change results in the need for additional funding, or the increased cost results in the need to significantly reduce the scope of the project. Notwithstanding this new language, it seems unlikely that sponsors routinely will augment awards to neutralize currency losses. But the new language would seem to support reasonable rebudgeting to manage the effect of exchange rate fluctuations.

Awardees also are advised to account for local currency gains prior to the expiration of the award, and to maintain "adequate source documentation from a commonly used source in effect at the time the expense was made."

Missing from the Uniform Guidance is instruction on how to financially track currency exchange. Without concrete guidance, federal awardees will continue to implement a spectrum of accounting methods to manage and track foreign exchange gains and losses. In all cases, under the Uniform Guidance, awardees must minimize the time that elapses between drawdown of federal funds and actual disbursement for project costs, even employment-related costs abroad (Section 200.305). Accordingly, large advances of grant funds to foreign offices and bank accounts to fund employee salaries could be difficult to align with the applicable guidance.

VI. How to Say Goodbye to Foreign Employees (And Mean It!)

When a relationship with an employee needs to end, the question to examine is: why? Is it a unilateral business decision of the employer rendering the work of an employee redundant or unnecessary? Is it due to poor performance? Or, is it due to misconduct of some kind? At times these rationales blend, but in terminating foreign employment relationships, the reason behind the termination may determine what type of process is warranted or what the potential cost of separation will be.

A. Unilateral decision or business rationale

If there is a primary business rational irrespective of performance, many jurisdictions outline a formula for making employees redundant. This involves a calculation of years of service multiplied by a defined amount of severance or indemnity. A typical formula would be between one week and one month per year of service, in addition to payment for unused vacation and other payouts. There is also a specific process for the termination, usually consisting of some discussion with the employee, notice of the decision, and explanation of severance calculations.

Before a decision to lay off or terminate an employee or reorganize, some jurisdictions, such as South Africa, mandate a lengthier process which cannot be pretextual. In the South Africa case, before a reorganization involving a termination can happen, there needs to be notice given, a discussion of the situation that includes consideration of alternatives, and then finally the offer of whatever solution has been taken. The underlying basis for this process is to ensure that termination of employment is the most reasonable solution to the given problem and is a last resort. Being able to convince local staff of the business rationale can take substantial documentation of finances, subjective assessments of the programs and staffing, and comparisons of seniority and experience. It also requires a meaningful relationship between the home office and the field office, because those types of discussions are sensitive, and a trust-based relationship matters to achieve the desired outcome. These are not instances where a decision to close or reduce staff can occur before the process plays out. If the final determination is called into question, the employer must demonstrate the process was followed and undertaken sincerely to avoid claims of unjust dismissal.

B. Performance-based or "For Cause" dismissals

At-will employment, or the ability to terminate a person for any lawful reason or no reason, is not the nature of employment relationships worldwide. Generally, an employer must have a sound and demonstrable rationale to terminate employment relationships. When contemplating a dismissal on the basis of poor performance or misconduct, many jurisdictions demand that employers show that (a) the performance issue was documented and adequate attempts were made to correct it or (b) the misconduct was egregious and is clearly documented. If the employer suspects misconduct but cannot prove it to a sufficient degree, it will open the employer to claims of unfair dismissal, with severance and penalties. Some jurisdictions articulate exactly what kind of misconduct qualifies as "for cause" -- usually embezzlement or theft, insubordination, or abdication of responsibilities.

In cases of simple poor performance not amounting to "cause", employees often contest the grounds. Their leverage is assertion of unfair dismissal which can expose employers to scrutiny, severance, and penalties. If unsuccessful in defending, penalties can be ten to thirty percent of the severance owed on top of the actual severance amount for ordinary redundancy. Most jurisdictions include a process to negotiate the exit by mutual agreement. Therefore, in cases where there is likely to be a challenge to a performance-based dismissal, a deal can be struck with the departing employee for some amount of severance and avoidance of penalties.

