I. Introduction

Successful multi-national companies value sending employees on expatriate assignments as a means of spreading company culture globally and sharing business knowledge across borders. While expatriate assignments may make good business sense, if employers do not handle such assignments properly, problems may arise that far outweigh the myriad benefits. Employers can, however, take certain steps in structuring these assignments to minimize potential exposure from employee claims and also to provide the company with more flexibility in the event the company needs to terminate the assignment early. This article explores issues employers should consider before sending employees on expatriate assignments and suggests best practices for structuring these assignments.

II. Choice of Law

Often the first question asked when setting up an expatriate assignment is “what law applies?” Employment law is viewed as matter of public policy in nearly every country in the world. Thus, even if an employment agreement includes a choice of law provision, that provision may not be enforceable, to the extent the employment agreement does not comply with the minimum statutory requirements in the local jurisdiction. As such, choice of law provisions are only so effective in the employment context. But if there is no choice-of-law provision in the employment agreement, then, if the employee brings suit in the host country, it is a virtual certainty that the local court will determine that the law in which the employee is working will control, especially where the local jurisdiction provides more protection. In Europe, for example, under the Rome Convention, if no country’s law is chosen in the employment agreement, it is chosen “by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country” or “if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated, unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.” Convention on the Law Applicable to Contractual Obligations, art. 6, para. 2, (80/934/EEC), Official Journal L 266, Sept. 10, 1980, p. 0001-0019.

Choice of law typically becomes an issue at the time of termination because most countries have some statutory notice and severance requirements. This is often counter-intuitive to U.S.-based multi-national companies that favor “at-will” employment, a concept that is unique to the United States. Under U.S. law, thus, there are far fewer statutory protections with regard to termination of employment than in many other countries. Thus, when sending a U.S. employee abroad, it is difficult - if not impossible - for an

1 Erika C. Collins is a partner at Paul, Hastings, Janofsky & Walker, where she chairs the firm’s International Employment law practice group. She is based in New York City.
employer to fully insulate itself from the employee choosing the most favorable law if he or she later brings a lawsuit. Conversely, when bringing a European citizen to the U.S. on assignment, it is unlikely that the employee will be willing to relinquish his rights under his home country law.

III. Extra-Territoriality

Multi-national companies should also consider what home country laws attach to the expatriate while on assignment. For example, several U.S. laws have extra-territorial application, meaning they protect a U.S. citizen employee on expatriate assignment. Title VII of the Civil Rights Act of 1964 (prohibiting discrimination based on race, sex, religion, or national origin), the Age Discrimination in Employment Act (“ADEA”) (prohibiting discrimination based on age), and the Americans with Disabilities Act (“ADA”) (prohibiting discrimination based on physical and mental disabilities) explicitly protect U.S. citizens working abroad for U.S. corporations or companies “controlled by” a U.S. corporation. Permanent legal residents (i.e., individuals holding Green Cards) are not protected by these laws while working abroad. Furthermore, it may be legally acceptable to violate U.S. law if compliance would inevitably violate local law in the host country. For example, one court allowed a U.S. company to hire only Muslims as helicopter pilots. Kern v. Dynlectron, 577 F. Supp. 1196, 1203 (N.D.Tex. 1983). The pilots were required to fly over Mecca, and Saudi Arabian law prohibited the entry of non-Muslims into Mecca. Id. at 1200. Any non-Muslim caught flying into Mecca was beheaded. Id. The court reasoned that non-Muslim pilots were not safely stationed in Saudi Arabia and therefore hiring only Muslim pilots, which normally would be discriminatory, did not violate Title VII. Id. at 1203.

The U.S. federal wage and hour law, the Fair Labor Standards Act (“FLSA”), specifically does not have extraterritorial application, but a question may arise over where an employee actually works. For example, the FLSA may apply to an employee who performs a portion of his or her work in a given workweek in the U.S., even if the remainder of the work that week is performed outside the U.S. Some U.S. courts, however, have refused to apply the FLSA to employees performing some services within the U.S. if the employees are based in a foreign country. See, e.g., Hodgson v. Union DePermisionarios Circulo Rojo, S. De. R.L., 331 F. Supp. 1119, 1121-22 (S.D. Tex. 1971) (Mexican bus drivers employed by Mexican company not protected by FLSA, although part of each workweek was spent driving in U.S.); Wolf v. J.I. Case Co., 617 F. Supp. 858 (E.D. Wis. 1985) (suggesting that FLSA may not apply to American citizen hired by American company to work in France despite 30-34 days of employment within U.S. each year).

