

COMMON LEGAL ISSUES WHEN EMPLOYING STAFF IN SUPPORT OF OVERSEAS ACADEMIC PROGRAMS

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INTRODUCTION

Internationalization of the curriculum has become a top priority for colleges and universities of all sizes in the United States. Once considered something of a luxury, colleges and universities now routinely seek to offer their students opportunities to extend their educational experience to an overseas setting. During the 2007–2008 academic year, 262,416 U.S. students studied abroad, up eight and a half percent from the year before, according to the latest annual survey by the Institute of International Education (IIE).¹ In November 2005, the Congressionally and federally appointed Lincoln Commission issued recommendations in support of expanding to one million the number of American students studying abroad annually in the next decade.²

1. INSTITUTE OF INTERNATIONAL EDUCATION, OPEN DOORS 2009: REPORT ON INTERNATIONAL EDUCATIONAL EXCHANGE (2009), <http://opendoors.iienetwork.org/?p=150651> [hereinafter OPEN DOORS].

2. COMMISSION ON THE ABRAHAM LINCOLN STUDY ABROAD FELLOWSHIP PROGRAM, GLOBAL COMPETENCE AND NATIONAL NEEDS: ONE MILLION AMERICANS STUDYING ABROAD (2005), available at <http://www.forumea.org/documents/>

Unprecedented growth in demand for overseas programs will challenge colleges and universities in many ways. In 2008, two major study abroad membership groups issued substantial white papers providing guidance to their college and university member institutions on (a) best practices in management of study abroad programs³ and (b) ethical principles for study abroad.⁴ Growth in study abroad activities, as well as the financial management and other business practices of colleges and universities as they relate to study abroad, have also recently attracted the scrutiny of regulators and law enforcement authorities, as demonstrated by the investigation into college and university study abroad business practices launched in 2007 by the Attorney General of the State of New York,⁵ and later joined by the Attorney General of Connecticut.⁶ As the spotlight increasingly shines on study abroad programming, colleges and universities will need to take care that they are applying the same level of legal, administrative and risk management discipline and oversight to these activities as they do in relation to their domestic affairs.

To support growth in demand for overseas programming, colleges and universities will need to determine which program models best suit their needs and aspirations, taking into account a host of evaluative factors, from availability of investment resources to ability to collaborate with foreign partners, to tolerance for organizational risk.⁷

This Article will introduce college and university legal counsel and administrators to some of the key issues to be considered when launching and sustaining college and university activities outside of the United States, with a particular focus on labor and employment challenges. Section I will provide an overview of some of the most common academic programs and research activities engaged in by colleges and universities and the range of

lincoln_commission_report.pdf.

3. NAFSA: ASSOCIATION OF INTERNATIONAL EDUCATORS, STRENGTHENING STUDY ABROAD: RECOMMENDATIONS FOR EFFECTIVE INSTITUTIONAL MANAGEMENT FOR PRESIDENTS, SENIOR ADMINISTRATORS, AND STUDY ABROAD PROFESSIONALS (2008), http://www.nafsa.org/_/File/_/final_imsa_taskforce.pdf.

4. THE FORUM ON EDUCATION ABROAD, CODE OF ETHICS FOR EDUCATION ABROAD (2008), <http://www.forumea.org/documents/ForumonEducationAbroadCodeofEthics.pdf>.

5. See Jonathan D. Glater, *Inquiry of Study Abroad Programs Grows*, N.Y. TIMES, Jan. 21, 2008, at A10.

6. Diana Jean Schemo, *Study Abroad is New Focus of Inquiry Into Perks*, N.Y. TIMES, Aug. 16, 2007, at A13; Elizabeth F. Farrell, *New York Attorney General Seeks Information from Study-Abroad Providers*, CHRON. OF HIGHER EDUC., Aug. 15, 2007, available at <http://chronicle.com/article/New-York-Attorney-General/39400>.

7. See generally BARBARA A. HILL & MADELEINE F. GREEN, A GUIDE TO INTERNATIONALIZATION FOR CHIEF ACADEMIC OFFICERS (American Council on Education 2008); *Cross Border Activities of Colleges and Universities*, ABANA REV. (Arab Bankers Ass'n of N. Am. New York, N.Y.), Winter 2005, at 7-9, available at http://www.arabbankers.org/download/123321_U127360__150842/ABANA_Review_Winter05.pdf.

legal operating models available to support them. Section II will discuss the three main categories of college and university employees working outside the United States and the typical sources of foreign law and regulation generally applicable to their employment. It will also review some of the key concepts concerning employment, tax and immigrant status, as distinct from the concept of labor authorization. Section III will review some of the key legal and practical concepts applicable to employment agreements in the international context. Section IV will address issues important to the termination of the employment relationship. Section V will briefly survey issues relating to the application of foreign benefit schemes and Section VI will flag additional issues to consider when employing staff abroad.

The legal landscape with respect to employment varies dramatically from country to country. The observations expressed in this Article are necessarily general and are drawn from the author's experience advising an accredited international education and exchange organization in relation to its education and development assistance activities in more than fifty countries. They are meant to be a practitioner's overview of the topic and to provide college and university counsel and administrators with a solid basis to begin asking questions of host country local counsel.⁸ Local counsel, critical to the successful implementation of international programming, can best guide the college or university attorney or administrator to the specific statutory and other frameworks applicable to the college or university's proposed employment activities.⁹

As a first step towards assisting a client institution in understanding its appetite and options in the international arena, college and university counsel must work closely with college and university officials at every level. What was once a somewhat overlooked and often highly diffuse set of activities, housed in disparate parts of the institution, must now be examined with discipline. Mandates from, and the explicit support of, the college and university's highest authorities, including the Board of Trustees and the President, are crucial.¹⁰ Counsel should also work with study

8. See Peter F. May, *12 Risky Issues When Hiring Abroad*, CHRON. OF HIGHER EDUC., Mar. 21, 2010, available at <http://chronicle.com/article/12-Risky-Issues-When-Hiring/64744/>.

9. See, e.g., Lex Mundi, http://www.lexmundi.com/lexmundi/Member_Search.asp?SnID=1417148456 (last visited Mar. 4, 2010); International Lawyers Network, <http://iln.com/> (last visited Mar. 4, 2010); HG.org, Law Firms and Lawyers International Associations, <http://www.hg.org/lawfirms-associations.html> (last visited Mar. 4, 2010); William P. Nicholson, *Global Engagement: Key US and Foreign Law Considerations When Doing Business Abroad*, National Association of College and University Attorneys Annual Conference Presentation, June 24-27, 2009, at 3 n.3 (recommending clients to obtain lawyer referrals from other entities working in the foreign country, domestic law firms that work internationally, etc.) (on file with the author).

10. HILL & GREEN, *supra* note 7, at 1, 7.

abroad officers, international program faculty, and relevant academic department heads and deans to inventory exactly what activities are currently taking place.¹¹ Without a full understanding of an institution's existing footprint of activities, college and university counsel cannot effectively advise on potential existing exposures or recommend alternative program models that might better meet the largest number of institutional priorities.

Perhaps the most common basis for foreign programming misadventures is the scenario where faculty or international programs office staff initiate significant levels of activity in a foreign jurisdiction, often the fruit of long-standing professional and intellectual ties with like minded academics, without recognizing, analyzing and anticipating the need for significant financial and legal support. This Article will hopefully add some analytical tools for counsel and administrators to help steer their institutions and faculty through uncharted waters. The enduring success of college and university internationalization efforts will depend in part upon identifying and addressing the legal and administrative challenges up front, before significant institutional resources and credibility have been put on the line.

I. OVERVIEW OF COMMON OVERSEAS PROGRAM STRUCTURES AND OPERATING MODELS

This section will provide an introduction to the common international operating models available to colleges and universities in foreign jurisdictions. Section I.A will provide some background definitions from the emerging lexicon of international programming, defining in particular "College and University-Sponsored Programs," "Contractual Programs," and "Permissive Programs."¹² Section I.B will introduce the reader to some common threshold issues to be addressed when evaluating proposed operating models. It will then offer a range of typical operating models generally available to colleges and universities operating abroad. The discussions in Section I.A and Section I.B will set the stage for understanding some of the legal and administrative issues relating to the employment of staff overseas.

A. The Emerging Lexicon of International Programming

Understanding the range of international activities now being undertaken by colleges and universities and their students, faculty and staff provides a helpful starting point for examining programming models. Examples of typical college and university overseas activities include:

11. William P. Hoye & Gary M. Rhodes, *An Ounce of Prevention is Worth the Life of a Student: Reducing the Risk in International Programs*, 27 J.C. & U.L. 151, 162 (2000).

12. *Id.* at 155–57.

- Direct enrollment relationships with foreign institutions¹³
- Students enrolled in home college and university campuses located abroad
- Mutual student and faculty exchange programs
- Internships, independent study, and service learning¹⁴ experiences
- Joint ventures with foreign institutions
- Faculty led short-term study tours
- Student organizations and clubs traveling internationally (music groups, athletes)
- Faculty research and sabbaticals
- Attendance at conferences and other meetings
- Alumni travel abroad programs

Each of the above activities falls within one of the following three program categories: College and University-Sponsored Programs; Contractual Programs; and Permissive Programs.¹⁵

1. College and University-Sponsored Programs

College and university-sponsored programs¹⁶ are organized, operated and maintained by a college or university with little or no outside assistance. Traditional study abroad programs—ten weeks or more of study resulting in academic course credit¹⁷—can fall into this category, as well as short-term, faculty-led trips and service learning or internship opportunities organized by a college or university. Language immersion

13. “Direct enrollment” generally refers to relationships where a U.S. college or university enters into an agreement with a host institution in a foreign country pursuant to which the host institution agrees to enroll the U.S. institution’s students in the host institution’s academic program or in a program customized for the U.S. institution’s students as a group. *See generally* NAFSA: ASSOCIATION OF INTERNATIONAL EDUCATORS, NAFSA’S GUIDE TO EDUCATION ABROAD FOR ADVISERS AND ADMINISTRATORS (3d ed. 2005).

14. “The term ‘service-learning’ means a method—(A) under which students or participants learn and develop through active participation in thoughtfully organized service that—(i) is conducted in and meets the needs of a community; (ii) is coordinated with an elementary school, secondary school, institution of higher education, or community service program, and with the community; and (iii) helps foster civic responsibility; and (B) that—(i) is integrated into and enhances the academic curriculum of the students, or the educational components of the community service program in which the participants are enrolled; and (ii) provides structured time for the students or participants to reflect on the service experience.” 42 U.S.C. § 12511(40) (2006).

15. *See* Hoye & Rhodes, note 11, at 155–57; GALLAGHER HIGHER EDUCATION PRACTICE GROUP, COLLEGE AND UNIVERSITY INTERNATIONAL EDUCATION PROGRAMS: MANAGING THE RISKS (2007), *available at* http://www.nacua.org/documents/ManagingTheRisks_GallagherIntl.doc (adopting Hoye and Rhodes’ categories).

16. Hoye & Rhodes, *supra* note 11, at 155.

17. GALLAGHER, *supra* note 15, at 7.

programs are also a popular college and university-sponsored activity. While college and university-sponsored programs may be sponsored by more than one U.S. institution, the critical distinguishing factor is that no outside contracted entities are involved in the design or delivery.

With respect to employment issues, college and university-sponsored programs create the greatest degree of legal, administrative and liability risks for an institution because there is no other party to which any or all of such risks may be transferred.¹⁸

2. Contractual Programs

Contractual programs¹⁹ involve the outsourcing by a college or university of most, if not all, aspects of a particular overseas academic offering. Generally, an overseas institution or a domestic study abroad provider organization designs and administers the program in consultation with the college or university. Alternatively, a college or university may enter into a formal exchange agreement with another host institution, in which all aspects of the relationship (recruiting, admissions, tuition, credit transfer, and other matters) are addressed.²⁰ Increasingly, colleges and universities are turning to contractual programs for shorter-term foreign programs, such as experiential and service learning trips, internships for work experience in a chosen field, and language immersion programs.²¹

With respect to employment issues, contractual programs create legal, administrative and liability risks to the institution, but they can usually be managed to minimize liability for the institution through well-crafted contracts, hold-harmless agreements, waivers, and other similar measures.²² In the employee context, however, it is important to note that some jurisdictions impose joint and several liability upon companies and their subcontractors for the proper registration and treatment of the subcontractor's employees.²³

18. Hoye & Rhodes, *supra* note 11, at 155.

19. *Id.* at 155–56.

20. *Id.* at 155; GALLAGHER, *supra* note 15, at 8.

21. OPEN DOORS, *supra* note 1; Beth McMurtrie, *Study-Abroad Numbers Continue to Climb, Trips Are Shorter, Report Says*, CHRON. OF HIGHER EDUC., Nov. 16, 2007, International, at A36; Karin Fischer, *Study-Abroad Directors Adjust Programs in Response to Recession*, CHRON. OF HIGHER EDUC., Mar. 6, 2009, International, at A25 [hereinafter Fischer, *Response to Recession*]; Karin Fischer, *More Colleges Coach Professors to Lead Study-Abroad Trips*, CHRON. OF HIGHER EDUC., Feb. 7, 2010, available at <http://chronicle.com/article/More-Colleges-Coach-Professors/63901/> [hereinafter Fischer, *More Colleges*].

22. Contractual agreements with local partners can be a very useful tool for transferring the responsibility for employment related issues, as the local partner agrees to assume all responsibility for the labor relationships required to deliver the program. GALLAGHER, *supra* note 15, at 8; Hoye & Rhodes, *supra* note 11, at 157–58.

23. For example, under Article 42 of the Spanish Workers' Statute, a company that engages part of its own activity with contractors and/or subcontractors can be

3. Permissive Programs

Programs that are not required, sponsored, paid for, organized, or endorsed by a college or university may be categorized as permissive programs.²⁴ Examples include: trips that students, faculty and staff may elect to take for purposes of academic and professional development, such as attendance at conferences; self-funded research and study; or self-organized consulting or lecturing at foreign institutions.

With respect to employment issues, in most instances, permissive travel creates the least amount of legal, administrative and liability risk for colleges and universities.²⁵ Two important caveats should be borne in mind, however. First, if a student or faculty member remains enrolled or employed by the institution for the duration of the permissive program, it is possible that the college or university may retain a degree of responsibility for potential health and safety related issues during the program. For example, domestic health insurance frequently does not apply to a faculty member or student who is outside the United States.²⁶ If a faculty member is permitted and funded to travel for professional development purposes,

found liable for pending salary and social security obligations of the contractor/subcontractor towards its workers. Art. 42 of Texto Refundido de la Ley del Estatuto de los Trabajadores (B.O.E. 1995, 1), available at <http://www.uned.es/ugt/legislacion/estatutodiciembre03.pdf> [hereinafter Spanish Workers' Statute]. In particular, the main company can be held responsible: (1) jointly and severally, for 1 year after the termination of the agreement with the contractor/subcontractor, as a consequence of pending salaries accrued while the agreement was in force, (2) jointly and severally, for some social security obligations accrued while the agreement was in force (e.g., lack of payment of social security contributions), (3) subsidiarily, for other social security undertakings, if the contractor/subcontractor goes bankrupt, and (4) for not having checked whether the contractor/subcontractor fulfils its health and safety commitments. *Id.* In order to avoid, or at least reduce, these risks, the main college or university should obtain from the Spanish social security administration a certificate attesting that the contractor/subcontractor is up to date regarding social security contributions and also make sure, from time to time (e.g., monthly) that the contractor/subcontractor is paying salaries and social security contributions.