C. Inability to Proceed with a Termination

There are times when separating from an employment relationship is not entirely possible or requires a court order. For example, in some countries, like Chile, an employer cannot dismiss an employee who is out on sick leave. In these countries, if an employee can find a physician who will sign a sick note, they can 'report sick' and after that point they cannot be routinely fired while on leave. The time prescribed by law for medical leave varies. In Chile, it can go on indefinitely as long as the governing agency approves the sick leave claim. This could involve an inspection of your work environment if the employee claims that some element of the employment contributed to the illness. Of some consolation is that payment of salary in Chile is undertaken by the government if sick leave is approved, but there are places where the employer is still liable for compensation during sick leave. Importantly, if there is some situation in the workplace that is making an employee uncomfortable or insecure, this is often the moment where sick leave is abused. If a termination decision may be forthcoming, it is critically important not to telegraph this prematurely because that allows time for the employee to report sick.

In other places, if there is no mutual agreement for a termination, only a court can approve a dismissal. For example, in the Netherlands, separating from an employee requires a judge to review the rationale and consent to the dismissal. Penalties are high if the court disagrees with the employer's grounds for termination.

This underscores two very important factors in international employment: (a) record keeping to document performance or process is critical to avoid unjust dismissal penalties, and (b) allowing a mediocre or poor performer to continue (so as to avoid a difficult conversation or avoid litigation)

only increases the potential severance or penalties to which an employer is exposed. It's critical to have the infrastructure ready to track and document performance and to manage it properly. Employers have found—through a desire to be "nice" by retaining employees—that when they finally find the need to separate, the cost can be a shock. Better to dismiss an employee on warning signs and negotiate the severance in year two, then put up with mediocrity for ten years and face nearly a year salary to terminate.

Conclusion

Looking ahead, employee mobility and work location flexibility will continue to be a high priority for globally-minded institutions. Counsel may wish to initiate a process to properly identify current and prospective international employment arrangements. (Querying the HR/payroll system for non-U.S. addresses can be illuminating.) Counsel also may wish to prepare a "playbook" or similar resource to guide the Office of General Counsel's approach to each proposal for deployment and employment of staff abroad. An informed strategy, a healthy patience, and a dose of cultural sensitivity often correlate with positive international employment outcomes.

Appendix A: Sample Foreign Employment Handbook Table of Contents

1. Introduction
2. Definitions and Interpretations
3. The Human Resources Function
    a. Objectives and Responsibility
4. Recruitment, Orientation and Induction
5. Code of Conduct
    a. Standard of Conduct
    b. Use of Organization’s Name
    c. Dress Code
    d. Drug and Alcohol Free Work Place
    e. Equal Employment Opportunity Policy
    f. Non−Discrimination and Anti−Harassment
    g. Sexual Harassment/Retaliation
    h. Human Trafficking
    i. Fraternization Policy
    j. Anti-Nepotism Policy
    k. HIV/AIDS Policy
    l. Whistleblower Policy and Procedures
    m. Immigration Law Compliance
    n. Confidentiality
    o. Data Protection
    p. Bribery and Corruption

q. Intellectual Property Rights

r. Security

s. Conflict of Interest

t. Terms of Sponsored Projects

6. Remuneration and Benefits

a. Remuneration

b. Taxes and other Deductions

c. Salary Review

d. Employee Benefits

7. Terms and Conditions of Employment

a. Working Hours

b. Timekeeping

c. Overtime

d. Absence from work

e. Other Employment

f. Other Directorships

g. Employee Information

h. Change of Personal Circumstances

i. Unionized Employees

8. Leave

a. Official Public Holidays

b. Annual Leave

c. Sick Leave

d. Compassionate Leave
e. Parental Leave: Birth or Adoption of a Child
f. Leave of Absence without Pay
g. Overstaying Approved Leave

9. Health and Safety Policy
    a. Occupational Safety
    b. Objectives of Occupational Health and Safety
    c. Protective Clothing and Uniforms
    d. Reasonable Accommodation
    e. Special Equipment
    f. In-house emergency services
    g. Accident Reports
    h. Security at the Workplace

10. Performance Evaluation
    a. General Purpose
    b. Objectives of the Performance Evaluation and Self-Appraisal
    c. Performance Evaluation Process
    d. Self-Appraisal
    e. Evaluation Meeting
    f. Timing
    g. Training and Development Needs

11. Grievance and Disciplinary Proceedings
    a. Open Door Policy

b. Formal Filing of a Grievance
c. Grievance Procedure
d. Discipline
e. Disciplinary Measures
f. Investigation

12. Termination of Employment
a. Normal Termination
b. Probation
c. Termination with Just Cause
d. Procedure for summary dismissal
e. Redundancy
f. Retirement
g. Hand Over

13. Changes to Manual Terms

14. Receipt and Acknowledgement

Art and Romance of Deploying and Employing Staff Abroad

John Gloster, *Moderator*, Senior Counsel, Howard University

Bill Ferreira, Partner, Hogan Lovells

Lisa Rae, General Counsel & SVP for Legal Affairs, School for International Training & World Learning

Agenda

1. Why employ or deploy abroad?
2. 'Hypothetical' scenarios to illustrate common issues
3. Closing thoughts and questions

Why employ or deploy abroad?