Other countries’ laws may also have extra-territorial effect, including European data privacy laws, but many country laws are silent with regard to extra-territoriality. It is imperative for employers to understand which laws have extra-territorial effect so as not to run afoul of these regulations during the period of the assignment.

IV. Taxes and Social Security

Even if an expatriate employee never files suit, tax and social security issues can present enormous challenges with expensive price tags, if the assignment is not structured properly at the front end.
First, the company must consider corporate taxes and permanent establishment issues that can arise from the assignment. Because expatriate employees often wish to stay on their home country payroll, certain record-keeping steps are needed to prevent a corporate tax problem. If a company maintains a person working abroad on its payroll, that company may create a “Permanent Establishment” in another, thereby creating a taxable corporate presence of the home company in the host country. This tax problem can be prevented by “seconding” the employee to the host company and entering into an inter-company agreement to address the accounting issues, whereby the host company reimburses the home company for the value of the expatriate’s services from which the host company is benefiting. For example, if a U.S. company sends an employee to work in France, there should be an agreement stating the U.S. employee is seconded, or on loan, to the French company, and the French company should agree to reimburse the U.S. company for receiving the benefit of the employee’s services. Other alternatives are to hire the individual through a service provider, or to transfer the employee to the host company and terminate employment with the home company. The latter option is often not appealing, as termination from the host company can trigger severance indemnities in many countries.

Second, the employer should consider the impact of the assignment on the employee’s personal tax liability. In this regard, several issues should be addressed, including tax treaties and totalization agreements. U.S. citizens and permanent residents, for example, are taxed on their worldwide income, no matter where in the world they are working. But these same expatriates will also incur tax liability in their host countries once they have been resident abroad for a certain period of time (usually after 183 days). To address this issue, many countries have entered into “double tax” treaties, which provide some relief through tax credits. Companies sending employees abroad should research whether such treaties exist between the host and home countries that are at issue in each assignment. A second personal tax issue involves home country tax exemptions. The U.S., for instance, has the Section 911 tax exemption for the first USD $91,400 of income earned while working abroad. Under Section 911, expatriate taxpayers who establish a bona fide residence in a foreign country or who meet the requirements of the “physical presence” test, are eligible for the foreign earned income exclusion. To meet the physical presence test, a U.S. citizen or a U.S. resident alien must be physically present in a foreign country or countries for at least 330 full days during any period of 12 consecutive months. (Section 911 of the Internal Revenue Code.) Companies should also consider whether to implement a tax equalization policy. Many companies with global mobility programs have such policies, whereby the company and the employee agree that the employee will pay no more and no less taxes than he or she would have if he or she had stayed in the home country. Companies often do this by using a hypothetical tax calculated by corporate accountants which is then deducted from the expatriate’s salary throughout the year.

Expatriate assignments may also result in employees and employers having to pay into the social security systems of both the home and host country regimes. As such, employers should investigate whether there is a “Totalization Agreement” between the employee’s home and host countries. Such agreements prevent employees and employers from having to pay into both countries’ social security systems, provided that the assignment is not anticipated to last more than five years and a “Certificate of Coverage” is completed and filed with the proper government authorities.
V. Benefits

Employers should consider what benefits can be continued during the expatriate’s assignment and whether it is cost-effective for the company to do so. Employers should also consider how to make the expatriate “whole” with respect to benefits that cannot be continued during the overseas assignment. A number of potential benefits should be considered in this regard. For example, the company should consider whether the company will provide a relocation allowance or reimbursement for moving and/or storage expenses; a company considering such benefits must also consider the tax consequences. Similarly, the employer should consider whether to provide housing and pay for utilities, as well as whether to pay for a pre-assignment house hunting trip. In addition, the company should consider whether a cost of living adjustment is necessary, how it will be calculated, and when it will be reviewed. Employers will also want to consider leave policies, such as home leave and emergency leave (including who will pay for a last-minute plane ride home). Another potential benefit the employer may want to consider is providing local transportation. Companies may want to provide spousal assistance, such as helping the spouse find a job in the host country. Finally, employers may want to provide cultural orientation, safety education, or language skills training for both the employee and his or her family.