Under Spanish law, joint and several liability for employee matters depends in part on whether a company is outsourcing a part of its "own activity" within the meaning of Article 42 of the Spanish Workers' Statute. See Spanish Workers' Statute, *supra* at art. 42. The parameters of "own activity" has not been determined by Spanish statute. A 2002 Spanish labor tribunal case found, for example, that there was no relationship of main company and contractor between an academic center and the company that was providing the canteen service. TSJ, Oct 17, 2002 (J.T.S., No. 3719).

24. GALLAGHER, *supra* note 15, at 8; Hoye & Rhodes, *supra* note 11, at 156.

25. Hoye & Rhodes, *supra* note 11, at 156.

26. U.S. Department of State, *Tips for Traveling Abroad*, http://travel.state.gov/travel/tips/tips_1232.html (last visited Mar. 5, 2010); Worldwidemedical.com, International Travel Medical Insurance and Visitors Health Insurance – Save Money, <http://www.worldwidemedical.com> (last visited Mar. 5, 2010); International SOS, International SOS – Medical and Security Solutions, Products and Assistance, www.internationalsos.com (last visited Mar. 5, 2010).

care should be taken in policy language and other communications to alert the faculty member that his or her coverage may not apply. Similarly, in the case of required internships where a student identifies and vets the internship site and conditions but a faculty advisor or other college or university employee approves the internship, a college or university may face responsibility for ensuring the general appropriateness of the site, or at least for disclosing any material safety information of which it may be aware (e.g., prior incidents of sexual harassment, etc.).²⁷

B. Introduction to Operating Models

Having reviewed the three basic categories of overseas academic programs engaged in by colleges and universities and noted some of the very general employment attributes relating to such categories, this section will inventory some of the common legal operating models available to colleges and universities when initiating overseas academic programs. The common operating models will be categorized according to the contractual program, college and university-sponsored program, and permissive program lexicon.

1. Contractual Programs

The range of contractual program operating models is huge. It is also growing, as demand for overseas programming, especially short-term options, continues to rise.²⁸ Typical arrangements include direct enrollment agreements, variously described “affiliation” agreements, and third-party provider agreements.

a) Direct Enrollment Agreements

Direct enrollment agreements between U.S. colleges and universities and foreign host institutions are historically the most common model for traditional study abroad.²⁹ Officials at each institution work together to assemble a written agreement, pursuant to which the U.S. institution’s students are permitted to enroll directly in the host college or university and receive home institution credit on a transfer credit basis upon their return to the United States. While the range of options varies tremendously, often

27. Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309, 345, 355–56 (2006).

28. Fischer, *More Colleges*, *supra* note 21; *See also* Press Release, Institute of International Education, Americans Study Abroad in Increasing Numbers (Nov. 16, 2009), available at <http://opendoors.iienetwork.org/?p=150651>; Press Release, Institute of International Education, U.S. Study Abroad Up 8% Continuing Decade-Long Growth (Nov. 17, 2008), available at <http://opendoors.iienetwork.org/?p=131592>.

29. *See generally* Richard Rodman & Martha Merrill, *Unlocking Study Abroad Potential: Design Models, Methods and Masters*, in 18 FRONTIERS: THE INTERDISCIPLINARY JOURNAL OF STUDY ABROAD (Fall 2009).

the host college or university will design a curriculum or suite of course offerings specifically for the U.S. students, especially in countries where English is not the native language.³⁰ Admissions criteria, tuition arrangements, housing, student discipline, academic probation and other policies must be carefully addressed in the agreement.

To effectively reduce a college or university's exposure to legal and administrative risks in the host country arising out of direct enrollment relationships, care should be taken to avoid the involvement of college and university faculty and staff working on the ground in the host country. As will be noted repeatedly below, the hiring of a single college or university employee working in the host country almost always triggers some level of formal legal responsibility to register or formalize the institution's presence in the host country, notwithstanding the terms of written agreements with host institutions.³¹

For liability purposes, some U.S. colleges and universities require full academic withdrawal or leaves of absence for students who enroll directly with a foreign host institution.³²

30. NAFSA: ASSOCIATION OF INTERNATIONAL EDUCATORS, *supra* note 13, at 183.

31. In India, for example, provisions of the Convention between the Government of the United States of America and the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income concerning the creation of a Permanent Establishment (PE) for tax purposes can be triggered by the presence of a single employee of a foreign entity. *See* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. V, U.S.-India, Sept. 12, 1989, T.I.A.S. No. 11,771, *available at* <http://www.irs.gov/pub/irs-trty/india.pdf> [hereinafter Indo-U.S. DTA]. If the government finds that a permanent establishment exists, the worldwide income of the foreign entity as is attributable to the PE or other business activities carried on of the same or similar kind as those affected through the PE may become subject to Indian taxation. *See id.* at art. VII. *See also* The Supreme Court of India's ruling in *Mumbai v. Morgan Stanley & Co. Inc.* 292 ITR 416 (SC 2007), *available at* <http://vlex.in/vid/dit-international-mumbai-morgan-stanley-inc-29613103>; Foreign Exchange Management (Establishment in India of Branch or Office or Other Place of Business) Regulations, 2000, *available at* http://www.rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=176 (last visited Apr. 5, 2010) [hereinafter India's Foreign Exchange Management Regulations]; LARRY A. DIMATTEO, *LAW OF INTERNATIONAL CONTRACTING* 273 (2d ed. 2009) (noting that "[i]n Germany, for example, the hiring of a single employee can result in the company being designated as having 'permanent status' which can lead to the taxation of the exporter's German-generated revenues.").

32. *See, e.g.*, Hartwick College, *Study Abroad*, <http://www.hartwick.edu/x13181.xml> (last visited Mar. 5, 2010) (permitting students to take a leave of absence for non-Hartwick College sponsored study abroad); University of California, Santa Cruz, *Leave of Absence for Non-UC Study Abroad*, http://oie.ucsc.edu/sa/_forms/NUCSALeaveOfAbsence.pdf (last visited Mar. 5, 2010) (requiring leave of absence and liability release for study in countries subject to U.S. State Department Travel Warnings).

b)Affiliation Agreements

Affiliation agreements are another way for U.S. colleges and universities to gain access to foreign academic programming. These agreements typically involve a much greater degree of collaboration between institutions and may include student exchanges, faculty exchanges, scholars in residence programs, teacher training, and professional and technical exchanges. As a creature of contract, the parties should carefully examine each activity to be undertaken by each party. In many cases, where U.S. faculty and administrator travel or even temporary relocation to the host country is envisioned, careful attention should be paid to the local rules governing immigration, employment and work permission, as discussed further below.

c)Third-Party Provider Agreements

Third-party provider agreements are becoming increasingly popular as colleges and universities attempt to expand the number of overseas offerings for their students while minimizing direct investment costs.³³ In some cases, colleges and universities band together into consortia, for the purpose of setting up a range of programming options to be provided to the member institutions' students, as well as to students from non-member institutions.³⁴ In other cases, independent study abroad provider organizations contract with colleges and universities to provide established overseas academic program sites with fully developed course curricula, language instruction and student services support.³⁵

With respect to legal, administrative and liability concerns, third-party provider arrangements offer an increasingly attractive way for colleges and universities to limit their exposure to risks from activities occurring in a foreign jurisdiction. Agreements address the full range of services to be provided by the third party provider, including enrollment and billing procedures, compliance with local law, independent contractor provisions, allocation of risk, including indemnity and insurance provisions, as well as the range of support for students (medical insurance, evacuation coverage, contingency planning, and risk assessment, etc.). See Appendix A for a sample third party provider agreement between two U.S. institutions.

33. Elizabeth Redden, *The Middlemen of Study Abroad*, INSIDE HIGHER ED (Aug. 20, 2007), available at <http://www.insidehighered.com/news/2007/08/20/abroad>.

34. See, e.g., IES Abroad, <http://www.iesabroad.org> (last visited Mar. 5, 2010) (IES is a non-profit membership organization comprised of more than 175 academic institutions).

35. See, e.g., Council on International Educational Exchange, <http://www.ciee.org> (last visited Mar. 5, 2010) (operating independent study abroad programs in 35 cities); World Learning, *Welcome to World Learning* (2010), <http://www.worldlearning.org> (World Learning's accredited SIT Study Abroad program offers independent study abroad programs in more than 50 countries).

2. College and University-Sponsored Programs

In general, there has been an increasing appetite in higher education, especially among larger institutions with more global brand recognition, to establish all-encompassing branch campuses of their institutions abroad.³⁶ Care must be taken, however, not to confuse a branch campus, and the U.S. regional accrediting body approval thereof, with the underlying operating model for such activity. Public colleges and universities need to review their charter documents carefully to ensure that appropriate powers have been granted to them to conduct activities directly outside of the United States. In any situation where a U.S. institution seeks to establish a presence in a foreign jurisdiction, great care must be taken at the outset to address fundamental threshold issues. This analytical imperative applies whether the proposed activity involves establishing a complete branch campus or simply sending a group of students and a faculty member on a college or university sponsored inter-term language immersion excursion. See Appendix B for a general checklist of legal and administrative matters to consider when auditing or starting up a college or university sponsored program.

The nature and extent to which a college or university-sponsored program will be subject to legal registration, tax and other responsibilities often depends on an analysis of the nature and extent of the contacts that a college or university and its staff will have with the jurisdiction. Unlike contractual programs, where the legal, tax and administrative burdens of operating in the host country may be transferred by contract to a host institution or a third-party provider, even the most modest college or university-sponsored program often triggers some level of legal responsibility. For example, in the area of immigration, even for short-term programs, appropriate entry visas must be obtained for all participants and accompanying faculty and staff.³⁷ In the post-9/11 era, gone are the

36. Tamar Lewin, *U.S. Universities Rush to Set Up Outposts Abroad*, N. Y. TIMES, Feb. 10, 2008, at A1. See also Press Release, New York University: The Office of Public Affairs, NYU to Open Campus in Abu Dhabi (Oct. 12, 2007), available at <http://www.nyu.edu/public.affairs/releases/detail/1787>.

37. Tourist visas may be appropriate for short-term, faculty led academic programs where the duration of the visit is less than 90 days. See, e.g., Embassy of Hungary: Consular Affairs, <http://www.huembwas.org/consul/ENG/consularaffairs.htm> (last visited Mar. 5, 2010). For programs lasting longer than 90 days, however, a student or other residency visa may be required. See, e.g., *id.*; Swiss Federal Department of Foreign Affairs, Schengen Visa Information, http://www.eda.admin.ch/eda/en/home/repn/ameri/vusa/ref_visinf/visusa.html#ContentPar_0011 (last visited Mar. 5, 2010). While tourist visas may appear to be the easiest route to follow, it should be noted that in most countries immigration officials at the border often have administrative discretion to grant visas of a much shorter duration than the prescribed maximum. In Mexico, for example, Article 42-I of the General Law of Population (Ley General de Población) governs visas granted to tourists. It provides as a maximum a term of six months which is non extendible. Within such period of time,

days when Americans abroad could rely on a sympathetic immigration official or local police if proper visa status was not obtained. Similarly, some jurisdictions require the withholding of employer income tax and payment of social benefits levies on employees working in a country for as few as thirty days.³⁸ Furthermore, it is typical for corporate income tax issues to arise from activities carried out by college and university employees providing services in a foreign country, even when payment for those services is received in the United States or a third country.³⁹ Notably, a foreign jurisdiction may not necessarily recognize an institution's U.S. non-profit status and thus local counsel should be sought at the outset of program planning to verify the income tax treatment of associated revenues.

Finally, as noted above, as a general matter, the engagement of a single host country national to provide services for a college or university or the presence of a U.S. faculty or staff member performing services for a college or university in a host country quite frequently triggers employment related legal and tax obligations (e.g. requirement of written employment agreement),⁴⁰ which in turn, often cannot be addressed without establishing a formal legal presence in the foreign jurisdiction. Appendix C sets forth a sample list of countries and indicates, in summary form, whether formation of a formal legal entity in the host country is required before hiring local nationals as employees. Appendix C also indicates whether special contract language is required in order to employ local nationals or expatriates.

There are many legal frameworks applicable to the kinds of activities colleges and universities engage in when establishing college and university-sponsored programs in foreign jurisdictions. For public and non-profit colleges and universities, the issue of tax exempt status often surfaces as an important threshold matter. As a general observation, legal

the immigration officers may grant less time. Usually the immigration officers grant a term of 90 days, pursuant to instructions of the officers of the National Institute of Migration.

38. In China, for example, foreign workers providing services in China are taxable on their income from the day they commence providing services. The relevant piece of legislation is the Notice concerning Several Detailed Questions in Calculating Individual Income Tax for Those Individuals who do not have Residence in China, issued by the State Administration of Taxation on March 23, 1995. If the residence in China is shorter than 90 days, the income generated in China can be waived for income tax. This is allowed under the Notice concerning Several Issues relating to the Waiver of Individual Income Tax based on the Actual Days of Residence for those who gets income in China during the Temporary Stay in China, issued by the State Administration of Taxation on March 5, 1988.

39. For a discussion of the Permanent Establishment regulations in India, *see* Indo-US DTA, *supra* note 31.

40. Hoyer & Rhodes, *supra* note 11, at 161 (highlighting the fact that written employment agreements may be required by local law).

frameworks applicable to non-profit or tax exempt activities are often modestly developed around the world, especially as they relate to foreign entities. Therefore, care should be taken with local counsel at an early stage to explore creative ways to achieve a college or university's goal of tax exempt treatment. Because the process for obtaining tax exemptions is so lengthy, the outcome so dubious and the reporting and administrative requirements so onerous, taxable or commercial models may be the best option for meeting a college and university's needs.

By way of example, in Brazil, where charitable foundations and other non-profit vehicles have historically been abused by unscrupulous businesspeople and politicians, the route to tax exemption is long and sometimes dubious for foreign educational enterprises.⁴¹ For at least one study abroad provider organization,⁴² formation of a taxable entity provided a solution. A simple corporate entity was formed to meet the administrative needs of students and faculty traveling to Brazil for semester long study. The Brazilian entity operates as a wholly owned subsidiary of the parent academic institution in the United States and has the power to act locally as the employer of record for hiring local and international staff and independent contractors (e.g. drivers, occasional lecturers, etc.). The entity also facilitates the myriad other elements of delivering an international program, including banking, student/cultural visa sponsorship for participants, and work permit sponsorship for non-Brazilian professional staff. With regards to corporate taxation, taxes are generally minimized by characterizing funds transferred to Brazil by the U.S. parent academic institution as working capital contributions or reimbursements of local expenses.

A detailed treatment of the legal frameworks available throughout the world to support activities relating to college and university-sponsored programs and the employment of staff abroad is beyond the scope of this Article. Local counsel must be consulted to analyze the proposed activities and determine whether formal registration of some kind will be required and, if so, to select the most suitable registration strategy.⁴³ By way of

41. See Gustavo Justino de Oliveira, *Ongs, Neopopulismo e Corrupção* [NGOs, Neo-populism and Corruption] INTEGRAÇÃO, <http://integracao.fgvsp.br/ano9/09/opinio.htm> (last visited Mar. 12, 2010); Rodrigo Ledo, *CPI dans ONGs resgata escândalo do dossiê mas adia votações sobre UnB* [Congressional Investigation of NGOs Reveals the Dossier Scandal but Postpones Voting], ÚLTIMO SEGUNDO, Apr. 1, 2008, available at http://ultimosegundo.ig.com.br/brasil/2008/04/01/cpi_das_ongs_aprova_investigacao_que_resgata_dossie_das_eleicoes_de_2006_1252026.html; Reinaldo Azevedo, *No escândalo da Petrobras, as Ongs* [In the Petrobras Scandals, the NGOs], VEJA.COM, July 10, 2007, available at <http://veja.abril.com.br/blog/reinaldo/geral/no-escandalo-petrobras-as-ongs/>.

