Breakout Sessions – Series 2

THREE-CARD BRAG

TALENT ACQUISITION, GLOBAL MOBILITY, AND THE LAW

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Cross-Border Remote Work Questionnaire

- What is the employee’s U.S. work authorization status?
  - Is this employee applying for or does this employee have a U.S. green card?
  - If the employee has a U.S. green card, will employee request a Reentry Permit before departing the U.S. (particularly if absence from US expected to be more than 365 days)?
- What is the anticipated length of remote or cross-border work? Possibly longer than 3 months? 6 months? 2 years?
- What is the reason for the remote work?
  - Is it because of a lapse or delay in U.S. work authorization?
  - Is it because the employee has encountered delays in visa issuance at the US Consulate overseas?
  - Is the arrangement solely at the employee’s request for personal reasons?
- In which country or countries will the employee work? For each country:
  - Does the employee have citizenship or work authorization?
  - Will dependent family members accompany the employee? If yes, will they have authorization to enter country / remain in country / work in country?
  - Does the company have a subsidiary, affiliate, or business partner there?
  - Has the employee previously worked in that country over the past 12 months?
    - If so, how many days?
  - Are there any “red flag” laws?
    - Foreign exchange controls (e.g. India)
    - Unfair dismissal protections (e.g. Brazil)
    - Local labor contract requirements (e.g. China)
    - Home office requirements (e.g. France)
    - Pay-to-play restrictive covenants (e.g. Spain)
    - Data protection / transfer restrictions (e.g. Korea)
- Where will the employee work? Home, hotel, client site?
- What are the employee’s job duties? Will he/she:
  - Generate revenue?
  - Create IP?
  - Visit client sites? If so, will this involve cross-border travel?
- What, if any, company property (e.g. laptop) will the employee possess remotely?
- Will the employee remain eligible for employer-sponsored benefits on assignment? (401k, health insurance, etc.)
Document Checklist (As Applicable)

- [ ] Border documents
  - [ ] Invitation letter (if applicable)
- [ ] U.S. re-entry documents (if applicable – U.S. green card holders who remain outside the U.S. for more than 365 days continuously)
- [ ] Remote Work Agreement or International Assignment Letter
  - [ ] U.S. at-will employment
  - [ ] Offset of severance, other non-U.S. entitlements
  - [ ] No duplicate benefits
  - [ ] Expiration date
  - [ ] Limitation on authority to conclude contracts, other tax protections
  - [ ] Any special benefits provided or limitations on benefits eligibility
  - [ ] Policies still apply, and cite important policies
  - [ ] Compliance representations regarding
    - [ ] work authorization
    - [ ] workplace safety
    - [ ] FCPA
    - [ ] tax
  - [ ] Representation that arrangement is for employee’s personal reasons
  - [ ] Consent to data collection, use, and transfer
- [ ] Nondisclosure agreement (may be included in remote work agreement)
  - [ ] Confidential information protection
  - [ ] IP protection
  - [ ] Restrictive covenants (if applicable)
- [ ] Intercompany services agreement with local partner (if applicable)
Three-Card Brag: Talent Acquisition, Global Mobility, and the Law

Presenters
Jacquelyn P. Maroney (Austin)
Diana J. Nehro (Boston/New York City)

Moderator
Carolyn A. Knox (San Francisco)

Agenda

- Global Mobility
  - Types of Assignments, Basic Terms, Business Considerations
  - Using collaboration to drive good business decisions
  - Return on investment for the business

- Legal issues implicated by these moves:
  - Immigration
  - Employment Law
  - Contract Law
  - Trade Secret and Data Management
  - Benefits
  - Taxes (payroll and corporate)

- Ancillary Documents
- Ending the Assignment
Legal Considerations Implicated by All Mobility Assignments

- Business Issues and Corporate Structures
- Virtual vs. Physical Locations
- Traveling Employees – no “place of employment”
- Immigration
- Employment Laws
- Contractual Matters
- Trade Secret Protections and Enforcement
- Safety Considerations and Evacuation Plans
- Benefits
- Tax Consequences

Business Considerations

- Types and Duration of Assignments
  - Outbound
  - Inbound
  - Short Term
  - Long Term
  - Virtual
- Business Need for Assignments
  - Executive leadership
  - Training
  - Taking on customer contract
  - Exploring new market
  - Business model
  - Employee flexibility/retention
  - Events
Immigration Considerations

- Most countries require visa for entry
- All countries, including U.S., require specific work authorization for foreigners
  - What is the host country’s definition of work
- Accompanying spouse often not allowed to work
- Can be quite time-consuming and costly
- Requires planning well in advance of assignment
- Frequently overlooked or delayed in the expat planning process
- Frequently overlooked as employee not deemed an expert

U.S. Temporary vs. Permanent Visa

- Temporary Visa Status
  - Authorizes employee to enter the U.S. and work for a temporary period
  - Authorized to work for sponsoring employer only
  - Limited maximum duration
  - Must leave the U.S. at the end of temporary stay