VI. Immigration

Expatriate employees will need either a work permit or a visa or both to work in another country (aside from EU nationals working in different countries within the EU). The company must have at minimum a branch office in the host country and often must have a subsidiary company in order to sponsor the expatriate’s work authorization. Work permits and visas should be arranged early. Some countries require medical exams, including HIV tests, so companies should advise the employee about any relevant requirements.

VII. Best Practices

There are certain “best practices” an employer should follow to help ensure expatriate assignments run smoothly and to minimize the company’s potential exposure.

Employers should always have a written agreement with an employee who will be working abroad. The employer is providing significant benefits to the expatriate and should obtain some protection and flexibility in return. Furthermore, having a written agreement allows the parties to memorialize certain items for the avoidance of doubt. It is much easier to address these grey areas at the beginning of the assignment. There are several key points that an expatriate agreement should always address, including:

- **Compensation issues**: These include salary, bonuses and other incentive plans, and participation in the host company’s equity compensation. The contract should also specify whether stock options continue to vest.

- **Reporting structure**: Employers should consider the effect of having the expatriate report to an executive employed by a different legal entity. The employer should take steps to avoid creating
evidence for “piercing the corporate veil,” thereby potentially subjecting the parent company to liability.

- **Tax issues:** The agreement should confirm whether the employee will be tax equalized and, if so, on what income. The agreement should also address tax issues related to severance pay and the exercise of stock options or the sale of stock while on assignment. Because of the many tax issues potentially affecting employees on expatriate assignment, employees should be encouraged to consult a tax professional before going on an international assignment in order to understand the potentially negative tax ramifications of the assignment.

- **Benefits:** The contract should specify exactly which benefits the employer will provide. For the avoidance of doubt, the contract should specify which benefits the employer will not provide or what the employee is expected to cover. Companies should have an international health insurance plan for expatriates. For purposes of pension and U.S. 401(k) plans, employers should keep expatriates on their home country payroll, something expatriate employees often prefer. Any “make whole” benefits provided should be memorialized in the agreement.

- **Holidays, annual leave, and maternity/paternity leave:** The contract should specify whether the employee receives local holidays, as well as whether the employee will continue to accrue home country vacation. In addition, because maternity and paternity leave regulations typically do not apply extraterritorially, it is critical to include a provision in the agreement that confirms whether home country or host country law/policy will apply in this regard.

- **Proprietary information and inventions:** The contract should address proprietary information and inventions if the expatriate is creating inventions or other proprietary information. The company should analyze enforcement issues (i.e. whether there is injunctive relief) when considering whether the expatriate should sign a new proprietary information agreement under host country law.

- **Terms of the international assignment:** The expatriate agreement should set forth the anticipated length of the assignment and that the company retains the right to terminate the assignment at any time and return the employee to the home country. The contract should specify whether the employee will be required to repay relocation and immigration costs if the employee terminates his or her employment during the assignment or does not relocate when the company requests.

- **Plan for emergencies:** In high geopolitical risk areas, the employer may want to have an evacuation plan. The employer should also consider whether to provide coverage pursuant to “SOS” or a similar provider of emergency evacuation services.

- **Repatriation:** The expatriate agreement should set forth the terms of repatriation, including what the company will pay for and whether there are any timeframes associated with those benefits. The employee should be required to repatriate once his or her employer says to do so. The agreement also should specify that if the employee does not repatriate within the requested timeframe that he or she will be responsible for any resulting tax liabilities. The expatriate should also be required to
relinquish upon repatriation his or her work authorization/visa that was sponsored by the company.

- **Termination of employment**: The agreement should set forth what, if any, severance policy will apply in the event of termination during the assignment and also, if possible, that any statutory severance payments will be offset by the policy. Beyond the employment agreement, it is also important for the employer to follow certain “best practices” if it has to terminate an employee while on assignment. It is best to avoid terminating employment while the expatriate is in the host country. Leaving someone in a foreign country without the right to work is simply not a good business practice. Instead, it is best to return the person to the home country and allow the home country company to address the employment separation.

**VIII. Conclusion**

When sending employees on expatriate assignments, employers must consider a wide array of issues. Reviewing these points before assignments begin and properly executing an expatriate agreement will minimize potential exposure and, in many cases, prevent problems from arising during or after assignments.