42. World Learning Inc. formed World Learning Do Brasil Intercâmbio Educacional Ltda., in order to administer its academic programs in Brazil (registration paperwork and charter on file with the author).

43. For an introductory discussion of considerations when establishing operations

illustration, registration strategies can include one or more of the following approaches:

- Direct registration of U.S. college and university as a foreign entity⁴⁴
- Registration of a college or university as a foreign Non-Government Organization (NGO)⁴⁵
- Registration of a Representative or Liaison Office⁴⁶
- Registration of a formal branch of the college or university⁴⁷

abroad, see DETLEY F. VAGTS ET AL., *TRANSNATIONAL BUSINESS PROBLEMS* 393–439 (4th ed. 2008).

44. Where available, this type of registration is the easiest to execute and generally involves the least amount of administrative reporting and corporate housekeeping. Documentation requirements can be as simple as providing the U.S. institution's charter documents (Articles of Incorporation and By-laws), I.R.S. tax-exempt determination letters and a simple statement of the activities to be undertaken.

45. Many countries with experience working with relief agencies like CARE or with United States Government contractors that are administering foreign assistance (for example, U.S. Agency for International Development contracts, cooperative agreements and grants) have specific registration pathways for foreign NGOs. *See, e.g.,* The Republic of Uganda, Non-Governmental Organisations Registration Regulations, Chap. 113 (1989), *available at* <http://www.usig.org/countryinfo/laws/Uganda/NGO%20Registration%20Act%201989%20Chap%20113.pdf>; *see also* Hashemite Jordanian Kingdom, Law on Societies of 2008 (2008), *available at* http://www.ngoregnet.org/Library/Jordan_NGO%20Law_2008%20Eng.pdf

(permitting registration of foreign NGOs upon filing of application accompanied by (a) the registration certificate of the foreign association, (b) the bylaws or the memorandum of association of the foreign association, (c) the places the foreign association operates in, (d) the programs and projects that the foreign association intends to perform in Jordan, (e) the representative(s) of the foreign association who will handle its affairs in Jordan, and (f) the representative(s) of the foreign association who will handle its affairs in Jordan).

46. "Representative" or "Liaison" Office registrations are usually designed for firms that are seeking to establish an initial presence in a country or testing the waters for new products or services provided by the parent institution back home. These frameworks are best suited to manufacturing, software, technology, and other companies seeking new markets for their products. While typically there is exemption from income tax on the activities of the office, depending on the country, the activities of the office can be quite restricted. For example, India prohibits any activities which could be characterized as carrying on a business while under the rubric of a liaison office registration. *See* India's Foreign Exchange Management Regulations, *supra* note 31 (defining a Liaison Office as "a place of business to act as a channel of communication between the Principal place of business or Head Office by whatever name called and entities in India but which does not undertake any commercial/trading/ industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel").

47. Branch Offices, like Representative Offices and Liaison Offices, are extensions of the home country entity and have no independent legal existence. Unlike Representative and Liaison Offices, however, they generally are permitted to carry on business activities as permitted by the Government. *See* India's Foreign Exchange Management Regulations, *supra* note 31. In India, a branch office is considered a permanent establishment under tax laws. Absent an available exemption from taxes,

- Registration of a Foreign Investment Company⁴⁸
- Registration of a wholly owned local domestic entity⁴⁹
- Registration of a local affiliated entity (e.g. Foundation, Association)⁵⁰
- Registration via a Formal Memorandum of Understanding⁵¹

however, it is likely that the revenue generating activities of a branch office will be taxed by local authorities and be also subject to requirements of tax transfer pricing regulations. *See* Indo-U.S. DTA, *supra* note 31, art. V, VII. For a general discussion of branch formation versus subsidiary formation, *see also* VAGTS ET AL., *supra* note 47, at 395–97.

48. For larger scale college or university-sponsored program activities, including significant branch campuses, most countries facilitate direct investment in the economic development of the host country through the formation of foreign investment companies. Foreign investment companies come in all flavors, depending upon the political, legal, and economic environment of the host country. In Indonesia, for example, the government permits foreign investors to establish a Foreign Investment Company (PT-PMA), and in many cases allows majority ownership by a foreign investor. *See* Presidential Regulation of the Republic of Indonesia Number: 77 of 2007, *available at* http://www.bkpm.go.id/file_uploaded/PresReg_77_2007_eng.pdf; Regulation of President of the Republic of Indonesia Number: 111 of 2007, *available at* http://www.bkpm.go.id/file_uploaded/Perpres%2011%20Year%202007%20English.pdf (relating to businesses that are closed to foreign investment and those that are open to it).

49. Domestic entities, including domestic corporations, are often relatively straightforward to establish (similar to establishing a corporation under Delaware law) and can be quickly approved by the relevant authorities. However, in some instances there are fairly onerous restrictions in the areas of management and governance. Some countries explicitly require that host country nationals participate in the capital and in the governance of host country domestic entities. In Indonesia, for example, local law requires that local corporations cannot have foreign capital participation unless their activities have not been declared restricted and unless they have been registered with the central or provincial approval authority. *See* Law of the Republic of Indonesia Number: 25 of 2007, *available at* http://www.bkpm.go.id/file_uploaded/Investment_Law_Number_25-2007.pdf.

50. In somewhat rare circumstances, a host country's legal regime simply will not allow for the direct conduct of a foreign university's activities in the host country, whether through direct registration, Representative/Liaison Office, Branch Office, or otherwise. More commonly, adverse tax consequences or restrictions on governance and control mechanisms required of other legal vehicles cause a college or university to explore sponsoring the establishment of a local non-profit entity, such as an association or a foundation. These types of entities vary tremendously in terms of form, formalities, membership requirements, and financial reporting.

51. No treatment of the topic of overseas program operating models would be complete without describing the concept of the Memorandum of Understanding (MOU). These sometimes ill-defined documents come in all shapes and sizes and frequently bestow an astonishing level of implied operational authority on the foreign party (sometimes in fewer words than the average fine print on a parking ticket). Some countries require U.S. institutions to sign an MOU with the host country's Ministry of Education or other governmental authority. In some instances MOUs can substitute entirely for other formal registration or entity formation process, providing all that is needed to establish locally compliant operations (for example bank accounts, local payroll administration, and immigration and work visa sponsorship). In Jordan, for

The wide range of operating models and their legal and administrative attributes demonstrates the urgent need for college and university counsel and administrators having early and detailed input into any significant international academic program development activity. While scale is important (e.g., establishing a complete branch campus as opposed to sending a college or university group on a two week Spanish language excursion to Mexico), the labor and employment issues discussed in the following sections of this Article almost always rear their heads at an astonishingly low level of college and university engagement in the host jurisdiction.

II. EMPLOYEE CATEGORIES AND SOURCES OF LAW

Having briefly examined a range of international academic program categories and operating models in Section I above, the remainder of this Article will focus on labor and employment issues specific to those program categories and operating models. This section will introduce the three common categories of employees working for U.S. colleges and universities overseas—host country nationals, expatriates, and third country nationals—and will discuss in general terms the sources of labor and employment laws applicable to their employment.⁵² It will also review some of the key concepts applicable to the distinction among employment, tax, and immigrant status, as distinguished from labor authorization.

A. Employee Categories

1. Host Country Nationals (HCNs)

Host country or local nationals (HCNs) are individuals holding citizenship of the host country or having the equivalent status of a U.S. “permanent resident.”⁵³ In the context of college and university-sponsored programs, colleges and universities frequently engage HCNs in all aspects of program delivery, whether as local program directors, local faculty, support staff or even drivers and security personnel where applicable. As

example, for many years, the *Law on Societies* authorized foreign institutions to enter into Cooperative Agreements with the Jordanian Government via Jordan’s Ministry of Social Development and other ministries. Jordan’s new *Law on Societies* (No. 51 of 2008) abolished the MOU registration route in favor of a direct NGO Registration process. Euro-Mediterranean Human Rights Network, *Monitoring Report on Freedom of Association in Euro-Mediterranean Region – 2009*, available at http://www.euro.parl.europa.eu/meetdocs/2009_2014/documents/dmag/dv/dmag20100324_05_/dmag20100324_05_en.pdf.

52. For a general analysis of multi-jurisdictional employment issues, see Kevin Cranman & John F. Baum, *Ten Proactive Steps for the Multi-Jurisdictional Employer: A Global Approach to Your Employment Law Audit*, 25 ACC DOCKET (2007).

53. STEPHEN PERKINS & SUSAN SHORTLAND, *STRATEGIC INTERNATIONAL HUMAN RESOURCE MANAGEMENT* 88–90, 147 (2d ed. 2006).

discussed below, some countries prohibit the direct employment by foreign institutions of HCNs, thus requiring an intermediary employer, such as a state-run employment agency or a local partner, or the establishment of one of the more involved legal operating models such as creation of a locally recognized corporate subsidiary.⁵⁴ In China, for example, foreign firms are prohibited from employing Chinese nationals directly for their representative offices in China.⁵⁵ Foreign firms' representative offices may only employ Chinese nationals via one of the state-owned or privately controlled employment intermediaries.⁵⁶

While rare exceptions do exist (e.g. under MOUs directly negotiated with host governments), HCNs will be subject to the application of host country laws and regulations concerning labor and employment.⁵⁷

2. Expatriates (Expats)

Parent country nationals or expatriates (expats) are U.S. citizens working overseas for a U.S. college or university.⁵⁸ While the analysis will depend on the facts of the particular case, the majority of U.S.-based college and university employees assigned to work on a temporary basis in a host country will likely be considered expats by the host country government. As noted below, in certain limited circumstances, exemptions from local employment laws and regulations may be available to college and university employers engaging expats abroad.

3. Third-Country Nationals (TCNs)

Third-country nationals (TCNs) are non-U.S. citizens working in a host country but holding citizenship of a third country.⁵⁹ TCNs present the most

54. In China, the Labor Law of the People's Republic of China, effective on January 1, 1995, applies to "enterprises inside the People's Republic of China" and to "employees" who have an employment relationship with such entities. Andreas Lauffs, *China*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS, 55-7 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009). "The term 'enterprises inside the People's Republic of China' includes both SOEs [state owned enterprises] and foreign-invested enterprises (FIEs), such as wholly foreign-owned enterprises (WFOEs) and Sino-foreign joint ventures [c]overed enterprises may be collectively or privately owned." *Id.*

55. *Id.*

56. See FESCO Service System, <http://www.fesco.com.cn/164/index.htm> (last visited Mar. 6, 2010) ("Founded in 1979, Beijing Foreign Enterprise Human Resource Service Co., Ltd. . . . is China's first professional human resource service provider for foreign enterprise representative offices in China, foreign financial institutions and economic organizations.").

57. Thomas J. Manley & Valerie Barney, *Globalization of Work: Offshore Outsourcing*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS, 96-23 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009).

58. PERKINS & SHORLAND, *supra* note 53, at 88-90, 147.

59. *Id.*

difficult cases when analyzing a college or university's labor and employment related obligations, as in some cases employment-related mandates such as social security and pension related schemes of the TCN's home country may need to be observed, even though the TCN is not working in his or her country of citizenship.⁶⁰

B. Sources of Law

As a threshold matter, it is absolutely critical that college and university counsel take to heart that "at will" employment is largely an American concept.⁶¹ Nearly all countries outside the United States regulate the employment relationship and many times to astonishing degrees.⁶² The most common sources of local law include (i) the civil code,⁶³ (ii) the labor

60. This is especially true where the TCN has been hired under the laws of one country and is then assigned to work in another country as a continuation of the initial employment relationship. For example, a German-based faculty member of a U.S. university, holding German citizenship and hired under German law, is assigned by the U.S. university to teach in South Africa for a two year period. In this example, the U.S. university would be required to continue contributions to the German social security system. Sozialgesetzbuch IV [Social Security Code], Jan. 1, 1977 at § 4, *available at* http://bundesrecht.juris.de/sgb_4/_4.html (last visited Apr. 2, 2010) (stating that employers must contribute to the German social security system if an employee has a persisting employment contract with the German employer and will stay abroad only for a fixed period of time). In regards to health care expenses, if this employee (who still participates in the German national health system) falls ill abroad, the employee might have recourse against the employer *directly* for the costs of medical coverage. While the employer may then make a claim on the employee's health insurance in Germany, the employer's claim against the insurance is limited to the (hypothetical) costs of medical coverage in Germany. That means the employer sends the employee abroad at the employer's own risk and must assume any additional charges for medical coverage. Sozialgesetzbuch V [Health Insurance], Jan. 1, 1989 at § 17.

61. Wendi S. Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS, 98-3 to -5 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009); Kevin Cranman & Natasha Baker, *Where in the World are Your Employees? Institutions as Global Employers: Employment Law Considerations in the Age of International Programs*, 36 J.C. & U.L. 565, 582 n. 70 (citing *Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th 384 (2006)); DIMATTEO, *supra* note 31, at 273 ("[t]he employment relationship is viewed differently both culturally and legally throughout the world. The differences in the legal status of the employment relationship varies from the employment at will doctrine in the United States to the view of employment as a property right in Germany and the notion of 'lifetime employment' in Japan.").

62. For example, French law requires that all employees be invited to a pre-employment termination meeting with management, at which the employee may have present an employee of the company or a local representative registered on a specific list established by the State authorities. This pre-employment termination meeting must be held in French, except if the employee agrees that it is held in a foreign language. *See, e.g.*, French Labor Code, C. TRAV. arts. L1232-2, L1232-3, L1232-4, L1232-7.

63. For example, The Greek Civil Code Art. 185 requires binding employment agreements, and Art. 192 describes the offer and acceptance process. Astikos Kodikas

code,⁶⁴ (iii) mandatory collective bargaining provisions,⁶⁵ and (iv) case law.⁶⁶ As a general rule, local labor standards will govern the employment relationship between the institution and individuals working overseas unless there is a recognized exception.⁶⁷

1. The Expatriate Exception

The most common exception to the application of local law is known as the expatriate exception. This exception is generally a creature of case law and may vary from country to country.⁶⁸ As a general matter, when

[A.K.] [Civil Code] 1:185, 192 (Greece). *See also* Civil Code of Quebec, art. 2092 C.C.Q. (1994) (outlining notice requirements relating to contract employees).

64. For example, Act XXII of the 1992 Hungarian Labor Code requires a written employment contract, and specifies what it must include. It also sets forth the minimum amount of time off that an employer must allow its employees. *See* <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex4.pdf> The Czech Republic's Labor Code of 2006, Act. No. 262/2006 Coll., as amended, governs numerous aspects of the employment relationship. It also provides that if an employee is dismissed from a position, the employment relationship is not terminated—other work must be offered to the employee. *See* http://www.mpsv.cz/files/clanky/3221/labour_code.pdf.

65. *See, e.g.*, Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, in 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS 75-1, 75-54 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (“Brazilian law establishes a ‘corporatist’ system in which the union represents *all* of the workers in a particular professional category in a designated geographical area.”).

66. *See, e.g.*, Cour d’appel [CA] [regional court of appeal] Paris, 18e ch., Apr. 3, 1995, SA Banco Borges et Irmao v. Fransisco Da Cunha Pinto [hereinafter SA Banco Borges et Irmao v. Fransisco Da Cunha Pinto]; Cour d’appel [CA] [regional court of appeal] Paris, 21b ch., May 22, 1998, Joaquim Gasalho v. SA TAP Air Portugal [hereinafter Joaquim Gasalho v. SA TAP Air Portugal] (Both decisions held that Portuguese expatriates involved had an employment relationship that continued to be governed by their original Portugal employment agreement.). *See also* Jorge Daniel Orlansky, *Argentina*, in 2B INTERNATIONAL LABOR AND EMPLOYMENT LAWS 76-1, 76-21 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (citing *Vizzotti v. AMSA S.A.* (Supreme Court of Justice Sept. 14, 2004) (addressing the acceptable parameters of seniority pay relative to severance)).