- Permanent Visa Status
  - Lawful permanent residence or “green card” status
  - Authorizes employee to work in any capacity on a permanent basis
  - Can work for any company in the U.S.
  - Allows individual to reside in the U.S. permanently
  - Eventually able to apply for U.S. citizenship
B-1 Visa / ESTA
Business Visitor

- What you are allowed to do in the U.S.
  - Attend business meetings, conferences, give or receive training (but no hands-on work)
  - Also includes trips for house hunting and orientation

- What you are NOT allowed to do in the U.S.
  - Does **not** permit “work” in the U.S., even if trip is for only a short duration
    - Examples of work include hands-on computer programming duties, installing/servicing software or computer systems, performing services at U.S. customer sites, managing projects or managing employees in the U.S.
  - Should never be on U.S. payroll

H-1B Visa
Specialty Workers/Professionals

- Position must require at least a Bachelor’s Degree in a specialized field
- H-1B Annual cap
  - 65,000 “regular” (minus Free Trade for Chile/Singapore)
  - 20,000 for U.S. Master’s and higher
  - Quota applications can be filed April 1 with an October 1st start date
  - Cap is likely met very quickly each year
- General limit of stay in U.S. is **6 years**
- Imposes strict regulatory compliance obligations
- Spouse **not** allowed to work generally
  - Some spouses to work once certain milestone reached in green card efforts, for now...
L-1 Visa
Intra-Company Transfers

- Requires an intra-company relationship between U.S. and foreign employer (parent, affiliate, subsidiary, joint venture)
- Foreign national must have worked for foreign-related employer for at least one year as executive/manager or a specialized knowledge worker
  - L-1A Managers/Executives
    - 7 years duration
  - L-1B Specialized Knowledge Workers
    - 5 years duration
    - Specialized or advanced knowledge of the Company’s technologies, products, or processes not generally found in the U.S. market
    - Highly scrutinized by U.S. immigration agents and approval harder to obtain
- Spouses allowed to work

TN Visas under NAFTA

- Available to Canadian and Mexican Citizens only
- Specific “Professional” occupations (key positions), defined by NAFTA
- Canadians can apply directly at a Port of Entry into U.S. – no need for a visa
- Mexicans must apply for a Visa at a U.S. Consulate abroad before entering the U.S.
- Valid for 3 years; no maximum stay; no annual quota
- Spouse not allowed to work
Visas for Expats  
Critical, Fundamental, Practical Issues

Vet the following issues **before** deciding to proceed with an international assignment:

- **Entity**: Does the employer have an entity in destination country?
- **Feasibility**
- **Timing**
  - What is the duration of travel in each country – The traveling employee
- **Crime**

*(Don’t forget: Spouses)*

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**Employment Law Considerations**

- Example: Mexican employee sent to U.S. for a two-year assignment
- How to address Mexico vs. U.S. employment agreement and relationship
- Choice of law considerations
- Mechanisms for reducing risk to employer
Key Contract Terms for Expat Agreements

- Compensation: amount, source, assignment-related payments and benefits as distinct from ordinary compensation
- Working hours, holidays
- Data privacy
- Choice of law provision
- Forum selection clauses
- Identify legal employer
- Limits on employee’s right to represent host company
- Application of policies, procedures, and benefits
- Contingencies: e.g., work permit requirements
- Termination provisions relating to the assignment
- Prohibition against duplicate benefits
- Other market benefits

Typical Assignment-Related Discretionary Benefits

Long Term Expat
- Pre-assignment visit
- Shipment of personal effects
- Housing: temporary accommodation and long term
- Relocation allowance
- Cost of living allowance
- Work permits for family members
- Tuition
- Travel stipend
- Language training
- Health insurance coverage
- Tax equalization
- Reduce/eliminate overtime
- Security

Short Term Expat
- Housing, travel
Tax Considerations

- Permanent Establishment
  - Treaty or local law
    - U.S.-Mexico Tax Treaty
    - Fixed Place of Business
    - Contract Authority

- "Deemed services" provisions in tax treaty
  - India, China, Indonesia

- Authority to “Conclude Contracts” for Home Company
Tax Considerations

- Payroll taxes
  - Treaty or local law
    - 183 days in any 12-month period
  - Inbound/outbound
  - Short term/long term
- Social Security
  - Totalization Agreement
- How to manage
  - Split payroll
  - Shadow payroll

Payroll Considerations

- Applicable wage rate
- Hourly versus exempt considerations
- Tax location
- Unemployment considerations
Additional Documentation

- Additional Documentation Affecting the Assignment
  - Agreements with Host Country Affiliates
    - Intra-Company Agreement
    - Intra-Affiliate Agreement
  - Confidentiality Agreements
  - Restrictive Covenants
  - Tax Equalization Benefit Agreement
  - Expat/Relocation Benefits Policy

End of Assignment Issues

- Address in the international assignment agreement
- End of assignment/end of employment relationship
- Return/localize
- Relocation benefits
- Reassignment
- Severance
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