- Importance to Higher Ed of international education and sponsored research/development projects
- Need to connect with host country local communities
- Quality control over academics, logistics, health and safety, and risk management

Scope and Oversight

- What work needs to be done, when, for how long, and with what level of oversight?
- Nature of the employment relationship: not “at-will”
- Buy-in, budgeting, and supportive services and benefits for a potentially long-term relationship

Scenario 1

- Goforth College has been running a study abroad program in the mythical Republic of Gambini for many years. USAID just awarded Goforth a grant for a new research project in Gambini. So Goforth wants to hire Jerry Gallo, a New Yorker who spends several months a year living in Gambini, to become Goforth's full time USAID project Country Director in Gambini. Jerry has been an independent contractor providing language instruction for Goforth's study abroad program for several years.

- Question to OGC:

- Can we hire Jerry for the USAID project?

Selecting a staffing structure

- **Core inquiries:**
  - What country?
  - How long?
  - What is the funding source?
  - Proposed compensation? Paid where?
  - What is person’s citizenship?
  - Who is the supervisor?
  - Other university staff already embedded?
  - Physical space needed?
  - What happens to person at end of project?

Secondment Considerations

- Pure secondment
- Secondment "light"
- Documentation of secondment
- Assignment letter

Scenario 2

- Jerry begins work in Gambini as Goforth's USAID Country Director. Jerry wants to hire his Gambinian wife and several other Gambini locals to assist the USAID project. Some of the local nationals want to be paid in US Dollars, because Gambini's local currency is experiencing rapid devaluation.

- Questions for OGC:

- How do we onboard the local nationals?
- Can they be paid in USD?
- What about tax withholding?

Common Structures

- **Reliance on partner organization**
  - Secondment
- **Independent contractor**
- **Direct employment**
- **Entity registration**
- **Professional employer organization (PEO)**

PEO Considerations

- Long term strategy?
- Funding of payroll
- Specific PEO responsibilities
- Indemnification, liability, insurance
- IP and confidentiality
- Termination of employment
- Termination of PEO arrangement

Scenario 3

- Jerry’s housing compound in Gambini is raided by thieves. This prompts Jerry to request from Goforth a package of benefits to account for the multi-year nature of his posting in Gambini. He wants a housing allowance to live in a safer part of the city, and a security guard for his compound.
- Questions for OGC:
- Can we give Jerry additional benefits?

Expatriate Benefits

- Motivations
- Objectives of a expat policy
- Who qualifies as an expat?
- Federal-funding considerations
- Equity issues with local staff

Scenario 4

- Goforth College still runs a study abroad program in Gambini! It's local director is Mona Lisa. Goforth leadership has received a poor evaluation of Mona Lisa, asserting that she may have verbally abused local staff and complaining that she misappropriated some of the USAID grant funds to support the study abroad program. Goforth would like to remove her immediately.

- Questions to OGC:

- What is the process by which Mona Lisa's employment could be terminated?
- Are there grounds for a 'for cause' dismissal?
- If not, would Mona Lisa be entitled to severance and indemnities ? How much?
- What happens if Mona Lisa contests the dismissal?

Scenario 5

- She begins looking into retirement. She discovers that her retirement contributions have been made since Goforth registered in Gambini 15 years ago, but she has been working for 25 years. Her tax contributions are not enough to full vest into the retirement system. Panicked, she contacts Goforth and asks them what can be done to get her full pension.

- Questions to OGC:

- What are the employer’s obligations and liability in this scenario?
- What are Mona Lisa’s obligations, if any?
- Can Mona Lisa agree to a settlement and release Goforth from liability?

Closing thoughts and questions

- Importance of competent local counsel
- Answering the key questions about the relationship before work begins
- Understanding how to end the relationship
- Questions?