67. Thomas J. Manley & Valerie Barney, *supra* note 57, at 96-23. *See also* Frederique Sauvage, *France*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS 4-1, 4-7 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (“French law recognizes the right of the parties to an employment contract to choose the law applicable to such contract, as provided by the Rome Convention of June 19, 1980. In the absence of any clear choice of law, French law recognizes that the contract is to be governed by the law that has the closest connection with the employment contract. However, as provided by the Rome Convention, the choice of law may not deprive the employee from the protection of rules that are mandatory in the countries where the employment is being performed and the law of which would be applicable in the absence of a specific choice.”); Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-22 (stating that the general rule is that the applicable law for an international employment agreement is the law of the place where the services are provided, citing the Superior Labor Court, Precedent No. 207).

68. Three U.K. cases discussing the parameters of the expatriate exception are

determining whether to allow for the application of a foreign jurisdiction's labor laws to an employee working within its jurisdiction, foreign courts will analyze, among other factors, the following criteria: (a) whether there is a substantial prior home country employment relationship; (b) whether the foreign assignment period is of limited duration (generally an outside maximum of 5 years), and (c) whether the employee has an intent to return to their home country at the end of their assignment.⁶⁹

The value of the expatriate exception can be substantial. For example, the employer can argue more easily for the continued application of U.S. labor law and local courts are more likely to enforce U.S. choice of law provisions in employment agreements.⁷⁰ Local courts are more likely to

Lawson v Serco Ltd, Botham v Ministry of Defence, and Crofts v Veta Ltd, [2006] UKHL 3, [2006] I.C.R. 250, available at <http://www.bailii.org/uk/cases/UKHL/2006/3.html> (last visited Apr. 2, 2010). Denmark has followed EU Act. No. 188 of June 19, 1980 ("Rome Convention") since May 9, 1984. Jacob Sand, *Denmark, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 12-1, 12-8 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (The Rome Convention states that an agreement of employment is governed by the law of the country in which the employee most frequently carries out his work, even if he is temporarily employed in another country).

69. In France, for example, U.S. bona fide expatriates assigned to France under the following conditions: (1) expatriated employees remaining on U.S. payroll and receiving instructions from their U.S. employers, and (2) expatriation periods being no longer than 2 to 3 years [5 years maximum if period is to be linked to U.S./France social security treaty] should have their U.S. employment agreement govern their employment relationship while in France subject to local labor code and applicable collective bargaining agreement "public order" matters (compensation, working time, vacation, etc.). Except for grossly unreasonable situations, the basis for terminating employees and related benefits such as notice, termination indemnity and damages for unjust terminations will be governed by U.S. law per the employee's original employment agreement, including their "employment at will" feature. See *SA Banco Borges et Irmao v. Fransisco Da Cunha Pinto*, *supra* note 66, *Joaquim Gasalho v. SA TAP Air Portugal*, *supra* note 66. Both decisions held that Portuguese expatriates involved had an employment relationship that continued to be governed by their original Portugal employment agreement. See also John F. Woyke, *Compensating the Internationally Mobile Executive*, in 1B *INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 97-2 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (As contrasted with third country nationals working abroad, "expatriates" may be defined as U.S. employees who work abroad for a finite period with the expectation they will return to the United States for the balance of their careers.).

70. See John Robinson, *The Extraterritorial Application of American Law: Preliminary Reflections*, 27 J.C. & U.L. 187, 203 (2000). See also, BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 151 (Hart Publishing 2005) (discussing in depth the extraterritorial application of labor laws and the EU Posted Worker Directive). For a different perspective, Italian law generally holds that when an employee carries out services under an employment relationship in a foreign country, he will normally be subject to the labor law of that country, unless foreign law is conflicting with Italian principles of public order. Recently, the Italian Supreme Court twice ruled that the principle of termination at will applicable in the United States is conflicting with Italian public order, and Italian law was deemed applicable as a result of the non-application of the conflicting U.S. principles. Italian Supreme Court decisions 11th November

enforce exclusive forum and other dispute resolution provisions providing for litigation or arbitration in the United States. Home country employee benefits may generally be continued without interruption⁷¹ and continuity of employment service may be maintained.

There are several common misapplications of the expatriate exception of which college and university counsel and administrators should be mindful. While the convention is different from country to country, generally speaking the expatriate employee must end the foreign assignment within three years or, at the outside margin, five years.⁷² Foreign jurisdictions with protective labor codes and active collective bargaining units are likely to favor the application of local law and collective bargaining positions the longer the employee remains working in the host country.⁷³ It is also important to remember that an individual who might qualify for the expatriate exception in connection with a prior U.S. employer may not meet the exception's requirements if hired by another U.S. employer while working overseas.⁷⁴ Some jurisdictions provide for mandatory application of their labor codes to all persons working within their jurisdiction (Mexico).⁷⁵ And finally, certain countries apply special laws to foreign citizens working within their borders (e.g. the EU Posted Worker

2002, n. 15822 and 9th May 2007, n. 10549.

71. Note that U.S. benefit providers, including retirement and pension funds, are often not registered to provide products or services outside of the territory of the United States.

72. Five years is the limit of home country social security benefits protection under the U.S. France social security treaty. US-France Social Security Agreement, art. 6(1), Oct. 21, 1987, available at http://www.ssa.gov/international/Agreement_Texts/french.html#part1.

73. See Nestor de Buen Lozano, Carlos de Buen Unna, & Manuel Cuevas-Trisan, *Mexico*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS 32-1, 32-11 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) ("Mexican law does not contemplate the application of a foreign nation's law in Mexico in matters related to labor, employment, or for purposes of the resolution of labor disputes.").

74. Recall the condition in the French cases of SA Banco Borges et Irmao v. Fransisco Da Cunha Pinto, *supra* note 66, and Joaquim Gasalho v. SA TAP Air Portugal, *supra* note 66, that, in order to enjoy the exception to application of French labor law to the employment agreement, the expatriate employee must receive continuing instruction from his or her home country employer. This is a particularly challenging situation for universities who often look to hire resident directors, academic directors and key faculty based on their experience with another institution's University Sponsored Program in the host country.

75. See Nestor de Buen Lozano, Carlos de Buen Unna, & Manuel Cuevas-Trisan, *Mexico*, *supra* note 73, at 32-11 ("Mexican law does not contemplate the application of a foreign nation's law in Mexico in matters related to labor, employment, or for purposes of the resolution of labor disputes."). Compare Elena G. Barikhnovskaya, *Russia*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS 41-17 to -18 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) ("There is no published information on any case involving the implementation of foreign labor law within the territory of the Russian Federation").

Directive).⁷⁶

2. Bi-Lateral Agreement Exceptions

The terms and conditions of bi-lateral agreements, such as those between the U.S. government and a foreign government or between a U.S. college or university and a local education or foreign ministry, can also provide for the application of U.S. law to the employment of U.S. nationals working in the host country and can also provide for significant income tax exemptions and exemptions from the application of local social security and other social welfare schemes.⁷⁷

3. Employment Status vs. Tax Status

It is vital for college and university counsel to recognize that employment status and tax status are distinct matters that are often governed by separate legal frameworks.⁷⁸ The labor law of a given foreign jurisdiction will govern issues relating to the employment relationship itself, including hiring rules, employment agreements, mandatory benefits, termination procedures and termination indemnities.⁷⁹ The tax laws of a given jurisdiction will determine whether an individual residing in a foreign jurisdiction will be liable for locally applicable income and other employment related taxes.⁸⁰ As a general matter, many jurisdictions follow the rule that presence in the jurisdiction for more than 181 or 183 days in

76. See Council Directive 96/71 1996 O.J. (L 018) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:EN:HTML> (concerning the posting of workers in the framework of the provision of services). This Directive essentially requires EU member countries to mandate that employers provide basic employee benefits to individuals working within their borders (e.g. maternity leave). See also HEPPLER, *supra* note 70, at 165–72.

77. For the U.S. Social Security Administration's list of social security or totalization agreements with foreign governments, see Social Security Online, *U.S. International Social Security Agreements*, http://www.ssa.gov/international/agreements_overview.html (last visited Mar. 6, 2010). See also John F. Woyke, *Compensating the Internationally Mobile Executive*, *supra* note 69, at 97-18; for USAID Bilateral agreements, see InsideNGO: Operating Excellence for Global Impact, <http://www.insidengo.org/linkspages/linkspage.htm#rules> (last visited Mar. 6, 2010).

78. In the United States, employment status is governed by the Immigration and Nationality Act (8 U.S.C. §§ 1–1701 (2006)). Tax status is governed by the Internal Revenue Code (26 U.S.C. §§ 1–9833).

79. See generally Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 61, at 98-3 to -5.

80. For an introductory discussion of the international tax environment and the bases for taxation, see VAGTS ET AL., *supra* note 43, at 220–62. In New Zealand, these tax laws are known as the “residence rules” and “source rules,” and are contained in sections YD 1 and YD 4 (respectively) of the New Zealand Income Tax Act 2007 (“NZITA”). Income Tax Act 2007, 2007 S.N.Z. No. 97 § YD1, YD4, available at <http://www.legislation.govt.nz/act/public/2007/0097/latest/DLM1512301.html> (last visited Apr. 6, 2010) [hereinafter New Zealand Tax Act].

either the tax year or a rolling twelve-month period will trigger “tax presence” for purposes of local income tax.⁸¹ Of particular concern in this regard are local tax regimes that require employers to withhold and remit to local tax authorities applicable income taxes on behalf of the employee.⁸² Failure by the employer to withhold and remit income tax can result in significant penalties and interest for both the employer and the employee.⁸³ In some jurisdictions, failure to withhold is a criminal offense, subjecting company officials to fines and potentially imprisonment.⁸⁴

A practical problem for many college and university employers stems from the scenario where the duration of an overseas assignment is unclear. For example, a faculty member may be hired to teach full-time at a college or university’s campus in a foreign jurisdiction for a single semester. Unexpectedly, the assignment must be extended for a second semester, triggering tax presence after the applicable period elapses. In this scenario, the faculty member and the college and university may become liable for income tax/tax withholding *retroactive to the beginning of the*

81. See Indo-US DTA, *supra* note 31, at art. XVI (protecting a U.S. salaried employee from taxation in India where the employee’s stay in India does not exceed 183 days and other conditions are met.) However, it may be possible for professors/teachers to seek an exemption which may enable a claim for exemption from personal taxation in India for a period up to two years if the professor/teacher comes to India for the purpose of teaching or engaging in research at a university, college or other recognized educational institution in India. See *id.* at art. XXII. In New Zealand, the “183 day test” is set out in sections YD 1(3) and (4) of the NZITA. New Zealand Tax Act, *supra* note 80, at § YD1(3)-(4). There is also an independent “permanent place of abode” test in section YD 1(2) of the NZITA, which depends on the extent of connections with New Zealand rather than days physically present there. *Id.* at § YD 1(2).

82. See Indo-US DTA, *supra* note 31, at art. V(2)(1), XVI. In New Zealand, section RA 5 of the NZITA requires employers to withhold and account to the New Zealand Inland Revenue for tax known as “PAYE” (pay-as-you-earn) on behalf of their employees. New Zealand Tax Act, *supra* note 80, at § RA 5.

83. In New Zealand, section RA 10 of the NZITA provides that an employer who fails to pay employment related taxes owes a debt to Inland Revenue. New Zealand Tax Act, *supra* note 80, at § RA 10. Section RA 8 confirms that an employee may also be liable for any unpaid PAYE. *Id.* at § RA 8. Part IX of the New Zealand Tax Administration Act 1994 (“NZTAA”) contains the penalties regime which applies to unpaid tax: this includes 5% initial plus 1% incremental late payment penalties, as well as civil penalties that range from 20% to 150% of the unpaid tax (depending on the employer’s culpability). Tax Administration Act 1994, 1994 S.N.Z. No. 166, available at <http://www.legislation.govt.nz/act/public/1994/0166/69.0/DLM348343.html> (last visited Apr. 6, 2010) [hereinafter New Zealand Tax Administration Act]. Part VII of the NZTAA contains the provisions that impose interest on unpaid tax (the rate is set at the Reserve Bank of New Zealand’s 90-day bank bill rate plus 4.5%). *Id.* at § 120H; Taxation (Use of Money Interest Rates Setting Process) Amendment Regulations 2009, 2009 S.R. No. 6 (N.Z.).

84. In New Zealand, sections 143A, 143B and 147 of the NZTAA provide for criminal offences in relation to taxes, on the part of both an employer and its employees/officers. New Zealand Tax Administration Act, *supra* note 87, at §§ 143A, 143B, 147.

assignment.⁸⁵ Often times, the faculty member has not planned for this situation and the college or university employer is then in the awkward position of having to extract the applicable taxes retroactively from the employee's pay in order to come into compliance.⁸⁶ College and university counsel, in consultation with local tax counsel, should pay close attention to the local rules regarding taxation and communicate the practical risks to program administrators in advance of making faculty assignments to overseas locations.

4. Immigration Status vs. Employment Status/Labor Authorization

A common source of confusion for college and university counsel and administrators is the distinction between immigration status and employment status/labor authorization. In many jurisdictions, for example, U.S. citizens may lawfully enter the country and remain for a period of up to 90 days without obtaining a residency or other immigration-related visa.⁸⁷ Lawful entry in and of itself, however, does not normally confer upon a foreign national the privilege of working in the jurisdiction. In many cases, application must be made in advance for an appropriate employment visa or work permit.⁸⁸ Generally, such visas and permits must be sponsored by an employer with local standing⁸⁹, which in turn can require a college and university to pursue registration as an employer or in some instances formation of a local entity to act as the employer.⁹⁰ To further complicate matters, it can often take many months for a work permit application to be granted. In some jurisdictions, application for

85. See, e.g., Indo-U.S. DTA, *supra* note 31, at art. 5(2)(1), 16.

86. Well-crafted tax assistance policies for expatriates will often address the issue of reimbursement of foreign taxes paid, as discussed in Section V below.

87. See, e.g., Embassy of Austria — Washington D.C., Entry and Residence Permits, <http://www.austria.org/content/view/38/64/> (last visited Apr. 6, 2010); Government of Canada, Temporary Resident (Visitor) Visa, http://www.canada.international.gc.ca/washington/imm/visa_temp.aspx?lang=eng#CITIZENS (last visited Apr. 6, 2010); Embassy of Mexico in Washington, Consular Services, <http://portal.sre.gob.mx/usa/index.php?option=displaypage&Itemid=111&op=page&SubMenu> (last visited Apr. 6, 2010).

88. See generally Ravi Singhania, *India*, in 2B INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 57-87 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (“[U]nder [India’s] central government policy, an employment visa is required of foreign workers, and employment visas are issued only to foreigners who are skilled professionals and are engaged by companies, organizations, and economic undertakings as technicians, technical experts, senior executives, and the like. Applicants are required to submit proof of contract/employment/engagement by the company or organization in India”).

89. See generally Ravi Singhania, *India*, *supra* note 88, at 57-87 (“Applicants [for employment visas] are required to submit proof of contract/employment/engagement by the company or organization in India”).

90. See Appendix C, *infra*.

work permission may only be made from outside the jurisdiction.⁹¹ In some cases, work may commence provisionally upon submission of the appropriate application.⁹² Beginning work in country without work authorization is illegal and can subject both the employee and the employer to fines, deportation, and in some cases imprisonment.⁹³

The work permission conundrum is especially challenging for college and university employers. Many institutions have historically assigned faculty and administrative staff on a short-term basis—less than one year or even a single semester. The current study abroad trend is towards increased short-term programs, where students and faculty travel together to one or more foreign sites for a period of weeks.⁹⁴ Obtaining appropriate work permission for short term assignments can be very expensive and administratively burdensome. In some cases, work permission cannot be obtained in the time frame needed to accommodate academic calendars. Given that many faculty rely on access to certain countries to continue their academic research, employers should be wary of authorizing overseas assignment without first obtaining proper work authorization. A U.S. faculty member facing deportation or potential restrictions on re-entry due to the failure of his or her U.S. employer to obtain proper work authorization would certainly consider seeking damages against that employer for any economic damages (e.g. lost wages) suffered due to the oversight.⁹⁵

91. See, e.g., Migration Regulations, 1994, (Austl.) sched. 1, item 1223A, § 3 (ag), available at http://www.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/sch1.html (provisions requiring a visa application to be lodged outside Australia where the individual is applying for a work permit and being sponsored by an entity with no presence in Australia (e.g. wishing to set up in Australia)).

92. Enrique Munita, *Chile*, in *LABOUR & EMPLOYMENT 2009* at 58 (Law Business Research Ltd 2009) (Foreigners' Department of the Ministry of the Interior may authorize "permission to work with a visa currently under proceedings....").

93. See, e.g., Douglas G. Gilbert & Rhonda R. Shirreff, *Canada*, in *LABOUR & EMPLOYMENT 2009* at 50 (Law Business Research Ltd 2009) ("An employer that employs a foreign national who is not authorized to work in Canada is liable for fines ranging from C\$10,000 to C\$50,000 as well as imprisonment for a term of six months to two years."); Patricia Ponce Arteta, *Ecuador*, in *LABOUR & EMPLOYMENT 2009* at 82 (Law Business Research Ltd 2009) ("The main sanctions against employers who hire foreigners without a visa are fines and the prohibition on deducting as a company expense the salaries or any other expense incurred in relation to the foreigner. The foreigner can be deported."); Paola Tradati, *Italy*, in *LABOUR & EMPLOYMENT 2009* at 141 (Law Business Research Ltd 2009) ("...[E]mployer runs a risk under article 22(12) of the Immigration Act that 'the employer that employs, at his own instigation, a foreign employee without the required work permit is punished with imprisonment from three months to one year and a pecuniary penalty of E5,000 for each employee employed.'").

94. OPEN DOORS, *supra* note 1, at 1 ¶ 1.

95. See, e.g., *Bauman v. Sisco Stevedoring, LLC*, 560 F.Supp.2d 1181 (S.D. Ala. 2008) (lost wages awarded for employer negligence).

5. Tax Treaties and Social Security Conventions

Extensive consideration of tax treaties and social security conventions is beyond the scope of this Article's introductory treatment of overseas employment issues. College and university counsel should be aware, however, that the United States has negotiated double taxation and other tax related treaties with numerous foreign jurisdictions.⁹⁶ In essence, double taxation treaties allow tax residents of one country to deduct taxes paid to a foreign jurisdiction from their tax obligations in their home jurisdiction.⁹⁷ Absence of a double taxation treaty can present serious challenges for college and university employers as most faculty and administrators cannot afford to pay income tax in both their home and their foreign jurisdictions. Tax assistance policies and other similar measures should be developed by college and university employers to address those situations where relief from double taxation is not available (or where foreign tax rates are significantly higher than in the United States).

Similarly, social security conventions and totalization agreements between the United States and foreign jurisdictions are designed to provide relief from the application to foreign workers of local social security, retirement and other mandatory social benefit schemes.⁹⁸ These agreements generally provide that, upon proof of participation in a foreign social benefit scheme, a foreign national working in a host country will not be compelled to contribute to the host country's social benefit program.⁹⁹ Such agreements typically provide for up to 5 years of relief, after which time foreign nationals are required to participate.¹⁰⁰ Familiarity with these

96. For a list of countries with which the United States maintains double taxation treaties, see U.S. Tax Treaties, <http://www.unclefed.com/ForTaxProfes/Treaties/index.html>. See also John F. Woyke, *Compensating the Internationally Mobile Executive*, *supra* note 69, at 97-18; VAGTS, *supra* note 43, at 252-62 (discussing generally tax treaties).

97. See generally VAGTS, *supra* note 43, at 245-62 (discussing generally double taxation).

98. See Frederique Sauvage, *France*, *supra* note 67, at 4-8 ("Irrespective of the choice of law applicable to [an] employment contract, the question of whether [an] employee will be covered by the French social security system needs to be looked into. In this regard, unless otherwise provided by a treaty allowing for the employee to continue being subject to a social security system other than the French one, French social security contributions are applicable to all employees working in France, irrespective of the duration of employment.").

99. See, e.g., Agreement on Social Security art. 6, U.S.-Fr., Mar. 2, 1987, 1516 U.N.T.S 26266.

100. See John F. Woyke, *Compensating the Internationally Mobile Executive*, *supra* note 73, at 98-20 ("many reciprocal treaties and tax benefits will expire" after five years have elapsed, and the employee may be considered localized, under host country law"). "Typically expatriate agreements are for a period of less than five years, because many reciprocal treaties and tax benefits will expire thereafter and the employee may be considered localized, and subsequently subject to many of the tax and social benefit obligations of host country residency." *Id.*

conventions is important for college and university counsel and administrators, as social benefit contribution costs can amount to nearly 40% of gross salary costs in certain countries, especially in the European Union.¹⁰¹

6. Employer Liability

College and university counsel should be sure to explore with local counsel any local obligations with respect to worker's compensation and similar employer liability schemes.¹⁰² In addition, there are a number of competitive underwriters in the United States that will write foreign worker's compensation and employer liability policies for U.S. colleges and universities.¹⁰³ Care should be taken to understand the universe of employees—host country nationals (HCNs), third country nationals (TCNs) and expatriates that will be covered in any given circumstance.

7. The Independent Contractor Trap

As a general matter, many of the most significant work related laws in foreign jurisdictions depend on the existence of an employment relationship.¹⁰⁴ In the United States, courts examine a variety of factors to determine the effective level of control that the hiring entity exercises over the engaged individual in areas such as supervision of work assignments, establishment of terms and conditions of work (e.g. pay, work schedules, work methods), and provision of resources needed to accomplish work assignments.¹⁰⁵ Classification of individuals working overseas for

101. See Social Security Online, 77 note 81.

102. See, e.g. Ravi Singhania, *India*, *supra* note 88, at 57-73 (“The Workmen’s Compensation Scheme was established by the Workmen’s Compensation Act, 1923 and is administered by the Ministry of Labour The Workmen’s Compensation Scheme is an employer liability scheme. All employers are required to obtain workers’ compensation insurance for all workers in their employ, unless they have been exempted from doing so.”); Julian Fiechter et al., *Austria*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 9-62 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (Austria requires employers to contribute toward occupational injury insurance); Lubos Tichy et al., *The Czech Republic*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 11-56 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) (Czech Republic imposes employer liability for work-related injuries and occupational illness); Jacob Sand, *Denmark*, *supra* note 71, at 12-52 (Denmark requires employers to contribute to a fund — amount based on the number of employees and number of “industrial diseases” typical in that line of business).

103. See, e.g., ACE Group — A Leading Global Insurance Organization, <http://www.ancelimited.com/AceLimitedRoot/>.

104. Manley & Barney, *supra* note 57, at 96-23.

105. See, e.g. CORPORATE COUNSEL’S GUIDE TO INDEPENDENT CONTRACTORS § 101.009 (Thomson West ed., 2004); COMM. ON DEV. OF THE LAW UNDER NAT’L LABOR RELATIONS ACT, AM. BAR ASS’N, THE DEVELOPING LABOR LAW, 2131-68 (Patrick Hardin & John E. Higgins eds., 4th ed. 2001).

educational institutions is a thorny issue. As a general matter, foreign jurisdictions apply their own version of a totality of facts and circumstances test.¹⁰⁶ For example, under South Africa's Basic Conditions of Employment Act (BCEA),¹⁰⁷ a person is deemed to be an employee if one or more of the following factors are present:

- The manner in which the person works is subject to the control or direction of another person;
- The person's hours of work are subject to the control or direction of another person;
- In the case of a person who works for an organization, the person is part of that organization;
- The person has worked for another person for an average of at least 40 hours per month over the last three months;
- The person is economically dependent on another person for whom the person works or renders services;
- The person is provided with tools of trade or work equipment by another person; or
- The person only works for or renders services to one person.¹⁰⁸

Due to the relatively high cost of employer related social benefit contributions, the generally lower tax burden applied to independent contractors, and the exemption from unfair dismissal claims at termination,¹⁰⁹ college and university administrators and in-country local staff members are often highly motivated to classify local staff as

106. See e.g., Andreas Lauffs, *China*, *supra* note 53, at 55-9 ("The term 'employee' does not include independent contractors who are engaged on a contract (*laowu hetong*) basis. Whether a person is providing services as an independent contractor or employee is decided not by the title chosen by the parties, but by the facts. This distinction governs whether or not the Labor Law applies to the relationship, a vital consideration in that only employees qualify for social security payments and employment protection rights. Distinguishing between independent contractors and employees depends on a number of factors, such as whether the employer's policies and procedures are applied to the individual, and whether the individual carries out work for compensation arranged by the employer.").

107. Basic Conditions of Employment Act 75 of 1997 (S. Afr.)(amended 2001, 2002), available at <http://www.info.gov.za/view/DownloadFileAction?id=70820>.

108. Basic Conditions of Employment Amendment Act 11 of 2002 § 83A (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=68045>.

109. See, e.g., E. Johan Lubbe, *South Africa*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 50-16 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) "A person's classification as an 'independent contractor,' rather than an 'employee,' typically gives the principal (or the alleged employer) greater flexibility. For example, when the relationship is terminated, an independent contractor may not claim unfair dismissal as an employee may be entitled to do." *Id.* at 50-16 n.69. "The existence of an 'employment relationship,' as opposed to an 'independent contractor' relationship, is a jurisdictional fact for the unfair dismissal provisions of the [Labor Relations Act] to apply." *Id.* (citing AVBOB Mut. Ass'n Soc'y v. Comm'n for Conciliation, Mediation & Arbitration 2003 (24) I.L.J. 535 (LC) at 538 (S.Afr.)).

independent contractors. This keeps the program costs lower and, unfortunately, can be a common practice among local businesses that do not operate with the profile of an international organization. There are numerous problems with misclassifying employees as independent contractors, however, including failure to comply with local collective bargaining agreements, failure to withhold and remit income tax, and failure to contribute to mandatory retirement and other social benefit schemes, among others.

For college and university employers, classification rules can be very tricky. For example, employment of local nationals to provide periodic language courses on a seasonal but regular basis (e.g. per semester) can lead to a finding of a permanent employment relationship.¹¹⁰ Part-time lecturers, if engaged on a regular basis, can also be considered employees in some jurisdictions. Longer-term misclassification nearly always rears its ugly head at the time the college and university wants to separate from the independent contractor. Because foreign labor tribunals strongly favor host national employees, especially when pitted against foreign employers, a negative finding in a labor action can result in significant fines, penalties, interest and payment of back retirement benefits. College and university counsel are well advised to seek local counsel's advice on each of the individuals and service providers that will be involved in the foreign activity and be sure to observe and if necessary document the appropriate classification at the time of engagement.

8. Who is the Employer?

As noted briefly above, an important threshold issue is whether or not a

110. In Brazil, for example, employment agreements for specific projects/fixed terms are only permitted by Brazilian Labor Law as an exception. *See* Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-26. The general rule is to hire employees for an indefinite term. *Id.* Accordingly, fixed-term contracts are accepted only in the following situations: (i) trial period (in which case the term cannot exceed 45 days with the possibility of one renewal for the same period – total of 90 days; and (ii) to perform determined seasonal or transitory activities (in both cases the term cannot exceed 2 years and any renewal of the agreement results in considering it an agreement effective for an indefinite term). Lei No. 5452 [Consolidation of Brazilian Labor Laws – CLT], de 1 maio de 1943, D.O. de 9.8.1943, art. 443 para. 2 (Brazil). In the case of language teachers providing Portuguese language classes for a part of each semester of a study abroad program, it is likely that such employees will be rendering services which will be permanent (e.g. will correspond to the institution's core activity), although seasonally. Although Brazilian labor law authorizes fixed-term contracts, if the activity performed by the employee is the core activity of the institution (therefore, a permanent one), the contract may be considered as entered for undetermined term. *See* T.R.S.T., São Paulo Labor Court of Appeals. Proceedings No. 00215-2007-255-02-00-9 - Decision No. 20090828547 (October 13, 2009). "Fixed term agreement. It is not within the characteristics of a fixed term employment agreement the hiring of an employee to perform activities within the employer's corporate purpose" *Id.* (citing CLT art. 443, para. 2).

U.S. college and university may directly employ individuals as employees in the host country—whether they are Host Country Nationals, TCNs or Expats. Early local counsel on this question is crucial to avoid potentially serious tax, labor and other consequences. In some countries, such as France, Russia, Vietnam, the PRC and Brazil, the local labor code requires that a locally recognized employer engage local staff.¹¹¹ In other countries, such as Taiwan, there is no requirement for a local employer *per se*, but, in order to remit local employment related taxes, the employer must have a local entity/registration to effect payment.¹¹² In some countries, such as Malaysia and Mozambique, the commercial code triggers registration or company formation requirements upon the engagement of the first employee in the host country.¹¹³

It should also be noted that often times engaging local employees or assigning expats to work in a host country constitutes “doing business” in the host country.¹¹⁴ Once such a nexus is established, issues of registration, corporate taxation, labor compliance, financial reporting, etc. are immediately presented.

III. EMPLOYMENT AGREEMENT CONSIDERATIONS

A comprehensive treatment of employment agreements in the international context is beyond the scope of this Article.¹¹⁵ This section will provide an overview of the typical types of employment agreements found in the international employment context and discuss some of the threshold issues to consider when entering into employment agreements.¹¹⁶

A couple of generally applicable principles should be borne in mind, however, when consulting with local counsel. First, in many jurisdictions

111. See, e.g., Andreas Lauffs, *China*, *supra* note 54, at 55-5, 55-7 (citing Company Law (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 1993, effective July 1, 1994) (P.R.C.)); Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-68 (citing Lei No. 6815, de 19 de agosto de 1980, D.O.U. de 21.08.1980, amended by Lei No. 6964, de 9 de dezembro de 1981, art. 99)(Brazil).

112. See John Briggs, Forming and Concluding Foreign Employment Relationships, Presentation at National Association of College and University Attorneys Conference on Compliance Programs 4 (Apr. 20, 2007), available at <http://www.nacua.org/nacuanet/NACUAResourcePages/Docs/InternationalPrograms/BriggsOutline.pdf>.

113. *Id.*

114. In India, for example, provisions of the Indo-US DTA concerning the creation of a Permanent Establishment for tax purposes can be triggered by the presence of a single employee of a foreign entity. See Indo-U.S. DTA, *supra* note 31, at art. 5(2)(l).

115. For an excellent treatment on the topic of expatriate employment agreements, see Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 61.

116. For excellent examples of clauses and drafting considerations for foreign employment engagements, see John Briggs, *supra* note 112.

(e.g. France, PRC, Poland, Russia), local labor rules require that the employer and employee document their labor relationship in the form of a written agreement.¹¹⁷ Other jurisdictions permit written agreements between employers and employees (e.g. Germany, Sweden, Japan, Australia).¹¹⁸ And still others (e.g. South Africa, United Kingdom, Japan) require the development of written work rules for all employees.¹¹⁹

A. Types of Employment Agreements

In general, there are five common types of employment agreements in the international context. The “Indefinite Period” agreement fixes no end date for the employment relationship;¹²⁰ termination and other applicable

117. See, e.g., Labor Contract Law (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008), art. 10 (P.R.C.) (China employers must conclude a written employment contract with each of their employees); Opinion on Several Issues Concerning the Thorough Implementation of the Labor Law (promulgated by the Ministry of Labor, Aug. 4, 1995) 1995 Lao Bu Fa 309, art. 16 (P.R.C.); Frederique Sauvage, *France*, *supra* note 67, at 4-8, 4-9. France requires written agreements. *Id.* (citing C. Trav. arts. L120 to -4, L 121 to -10, L 122 -54. See also Council Directive 91/533, 1991 O.J. (L 288) (EC); Andrzej Czopski, *Poland*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 17-18 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Poland Labor Code, art. 29 requires written labor agreements); Elena G. Barikhovskaya, *Russia*, *supra* note 75, at 41-21 (Russian Labor Code art. 67 and S. Ct. Decree No. 2, cl. 12 requires written labor agreements within the first three days of employment).

118. See, e.g., Walter Ahrens & Mark S. Dichter, *Germany*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 5-10 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Germany followed EU Directive 91/533 of October 14, 1991 by passing the Statute Concerning Notice of Relevant Terms and Conditions of Employment, Jul. 20, 1995); Reinhold Fahlbeck & Bernard Johann Mulder, *Sweden*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 19-22 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Sweden, which honors oral contracts, followed EU Directive 91/533 through the implementation of 1982 Employment Protection Act §6(a)); Setsuko Ueno & Marjorie Culver, *Japan*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 56-14 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (discussing Japan’s Labor Standards Law of 1947); John Cooper & Julian Clarke, *Australia*, in 2B INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 70-15 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (discussing Australia’s Workplace Relations Act of 1996).

119. Except in limited circumstances (e.g., employment of children under 15 years of age), South African law does not require written employment agreements with employees. See E. Johan Lubbe, *South Africa*, *supra* note 109, at 50-18 (“Section 29 of the BCEA, however, does impose an obligation on employers to provide newly hired employees who will be working more than 24 hours per month with ‘written particulars of employment,’ a statement setting out the essential terms and conditions of employment.”). See also Paul Callaghan, *United Kingdom*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 8-16 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (The U.K. requires written “terms and conditions” relative to employment, pursuant to Section 1 of the Employment Rights Act of 1996); Setsuko Ueno & Marjorie Culver, *Japan*, *supra* note 118, at 56-10 (discussing Japan’s Labor Standards Law of 1947, art. 89).

120. See Frederique Sauvage, *France*, *supra* note 67, at 4-10 (“A contract for an

procedures are usually prescribed by the applicable labor code.¹²¹ “Fixed Period” agreements generally fix an end date for employment,¹²² after which the employer generally has no further contractual obligations.¹²³ It is important to note, however, that utilization of successive “Fixed Period” agreements beyond two periods, or about two years, is generally prohibited.¹²⁴ Courts will often apply statutory and other benefits as if an employee were subject to an “Indefinite Period” agreement if the employer continues to issue successive “Fixed Period” contracts to its employees.¹²⁵

indefinite period is made without limitation in time and is the standard employment relationship in France. Any employment contract that is not validly concluded for a fixed period is deemed to be in force for an indefinite period.”) See also Labor Contract Law (P.R.C.), *supra* note 117, at art. 14 (open-ended employment contract is a contract where the employer and worker have agreed that the contract does not have a definite date of conclusion); Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-26. “In the absence of a specific termination date, it is presumed that a contract is for an indefinite period. This presumption is rebuttable, but is so strong that the existence of a contract for a fixed period must be proved by the party claiming there is a termination date.” *Id.* (citing Amauri Mascaro Nascimento, *History of Labor Law in Brazil, in A PANORAMA OF BRAZILIAN LAW* 235, 251 (Jacob Dolinger & Keith Rseñ eds., 1992)).

121. See e.g. Employment Contract Law (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008 (limiting the number of fixed-term contracts that an employer may sign). See also Andreas Lauffs, *China*, *supra* note 54, at 55-11, 55-12 (discussing Article 2 of the Shenzhen Labor Contracts Regulations and Article 15 of the Beijing Labor Contracts Regulations).

122. See Frederique Sauvage, *France*, *supra* note 67, at 4-10. “Contracts entered into for a set term are an exception to the standard French employer-employee relationship, which is entered into for an indefinite period of time. An employment contract may be concluded for a fixed term only if the conditions set by the Labor Code are met. Such a contract may not be used in connection with the normal and permanent activities of the employer. The reason for entering into the fixed term employment contract must be clearly stated in the contract, which must be evidenced in writing. Failure to meet the conditions for a valid fixed term employment contract result in its requalification into an agreement with no fixed term.” *Id.* (citing C. TRAV. art. 122-3-1 (Fr)). See also Labor Contract Law (P.R.C.), *supra* note 117, at art. 13 (fixed term employment contract is one where the concluding date of employment is established and agreed upon by the employer and the worker); Lei No. 10.406, de 10 de janeiro de 2002, D.O.U. de 11.1.2002, art. 596 (Brazil) (provisions on contracts for a fixed term).

123. *But see* Frederique Sauvage, *France*, *supra* note 67, at 4-11. “At the term of a fixed term agreement, the employee is entitled by law to a payment of 10 percent of the gross compensation received during the term of the agreement to compensate the employee for having been employed pursuant to a fixed-term agreement.” *Id.* (citing C. TRAV. art. L 122-3-4).

124. See *id.* at 4-10. “A contract for a fixed term may be renewed once. However, it must not, in most instances, exceed a maximum of 18 months, including the renewal period.” *Id.* (citing C. TRAV. art. L 122-1-2 (Fr.)). See also Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-26 to -27. “[T]he terms of . . . permissible fixed-term employment contracts [in Brazil] may not exceed a term of 2 years. . . . The law only permits one extension of an existing contract for a fixed term.” *Id.* (citing Consolidacao das Leis do Trabalho, arts. 445, 451 (Brazil)).

125. See Frederique Sauvage, *France*, *supra* note 67, at 4-10. “Failure to meet the conditions for a valid fixed term employment contract result in its requalification into

For colleges and universities that commonly issue successive one year contracts to foreign faculty, care should be taken to recognize that after about two years, the relationship will likely automatically be considered a permanent one, potentially triggering substantial termination benefits and indemnities at the end of the period of employment.

“Temporary Period” agreements are a variation on the fixed term agreement and may be used in limited circumstances to engage employees for limited periods and for specific purposes.¹²⁶ “Specific Purpose” or “On-Call” agreements have also been developed more recently to assist employers in managing staffing needs, without the need for full-time permanent hiring.¹²⁷ Finally, “Secondment” agreements are sometimes used to temporarily assign an employee from one employer to another employer or affiliated entity and can be helpful in preserving the primary employment relationship and attendant benefits and seniority.¹²⁸

B. Standard Agreement Terms

Where a written employment agreement is required by foreign law or is desirable for the clear administration of the employment relationship between a U.S. college or university and an employee working abroad, there are a number of standard terms and conditions to be considered for inclusion. Generally speaking, the employment agreement should address such foundational issues as:

- Definition of the contracting parties (especially if a local affiliate of the college or university will be the formal employer)¹²⁹

an agreement with no fixed term.” *Id.* (citing C. TRAV. art. L 122-3-1 (Fr.)).

126. See Labor Contract Law (P.R.C.), *supra* note 117, at art. 15 (permitting contracts which “expire upon the completion of a certain job”); Pedro Romano Fragoso Pires & Carla Alves Peterson Correa, *Brazil*, *supra* note 65, at 75-30 to -31. “‘Temporary labor’ is defined by statute as ‘that rendered by an individual to a firm, because of a temporary need to substitute its regular permanent staff or an extraordinary increase in business.’” *Id.* (citing Lei 6.019, de 3 de janeiro de 1974, D.O.U. de 04.01.1974, I Colecao art. 2 (Brazil)).

127. For example, Spain allows the formation of temporary employment contracts for the performance of a specific task of service. See Lourdes Martin Florez & Alvaro Navarro Cuellar, *Spain*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 7-17 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Royal Decree 2720/1998 of Dec. 18, implementing SW art. 15 on temporary employment contracts); E. Grace van Arkel & Cees J. Joonstra, *The Netherlands*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 6-25 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Book 7, Title 10 of the The Netherlands Civil Code (governing employment agreements) allows for the formation of “on-call” pre-agreements (*voorovereenkomst*) between employers with varying workflow or seasonal tasks, and employees).

128. For an illustration of and rationale for typical secondment agreement provisions (in dicta,) see *Eschelbach v. CCF Charterhouse/Credit Commer. de Fr.*, 2006 U.S. Dist. LEXIS 50672, at *24 (S.D.N.Y. July 25, 2006).

129. Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 61, at 98-2.

- At-will versus fixed-term engagement¹³⁰
- Choice of law and jurisdiction¹³¹
- Dispute resolution¹³²
- Term of employment and renewal¹³³
- Reassignment¹³⁴
- Localization¹³⁵
- Scope of employment¹³⁶
- Foreign language requirement¹³⁷
- Compensation, benefit plans, social security, and stock plans¹³⁸
- Notice and termination¹³⁹
- Repatriation and severance packages¹⁴⁰
- Post-employment obligations and restrictions: confidential information, trade secrets and restrictive covenants¹⁴¹

C. Mandatory Agreement Provisions

As noted above, the labor codes and other sources of law in many countries prescribe certain mandatory provisions that must be recited in an employment agreement or that will be automatically read into the agreement by the local labor court. Examples of these include prescriptions as to the content and form of the agreement,¹⁴² probationary

130. *Id* at 98-3.

131. *Id* at 98-5 to -12. See also F. Gamillschegg & M. Franzen, *Conflicts of Laws in Employment Contracts and Industrial Relations*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 160-80 (R. Blanpain & C. Engels eds., 6th ed. 1998).

132. Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 61, at 98-12 to -19.

133. *Id.* at 98-19 to -21.

134. *Id.* at 98-21.

135. *Id.* at 98-21 to -22. “Localization” is a term used to describe a process whereby an employee engaged initially on an expatriate basis (with home office salary and perquisites), after a period of years, is moved to a salary and benefits package that more closely approximates the local labor market conditions. *Id.*

136. *Id.* at 98-23.

137. *Id.* at 98-23.

138. Lazar, *Negotiation and Drafting Expatriate Employment Agreements*, *supra* note 65, at 98-24.

139. *Id.* at 98-32 to -37.

140. *Id.* at 98-37 to -38.

141. *Id.* at 98-39 to -47.

142. For example, Germany requires a written notice to employee including ten specific categories of information such as date employment commenced, expected period of employment, annual leave and compensation and benefits. Walter Ahrens & Mark S. Dichter, *Germany*, *supra* note 118, at 5-10 to -11. If salary amount is not specified, employee is entitled to claim a “usual” salary, which is generally held to be equivalent to what the salary under an applicable collective bargaining agreement

periods (generally 30 days¹⁴³ to 6 months¹⁴⁴), and leave provisions.¹⁴⁵

D. Common Agreement Traps

College and university counsel should be aware of several common traps when dealing with employment agreements. In many jurisdictions an “offer letter” that states all of the basic employment terms can create a contract and preclude negotiation of additional terms and conditions favorable to the employer’s position (e.g. probation periods, mandatory arbitration, governing law, etc.).¹⁴⁶ Blithely reciting the local labor statutes can lead to residual contractual entitlements. Agreements to agree are generally unenforceable, and inclusion of speculative terms such as contingent compensation can lead to serious disputes with employees down the road.

E. Modification of Terms and Conditions: Constructive Dismissal

Care needs to be taken when seeking to modify the terms and conditions of employment agreements in the international context. Many jurisdictions adopt a general standard of “constructive dismissal” that can lead to unintended and harsh consequences for the employer. In South Africa, a unilateral change to an employee’s terms and conditions of employment by the employer and without the employee’s consent can amount to an automatically unfair dismissal, an unfair dismissal, or a constructive dismissal. An employee may be reinstated with retrospective effect or awarded up to 24 months’ remuneration as compensation for an automatically unfair dismissal, or up to 12 months’ remuneration for an unfair dismissal or a constructive dismissal.¹⁴⁷ In France, unless otherwise

would be. *Id.* at 5-11.

143. See, e.g., David J. Millstone & Judit Nador, *Hungary*, in 2A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 14-30 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (discussing Hungarian Labor Code §91).

144. Italy requires that employment contracts include any applicable probationary period, which may vary in length depending on the category of employment (with a maximum of six months for upper management) pursuant to an applicable National Collective Bargaining Agreement. See Piergiovanni Mandruzzato, *Italy*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 6-13 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009) (Italy Civil Code, Article 2096).

145. See *supra* note 142 discussing German law.

146. The Netherlands only requires an offer and acceptance to form an employment agreement, which may be either oral or written. E. Grace van Arkel & Cees J. Joonstra, *The Netherlands*, *supra* note 127, at 16-22. Certain terms may not be incorporated at a later time (such as a provision requiring a mandatory probationary period), if not agreed upon in writing at the onset. *Id.* at 16-23.

147. Labour Relations Act 1995, 1995 S.N.Z. No. 66 (N.Z.) § 194. In *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd*, the South African Court of Appeal held that an employer’s termination of a group of shift workers for failing to agree to a change in shift schedules was an automatic unjust dismissal and ordered their

provided in the employment agreement, an employee is permitted to refuse a substantial modification to his or her employment agreement. If the employer does not obtain the proper consent, the employee can claim that the employment contract was modified to his or her detriment, and bring a constructive discharge claim.¹⁴⁸ Generally speaking, these examples show that unilateral action of the employer that substantially modifies a material term or condition of an employment agreement to the detriment of the employee without effective ratification by the employee can result in a finding of constructive or unjust dismissal.

IV. TERMINATION OF EMPLOYMENT

As noted above, the concept of “at-will” employment does not generally apply in jurisdictions outside of the United States. Great care needs to be taken when considering severing the employment relationship with employees working overseas. Local labor counsel should be consulted as early as possible to ensure that all applicable regulations and procedures are followed to avoid claims of “unjust dismissal” or other punitive action.¹⁴⁹

Immediate termination of employment can frequently be achieved in cases of serious dereliction of duty, fraud, theft and other serious misconduct. Many times the bases for immediate termination are set forth in the relevant statutory framework. In Ecuador, for example, upon presentation to the labor inspector, employment may be terminated for the following reasons under the Labor Code:¹⁵⁰

- Worker repeatedly arrives late to work or cannot justify his/her tardiness or when worker abandons his/her post without just cause for more than three consecutive days so long as said

reinstatement with retroactive effect. *Chemical Workers Industrial Union v. Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).

148. Carole E. Scott, *Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France*, 7 *SAN DIEGO INT'L L.J.* 341, 360 (2006).

149. LARRY A. DiMATTEO, *supra* note 31, at 274. “For example, the Russian Labour Code makes it very difficult for the employer to terminate employment. Furthermore, the written contract is the basic form for commencing an employment relationship and there are detailed requirements for dismissing employees.” *Id.* (citing *Trudovoi Kodeks RF [TK] [Labor Code] arts. 77-84 (Russ.)*). For college and university employers, agency principles in the local context must be studied to ensure that nothing contained in a commercial agency contract is repugnant to imperative [mandatory] provisions of any law applicable to the contract. *Id.* at 276. “In many countries a non-resident principal will be liable for tax if the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the principal. For instance, when a principal appoints an agent in a foreign country, with a fixed office therein and with power to make contracts on his behalf, the principal may be deemed to be carrying on a business in that foreign country and be taxed accordingly.” *Id.* (citing Council Directive 86/653, 1986 O.J. (L 382) 7 (EC)).

150. Patricia Ponce Arteta, *Ecuador, supra* note 93, at 84-85.

- causes were produced within a monthly period of work;
- Serious acts of indiscipline or disobedience in violation of legally approved internal regulations;
 - Lack of integrity or immoral conduct of the worker;
 - Serious damage caused to the employer, the employer's spouse, relatives, or representative;
 - Worker's unfitness for the job for which he or she was hired;
 - Unjustified accusation against the employer with respect to its social security obligations. If such an accusation is justified, the worker will be guaranteed job security for another two years;
 - Failure to follow safety, preventive and sanitary measures required by law, regulations or a competent authority; or failure to follow a doctor's prescriptions and orders without justification.

Employment termination without a valid legal basis will most often be considered unjust termination and result in damages, penalties and sometimes reinstatement. Unjust termination may subject organizations and their representatives to criminal penalties (in extreme cases, imprisonment) as well as civil sanctions. For example, in France, unjust termination in violation of the French Labor Code is likely to give rise to a significant award of damages to the employee, in addition to fines payable by the employer.¹⁵¹ In these recent challenging economic times, colleges and universities should not rely on the U.S. expectation that poor economic conditions or "redundancy" will provide a valid basis for employment termination. Damages can be significant, as demonstrated by the Ecuador Labor Code, which awards one month salary for each year of service (up to 25x monthly salary) for employees with more than 3 years of service, plus a bonus equal to 25% of the last monthly salary for each year of service.¹⁵²

A valid or just termination generally can only be effected by conforming to the cause, process and procedure standards applicable in the relevant jurisdiction. Certain jurisdictions (France, UK) require strict pre-termination procedures and meetings with employees and care should be taken not to communicate a final decision before affording the required process. In the UK, for example, the following steps must be followed in order to implement a valid reduction in force of 20 or more employees:¹⁵³

- Verbal announcement
- Written confirmation of announcement

151. In France, unjust termination in violation of the French Labor Code is likely to give rise to a significant award of damages to the employee in addition to other fines, payable by the employer. 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS 4-22 & 4-23 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009).

152. Patricia Ponce Arteta, *Ecuador*, *supra* note 96, at 84-85.

153. The generally applicable employment legislation in the UK is the Employment Rights Act of 1996. Employment Rights Act, 1996, c. 18 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1996/ukpga_19960018_en_1.

- Written invitation to meeting #1
- Discuss ideas and alternatives
- Written invitation to meeting #2
- Respond to ideas and alternatives
- Written confirmation with appeal process
- Conduct appeal meetings and confirm
- Distribute waivers and pay for legal review
- Execute waivers and separate

It is always important to remember that foreign labor courts will generally favor the employee in disputed termination scenarios. In addition, care should be taken to distinguish between the provision of “notice” and the provision of “severance”. They have different meanings and sometimes inartful drafting can extend the length of time for which an employer may be liable for termination indemnities. As in the United States, releases of claims must generally be supported by new consideration. And finally, all termination documentation must follow the local country language requirement and protocols.¹⁵⁴

V. BENEFITS

The range of employment related benefits available to college and university employees working overseas is huge. This section will briefly overview the typical benefit schemes that will be encountered by college and university counsel and administrators. As a general matter, colleges and universities employing staff abroad will be required to observe the local laws and regulations concerning employment related benefits. These benefits are specific to each country, but almost universally include mandatory retirement schemes.¹⁵⁵ Other examples include:

- Vacation pay
- Sick pay
- Maternity benefits¹⁵⁶
- Worker re-training funds
- Worker’s compensation funds
- Commuter travel allowances

154. See, e.g., C. TRAV. arts. L1232-2, L1232-3, L1232-4, L1232-7.

155. For example, the French Labor Code provides for mandatory retirement schemes, as paid through the national social insurance system, or, in some cases, as required by collective bargaining agreements. 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS 4-97 & 4-98 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009).

156. In India, The Maternity Benefit Act, No. 53 of 1961 provides for paid maternity leave at full salary for up to 12 weeks. 2B INTERNATIONAL LABOR & EMPLOYMENT LAWS 57-82 to 57-85 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009).

- Meal allowances
- Housing allowances
- Public health insurance schemes
- Short and long term disability schemes
- “13th month” salary¹⁵⁷

The cost of social security and other benefit schemes can be formidable, so careful planning should be undertaken to understand the full cost profile of a local hire before any offer of employment is tendered.

Navigating policy issues as they relate to benefits, both mandatory and customary, presents unique challenges for the multinational college and university employer. For true expatriates—faculty or staff employed in the United States and assigned for limited duration in a foreign country – the cost of local mandatory retirement schemes must be borne by both employer and employee with little hope that any benefits will ultimately accrue to either.¹⁵⁸ This raises the costs of running overseas programs, as both U.S. and local retirement benefits must be paid by the parties. Expats with full international health benefits contracted in the United States to cover their overseas stay often face similar mandatory health benefit schemes in countries where the public facilities available to them do not meet the standards typically expected by a U.S. employee.

With regard to host country nationals, enrolling in the local mandatory retirement and other benefit schemes can be time consuming and the terms and amounts of benefits can change dramatically due to changes in economic conditions or in the political landscape. As noted above, such schemes typically apply from the very first employee hired locally, thus adding to start up costs in potentially unanticipated ways. Sometimes local employers engage in labor practices designed to avoid paying full benefits for their host country national employees. Sometimes these practices are so ingrained that a U.S. college or university’s local managers will assume that the college or university should follow the local custom, even if technically in violation of local law. It is important to remember, however, that U.S. colleges and universities are visible international organizations when working overseas, particularly in lesser developed countries. After years of pressure from the World Bank, the International Monetary Fund

157. The “13th Month” salary generally refers to the additional one month of salary paid to employees, especially in South America, in respect of vacation. *See* Patricia Ponce Arteta, *Ecuador*, *supra* note 93, at 83 (“Christmas bonus or 13th salary . . . consists of a sum equivalent to the twelfth part received by the employee in the 12 months from 1 December of the previous year to 30 November of the year the payment is made. For this payment, all remunerations, including overtime pay, are added to the employee’s earnings.”). Ecuador even has a School bonus or 14th salary, which is equivalent to the base unified salary and is paid each year by the 15th of August in the highlands and Oriente, and by the 15th of March in the coastal area. *Id.* at 84.

158. But see the discussion of totalization agreements and tax treaties, *supra* part II.B.2, which may provide some relief.

and other multi-lateral international agencies to get serious about tax policy and enforcement,¹⁵⁹ many countries are looking first to international employers to exercise their new enforcement muscles, particularly because international employers often offer salaries at the higher end of the local scale.

Given the anticipated growth in international programming, U.S. college and university administrators need to think through policies in at least three key areas: compensation philosophy, tax assistance and currency protection. In the compensation area, decisions are required up-front as to whether staff working overseas (whether local nationals or expats) will be compensated at a local rate and in line with local market conditions or at rates tied to U.S. based salaries.¹⁶⁰ For expats, many institutions begin with a U.S. based salary, plus a formula for location allowances indexed to local market conditions.¹⁶¹ A key rationale for this approach is that faculty or staff on temporary assignment overseas must also cover the costs of maintaining their U.S. residences and commitments, at least to some degree. After a period of years, however, this assumption (and the high costs to the employer) prompts most employers to transition even expat staff towards local salary and benefit scales.¹⁶² Where significant numbers of U.S. based faculty or staff are assigned to multiple overseas locations, a compensation philosophy that balances equity in base pay for similar positions (e.g. overseas faculty) with the sometimes dramatically different salary scales and costs of living from country to country (e.g. Ghana vs. Switzerland) is critical.

A second key benefits policy to consider is tax assistance. Tax rates in

159. At a joint meeting between The Organization for Economic Cooperation and Development (OECD) Committee on Fiscal Affairs (CFA) and the OECD Development Assistance Committee (DAC), the two Committee chairs announced the creation of a Task Force on Tax and Development. *See* Joint Meeting on Tax and Development between the Committee on Fiscal Affairs (CFA) and the Development Assistance Committee (DAC), The Organization for Economic Cooperation and Development (Jan. 27, 2010), *available at* <http://www.oecd.org/dataoecd/7/36/44493096.pdf>.

160. For a general treatment of compensation issues in the international employment context, see STEPHEN PERKINS & SUSAN SHORTLAND, *STRATEGIC INTERNATIONAL HUMAN RESOURCE MANAGEMENT* 137 (2d ed. 2006)(discussing choices and consequences in international employee compensation). *See also* PETER J. DOWLING, DENICE E. WELCH, & RANDALL S. SCHULER, *INTERNATIONAL HUMAN RESOURCE MANAGEMENT* 181 (3d ed. 1999).

161. PETER J. DOWLING, DENICE E. WELCH, & RANDALL S. SCHULER, *supra* note 160, at 182–87. 162. This transition is known in international human resources circles as “localization.” *See, e.g.*, Expat localisation: policy versus practice, HR Story, Expatica The Netherlands, *available at* <http://www.expatica.com/hr/story/Trends-in-expat-localization-policies.html>.

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some jurisdictions can approach 45% of gross wages when the costs to the employee of locally mandated benefits are added into the equation. A well designed tax assistance policy can help ease some of the financial burdens for faculty and staff working overseas.¹⁶³ The two most common approaches are known as “tax equalization” and “tax protection.”¹⁶⁴ Under tax equalization, “firms withhold an amount equal to the home country tax obligation of the expat and pay all taxes in the host country.”¹⁶⁵ Under tax protection, “the employee pays up to the amount of taxes he or she would pay on compensation in the home country. In such a situation, the employee is entitled to any windfall received if total taxes are less in the foreign country than in the home country.”¹⁶⁶

Finally, currency protection policies can be important tools for avoiding large losses of purchasing power for employees receiving U.S. dollar denominated salaries while working overseas.¹⁶⁷ Again, such policies can range from simple to complex with respect to terms and implementation, with most attempting to protect purchasing power within a band of 10% or so, and relatively few requiring repayment of funds in the event of a windfall in purchasing power due to currency fluctuation.

As should be evident from the brief overview of benefits and policies provided above, the college or university’s venture into the world of international employment can quickly bring with it a range of significant challenges for human resource and finance administrators. International program design and development activities should factor in the costs of developing the expertise in house or contracting with outside professionals to fully support the employment of expats, local nationals and third country nationals.

VI. OTHER ISSUES TO FLAG

While beyond the scope of this Article, other issues to consider when employing staff overseas include:

- Application of U.S. employment related statutes and regulations to U.S. citizens working abroad (e.g. Title VII)¹⁶⁸

163. PETER J. DOWLING, DENICE E. WELCH, & RANDALL S. SCHULER, *supra* note 160 at 193-95.

164. *Id.* at 194.

165. *Id.*

166. *Id.*

167. *Id.* at 195.

168. See John H. Robinson, *The Extraterritorial Application of American Law: Preliminary Reflections*, 27 J.C. & U.L. 187, 197-98 (2000). See also Timothy J. Darby, *Extraterritorial Application of U.S. Laws*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS at 34-1 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009); See Baker and Cranman, *supra* note 61.

- The European Union (EU) Data Protection Directive¹⁶⁹—EU’s comprehensive data privacy rules when handling host national personal information
- Avoiding the “double employer” trap (when an employee holds contracts with both the U.S. employer and a local employer (e.g. a branch or affiliate of the U.S. employer) for the same or overlapping duties
- Application of local non-discrimination and other protective measures¹⁷⁰
- Labor unions and collective bargaining agreements

VII. ADDITIONAL RESOURCES AND CONCLUSION

The range of labor issues and regulations applicable to employing staff overseas is incredibly varied. Because this variation is compounded across the great number of jurisdictions in which colleges and universities are seeking to operate, there are relatively few primary source English language legal research materials upon which to draw. This Article has attempted to highlight some of the threshold considerations for college and university counsel when advising their clients on international assignments for staff and faculty and engagements of local nationals abroad. Appendix D contains some useful reference resources for college and university counsel and administrators that provide further insight into local labor regulations.

In all cases, college and university counsel and senior administrators, in consultation with local foreign counsel, need to be involved as early as possible in the initial planning and implementation of human resource plans. With proper preparation and foresight, and a healthy dose of patience and cross-cultural sensitivity, U.S. colleges and universities can successfully take advantage of the many exciting opportunities to internationalize their curricula and successfully staff their overseas programs in conformance with local and international norms.

169. Council Directive 95/46 1995 O.J. (L 281) 31 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>.

170. See Baker and Cranman, *supra* note 61. See also Peter Schmidt, *AAUP Urges Faculty Role in Protecting Workers’ Rights at Overseas Campuses*, CHRON. OF HIGHER EDUC., Apr. 9, 2009, <http://chronicle.com/article/AAUP-Urges-Faculty-Role-in/47174/>.

APPENDIX A

AGREEMENT BETWEEN “UNIVERSITY” AND “PROVIDER”

University, a _____ corporation (“University”) and Provider, a _____ corporation (“Provider”) hereby agree that Provider will permit the University’s students to participate in Provider’s international study abroad program in Uganda, Africa. The following provisions shall govern the conduct of the parties:

1. Students from University participating on the Provider’s study abroad program sponsored and operated by Provider in Uganda, Africa will remain as matriculated students at University.
2. Provider will provide formal notification to students and to the International Study Programs Office at University of their enrollment status within two weeks of acceptance.
3. For the Uganda program, Provider will bill University for the required \$400 program deposit with each student’s final program bill. University agrees to pay this deposit under the terms outlined in Provider’s Conditions of Participation.
4. University students applying to the Uganda program will make their required payments for standard program fees to University; Provider will bill University for the amount of the program (including tuition, fees, room and board). Payment to Provider shall be made within 30 days of receipt of Provider’s invoice, subject only to later disbursement of non-University financial aid, in which case payment shall be made as promptly as possible following disbursement.
5. All financial aid awarded to University students will be administered by University’s Financial Aid office, with the exception of Provider scholarships. Provider scholarships require a separate application form; these awards are administered by Provider’s Financial Aid Office.
6. Provider will provide notification of grades by sending a grade report to each University student participating in the Uganda program.
7. Provider will provide University with formal college transcripts (and a narrative evaluation of the Independent Study Project) for each

student who participates in the Uganda program.

8. The parties recognize and acknowledge that all rights and goodwill in their respective trademarks are the exclusive property of their separate organizations. University may announce its affiliation with Provider with respect to the Uganda program in its catalog or other printed materials, and may publicize the Provider sponsored and operated program in Uganda in a manner deemed mutually acceptable to the parties. Provider may include University's name in its published list of student home institutions. Except as set forth above, the parties agree not to use the other's name or other trademarks in advertising, marketing or other materials without the prior written permission of the other.
9. This Agreement shall remain in effect from _____ through _____, unless terminated earlier pursuant to the terms hereof, and may thereafter be renewed by mutual written agreement of the parties. Notwithstanding the foregoing, this Agreement may be terminated at any time by either party for its convenience upon one hundred and eighty (180) days written notice to the other party hereto. The parties understand and agree that nothing herein shall require Provider to run the Uganda or any other program and that students from University shall be subject to all admissions and other criteria relating to their participation. Provider may cancel, modify or otherwise adjust its program offerings, including the Uganda program, at any time and for any reason.
10. Provider agrees to indemnify, defend and hold harmless University and its officers, trustees, employees, agents, affiliates and representatives (the "University Representatives") with respect to any and all claims, demands, damages, actions, causes of action, judgments and expenses (including without limitation reasonable attorneys' fees)(collectively, "Losses") which arise out of, relate to or are in any manner connected with the international program contemplated herein or any travel, field trip, field experience, internship or activity incident thereto and which arise out of the negligent, tortious, intentional or unlawful acts, omissions or conduct of Provider or its employees, officers, directors, agents, affiliates, contractors or representatives (the "Provider Representatives"), including, without limiting the foregoing, any Losses alleging personal injury, death, property damage, negligent supervision, unlawful discrimination, harassment, negligent hiring or any other claim or cause of action connected with or arising out of this Agreement, the Uganda program or any travel, field trip, field

experience, internship or activity incident or related thereto.

University agrees to indemnify, defend and hold harmless the Provider Representatives with respect to any and all Losses which arise out of, relate to or are in any manner connected with the international program contemplated herein and which arise out of the negligent, tortious, intentional or unlawful acts, omissions or conduct of the University Representatives. This indemnification obligation shall not apply to any acts, omissions or conduct of University students as they are not employees or agents of University.

11. This Agreement shall be governed by, and construed in accordance with the laws of the State of _____, without regards to its conflicts of laws rules. Any dispute between the parties and arising out of or related to this Agreement, the international program contemplated hereunder or any travel, field trip, field experience, internship or activity incident thereto shall be resolved exclusively via confidential, binding arbitration under the commercial rules of the American Arbitration Association, in _____ or at another location within the United States that is mutually agreed upon by the undersigned parties in writing.
12. Provider agrees to provide employer's liability insurance, automobile liability insurance and general liability insurance in amounts sufficient to adequately cover the Provider Representatives in planning, providing and operating the Uganda program and carrying out Provider's rights and responsibilities arising out of or in connection with this Agreement or the international program contemplated hereunder. At a minimum, Provider shall have auto liability insurance coverage with minimum policy limits of \$2,000,000 each person/\$2,000,000 bodily injury and property damage each accident; general liability insurance in minimum limits of \$5,000,000 bodily injury and property insurance each occurrence and aggregate, and employer's liability with limits of \$1,000,000.00 each accident. Claims made policies shall not be acceptable. Satisfactory certification that all of the insurance policies and coverages required by this Paragraph are in full force during the term of this Agreement must be furnished before commencement of any services hereunder. With respect to each of the policies of insurance or coverages required by this Paragraph, Provider shall provide to the Department of Risk Management and Safety at University, in advance of the commencement of providing any services hereunder, certificates of insurance (in the English language) evidencing that said policies of insurance are and will remain in effect throughout the

term of this Agreement; that University is an additional insured thereunder; and, that University will be notified by Provider's insurer(s), in writing, at least thirty (30) days in advance if any such policy or coverage is to be canceled or terminated for any reason.

13. With respect to University student participants in the Provider's Uganda program, Provider shall, subject to the Family Educational Rights & Privacy Act, immediately report to University's International Studies Program staff:
 - a. incidents or complaints involving violations of Provider policies or
 - b. disciplinary rules;
 - c. incidents or allegations of harassment, discrimination or other unlawful conduct;
 - d. any accidents, injuries, arrests or emergencies
14. In the performance of the services contemplated herein, Provider shall not be considered an agent of University but shall be, and shall be deemed to be, an independent contractor. The undersigned parties agree that University shall have no control over the day-to-day operations of the program contemplated herein. Provider, not the University, shall control the manner, means and methods of the performance of Provider's obligations under this Agreement.
15. In advance of their departure, Provider and University each agree to require that each University student participating in the Uganda program execute a liability waiver form for the Uganda program.
16. This agreement is subject to the provisions of the Anti-Kickback Enforcement Act of 1986, Public Law 99-634 (41 U.S.C. secs. 51-58). By agreeing to this binding Agreement, the transacting parties (1) certify that they have not paid kickbacks directly or indirectly to any employee of University for the purpose of obtaining this or any other agreement, purchase order or contract from University and (2) agree to cooperate fully with any Federal Agency investigating a possible violation of the Act. Copies of the statute and the pertinent regulations may be obtained from University upon request of the Office of Affirmative Action and Government Regulation Compliance.
17. Provider hereby certifies that it is an Equal Employment Opportunity employer and that it complies with the provisions set forth in Executive Order 11246, as amended, and with all other

applicable state and federal statutes and regulations that prohibit discrimination in the workplace, including but not limited to Department of Labor regulations and The Rehabilitation Act of 1973, as amended. The contract clauses set forth at 41 CFR sec. 60-1.4 (a) and (b), 41 CFR sec. 60-1.7, 41 CFR sec. 60-250.4 and 41 CFR sec. 60-741.4 are hereby included and made a part of this agreement.

IN WITNESS WHEREOF, the undersigned parties hereto have set their hands by and through their duly authorized officers on the date and year first recited above.

UNIVERSITY:

By: _____
Name: _____
Title: _____
Date: _____

PROVIDER:

By: _____
Name: _____
Title: _____
Date: _____

APPENDIX B

UNIVERSITY SPONSORED OVERSEAS ACADEMIC PROGRAMS

Start-Up Issues Check List

Registration/Legal Status

1. Is University registered or otherwise qualified to do business in this country?
 - a. If yes, what is the official registered name and the legal nature/structure (e.g. Direct Registration, Branch Office, Wholly Owned Subsidiary, Local NGO, etc.)?
 - b. If no, do the proposed activities require registration of University (e.g. as an employer) as a foreign organization conducting business in this country? Note that even where University is working through a local partner institution, University staff working in-country paid directly by the University may trigger local employment obligations (e.g. tax withholding).
 - c. Are there any U.S. Government restrictions on conducting activities in this country (e.g. Cuba, Iraq)?
 - d. Consult with University Counsel and local counsel *before* commencing activities.

Real Estate

Program Office:

1. Will the activities require the leasing of administrative or program office space by University?
2. How will the Program Office be adequately secured and in compliance with local building, fire or safety code requirements, local ordinances, zoning requirements and laws? Will the space be inspected by a University person prior to facility use? (recommended). Is there a checklist for inspection?
3. Create an inventory of all University owned, leased, and rented personal property. Consult with University risk manager to ensure appropriate coverage(s), including coverage for items in transit.

Classroom Space:

1. Will the activities require the leasing of Classroom Space by University?
2. How will the Classroom Space be adequately secured and in compliance with local building, fire or safety code requirements, local ordinances, zoning requirements and laws? Will the space be inspected by a University person prior to facility use? (recommended). Is there a

checklist for inspection?

3. Is there Lab/Research space? What steps need to be taken to comply with University policy and local regulations with hazardous materials disposal, etc.?

Staff Housing:

1. Will the activities require the leasing of residential housing for University expatriate staff by University?
2. Will the lease of housing be accomplished in the name of the University or in the name of the individual expatriate? Will the University's insurance policies cover these premises?

Student Housing

1. What will be the arrangements for housing students during the program (e.g. dormitory, homestay)?
2. If dormitory or other institutional space will be utilized, how will the space be adequately secured and in compliance with local building, fire or safety code requirements, local ordinances, zoning requirements and laws? Will the space be inspected by a University person prior to facility use? (recommended). Is there a checklist for inspection?
3. If homestay or similar non-institutional space will be utilized, how will placements be handled? How will screening and orientation of families be accomplished?

Excursion Sites:

1. Briefly inventory and describe the nature, frequency, duration and location of Program excursions or other travel related to the proposed activities (include rural homestays).
2. Will any written contracts be required to govern any aspects of these excursions (i.e. transportation, lodging, activities etc)?
3. How will excursion lodgings be adequately secured, and in compliance with local building, fire or safety code requirements, local ordinances, zoning requirements and laws?
4. What sorts of activities will be allowed and/or disallowed (e.g. renting vehicles, riding motorcycles, scuba diving and other risk prone activities)?

Employees - Local Hires

1. Will the activities require the hiring of local nationals, for what types of positions and at what rate of compensation?
 - a. If yes, what employer registration requirements are applicable, including registrations for local tax withholding, retirement, social security, health and other benefits?

2. How will local hires be paid – e.g. through a local payroll, cash, direct deposit?
3. How will required deductions and remittances for local payroll be handled and what reporting systems will be needed?

Consult University Counsel and local counsel *before* commencing any local hiring.

Employees – Expatriate

1. Will the activities require the hiring of Expatriate staff (U.S. or third country nationals), for what types of positions and at what rate of compensation?
 - a. If yes, what employer registration requirements are applicable, including registrations for local tax withholding, retirement, social security, health and other benefits?
2. How will Expatriates be paid – e.g. through a U.S. Bank Account, local payroll, cash, direct deposit?
3. How will required deductions and remittances for payroll be handled and what reporting systems will be needed?
4. What work authorization or visa will be necessary for proper employment and immigration status in country?

Consult University Counsel *before* commencing any Expatriate hiring.

Independent Contractors

1. Will the activities require the hiring of Independent Contractors, for what types of services and at what rate of compensation?
 - a. If yes, what local registration requirements are applicable, including registrations for local tax withholding?
2. How will Independent Contractors be paid – e.g. by check, cash, direct deposit?
3. How will required deductions and remittances for taxes be handled and what reporting systems will be needed?

Be sure to check with local counsel as to rules regarding classification of service providers who are individuals (employee vs. independent contractor).

Tax Issues

Corporate Income Tax:

1. Based on the local registration status of University and University's U.S. tax exempt status, will University have any obligation to report on its activities to local income tax authorities?
2. Will tuition revenues in the United States be considered gross revenue to University derived from local activities and therefore subject to local corporate income tax regime (absent a local exemption)?

Other Taxes:

Briefly inventory local tax withholding obligations in each category noting any balance/payment level that triggers tax liability:

- a. Local Hires
- b. Expatriates (generally subject to local income tax if staying in country longer than 183 days)
- c. Independent Contractors
- d. Program Funds
- e. Rental / leased property
- f. VAT Tax paid / Refunds
- g. Fringe Benefits paid In Country

Consult local accountant *before* making any payments.

Banking/Cash Management

1. How will the proposed activities be funded?
2. What is the average annual program expenditure?
3. Will a bank account be required?
 - a. If yes, who should be the signatories on this account (note: VP Finance should be a co-signatory on all accounts where possible)?
 - b. If no, what alternative cash safekeeping/management strategies are in place (if a personal bank account is used, list the signatories on this account)?
4. Who will be primarily responsible for program record-keeping and account reconciliation?
5. What receipting practices for transactions and petty cash will be required?

Transportation

1. Describe all methods of transport expected to be used in connection with the proposed activities (including excursion, rural homestays, etc.)
2. Will there be any recurring transportation arrangements with local companies to provide transport for students, participants and/or staff?
3. Certificates of Insurance Coverage should be obtained from any transportation providers.
4. Will University own or *control* any vehicles used in transporting students, participants, and/or staff (include Staff vehicle if ever used in transporting students, participants and other members of staff)?
5. If yes, please provide details of vehicles and of how insurance coverage on these vehicles (i.e. make/model/year as well as insurance company/insured amount/limits/deductibles etc) will be handled.

Insurance/Risk Management

1. Is the University required to purchase any form of insurance locally (property, fire, health for local employees, disability, workers' compensation, etc.)?
2. Do the students/participants have appropriate health/medical insurance coverage while in-country?
3. Does University's health/medical coverage cover University employees working outside the United States?
4. Does University's liability insurance program adequately cover the proposed activities (some policies exclude coverage for countries where the U.S. Department of State has issued a Travel Warning, most exclude war)? Primarily, 4 lines of insurance coverage are implicated: General Liability, Auto Liability, Property Insurance (covering University's owned property) and Workers' Compensation.
5. Will University require a formal release and/or liability waiver from participants before permitting them to participate in the program?

Crisis Planning and Communication

1. Be sure that all students, participants and expatriate staff are registered with the local Embassy or Consulate.
2. In the event of an emergency situation in-country, there needs to be an established *written* communication procedure for reaching all students, participants and staff and University headquarters. Phones, cell phones and/or satellite phones should be required.
3. In the event of an emergency situation in-country, there should be an established *written* evacuation procedure for students, participants and staff.
4. In the event of a *medical* emergency situation in-country, is there an established *written* med-evac plan for all phases of the program activity?

Student, Participant Visas

Establish what types of visas your program participants, students or others visiting the site should have.

1. Do you need a sponsoring organization other than University?

Health and Safety

1. Are there any abnormally dangerous conditions at the program/activity site (including excursion, homestay and rural visit sites), e.g. consular information, unusually high crime rates, potential for sexual harassment, unique risks for disease, unsafe blood supply, civil unrest, terrorism etc.?

(March 2008)

APPENDIX C

Countries Requiring Formation of Registered Entity to Employ Local Nationals¹⁷¹

Country	Requires Formation	Special Contract for Local Hire	Special Contract for Expatriate
Indonesia	Yes	Yes	No
China (PRC)	Yes	Yes	Yes
Mongolia	Yes	Yes	No
Mexico	Yes	Yes	Yes
Viet Nam	Yes	Yes	No
Jamaica	Yes	Yes	No
Ghana	Yes	Yes	No
Jordan	Yes	Yes	Yes
Chile	Yes	Yes	No
Australia	No	Yes	No
France	Depends	Yes	Yes
Brazil	Yes	Yes	Yes
Bolivia	Yes	Yes	No
Ecuador	Yes	Yes	No
Botswana	Yes	Yes	No
Cameroon	Yes	Yes	Yes
Germany	No	Yes	No
Ireland	No	Yes	No
Madagascar	Yes	Yes	Yes
Morocco	Yes	Yes	Yes
Netherlands	No	Yes	No
Nepal	Yes	Yes	No
South Africa	Yes	Yes	Yes
Spain	Yes	Yes	No
Switzerland	No	Yes	No
Senegal	Yes	Yes	Yes
Uganda	Depends	Yes	Yes
Samoa	Yes	Yes	No

Disclaimer: This table does not constitute legal advice and is provided for illustrative purposes only. Information is current as of February 2010. Always consult local foreign counsel for advice; the applicable laws in many jurisdictions may change with some frequency.

171. All data gathered from Worldwide Consulting Group LLC, <http://www.worldwideconsulting.com> (last visited Mar. 29, 2010).

APPENDIX D

USEFUL INTERNATIONAL EMPLOYMENT LAW RESOURCES 2010

American Bar Association:

The American Bar Association has an International Employment law Section and Committee which has its own annual conference, monthly newsletter, and resources, including the following publications:

AMERICAN BAR ASSOCIATION, INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: INTERNATIONAL LABOR AND EMPLOYMENT LAW, VOLUME I (EUROPE) (Philip M. Berkowitz, Anders Etgen Reitz, & Dr. Thomas Muller-Bonanni eds., 2d ed. 2008).

AMERICAN BAR ASSOCIATION, INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: INTERNATIONAL LABOR AND EMPLOYMENT LAW, VOLUME II (Philip M. Berkowitz, Anders Etgen Reitz, & Dr. Thomas Muller-Bonanni eds., 2d ed. 2008).

LUCINDA A. LOW, INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: INTERNATIONAL LAWYER'S DESKBOOK (2d ed. 2002).

AMERICAN BAR ASSOCIATION, INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: LABOR AND EMPLOYMENT LAW IN THE NEW EU MEMBER AND CANDIDATE STATES (Anders Etgen Reitz ed., 2007).

1A INTERNATIONAL LABOR & EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

1B INTERNATIONAL LABOR & EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

2A INTERNATIONAL LABOR & EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

2B INTERNATIONAL LABOR & EMPLOYMENT LAWS (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

The American Bar Association also puts out regular newsletters on International Labor and Employment Law topics. Their section website is: <http://www.abanet.org/dch/committee.cfm?com=IC835000>.

Other Compendia:

GETTING THE DEAL THROUGH, LABOUR & EMPLOYMENT IN 43 JURISDICTIONS WORLDWIDE (Barry A. Hartstein & Tram-Anh T. Frank eds., 2009), *available at* <http://www.gettingthedealthrough.com>.

Web-Sites:

The Doing Business Project, <http://www.doingbusiness.org/>