THE NUTS AND BOLTS OF EMPLOYMENT AGREEMENTS FOR FOREIGN EMPLOYEES WORKING OUTSIDE THE UNITED STATES

BY

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When in Rome, do as the Romans do. This infamous saying is the perfect mantra for U.S.-based multinational employers in general, and especially when it comes to drafting employment agreements. Whether hiring, managing or terminating employees globally, local employment laws (and cultural norms) will apply to every aspect of the employment relationship. The U.S. multinational employer which recognizes that many U.S. concepts simply do not translate internationally will be well-positioned to manage international employment relationships.

For instance, as a threshold matter, the concept of “at will” employment simply does not apply outside of the U.S. Whereas in the U.S. an employer can terminate employees without notice for any reason, so long as it is not an unlawful reason, this ability does not generally exist outside of the U.S. Further, most non-U.S. employment laws are far more protective of employees than even U.S. laws. Failure to recognize these fundamental differences and provide local law compliant employment contracts at the outset of the relationship can result in missed opportunities for the employers seeking to take advantage of pro-employer laws internationally.

A. FORM OF THE EMPLOYMENT AGREEMENT

Outside the U.S., offer letters are not common. Instead, it is standard practice in most jurisdictions to issue a comprehensive employment contract, outlining various key employment terms. Employment agreements will look different depending upon the country involved. For instance, countries influenced by the Napoleonic Code (e.g., France), which are based on statute, will read into the contract and apply the statute for missing terms, whereas countries influenced by Anglo-Saxon law (e.g., the United Kingdom) are also based on contract, which results in very long contracts.

It is also important to understand that it is not recommended to issue a U.S. style offer letter before issuing a local law compliant employment agreement. This is because once accepted, such an offer letter will create an enforceable agreement, and despite language in the offer to the contrary, employees are not obligated to later sign a local law compliant employment agreement that contains more restrictive terms (e.g., a probationary period). Further, in many jurisdictions, future changes to that initial contract will require additional consideration beyond continued employment (e.g., Canada).

In most jurisdictions, while employment agreements are common and best practices, they are not mandatorily required as a matter of law. With that said, in the European Union, under Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, employees must be provided with a written statement of employment within two months of the commencement of employment. The statement must address, among others, the identity of the parties, place of work, title and nature of work, date of commencement, amount of paid leave, applicable notice periods, remuneration details, working hour provisions and information on any applicable collective agreement (where appropriate, such information can be provided by references to applicable laws). Failure
to do so can result in monetary sanctions. Given this requirement, issuance of an employment agreement in Europe is the norm.

Furthermore, it is important to ensure that the appropriate form of agreement be used. Crucially, only individuals to be engaged as employees should receive employment agreements, whereas independent contractors should receive an independent contractor agreement. Misclassification is one of the very few employment law topics that do translate internationally, with very similar litmus tests and penalties. As such, it is vital to ensure that not only the form of the agreement, but also the substance of the relationship support engagement as either an employee or an independent contractor.

In addition, in some jurisdictions, employees who also hold certain corporate roles should expressly not receive an employment agreement. For example, in Germany, the managing director of the local entity should receive a managing director agreement, not an employment agreement. Similarly, in Japan, an executive director level employee should receive an entrustment agreement, not an employment agreement. This is because such individuals are not automatically protected by local employment laws, but rather are subject to somewhat more lenient corporate rules, unless the employer contractually agrees otherwise through an employment agreement.

Finally, mobile employees (for instance, expat employees seconded by the U.S. parent company or often a U.S. holding company to a foreign subsidiary for a period of time) would typically receive a secondment letter from their U.S. employer in order to maintain the connection to the U.S. and arguable application of at will employment. Such employees would not receive an employment agreement from the local receiving entity or any other documentation that might give rise to protections under the local employment laws (unless the expat relationship is structured as a termination & rehire, by which the home country relationship is severed). Mobile employees present a whole host of issues on the corporate (company and individual), tax, social security, employment and immigration front, and any such arrangements should be carefully planned and implemented.

B. KEY EMPLOYMENT TERMS

Once the appropriate form of the agreement has been determined, it is important to ensure that the agreement contains key employment terms important to the organization and required by local laws.

Most importantly, the agreement should properly identify the employer. Typically, the employer is a local corporate entity, that is a subsidiary, branch or representative office established to do business in the jurisdiction in which the foreign employee will be engaged. In some instances, it is possible for a foreign entity to enter into an employment relationship with a local employee (for instance, in Australia, Belgium, Canada, Chile and Italy, just to name a few). If that is the case, the employment agreement should properly limit the local employee’s authority (e.g., the ability to enter into contracts for sales employees) at least so as to mitigate against permanent establishment or doing business exposure for the hiring company in the jurisdiction. Ultimately, the decision as
to how to engage is a balance between corporate, tax, employment and immigration considerations.

Also, as mentioned above, the “at will” concept is very unique to the U.S. Internationally, any changes to terms and conditions of employment require employee consent and in some instances (e.g., Brazil or Italy) changes may not be permissible even with employee consent. This means that there should be no at-will language in foreign employment agreements as it is inapplicable and potentially contradictory to other provisions in the agreement and local laws. For example, although non-U.S. employers cannot terminate employees unilaterally at will, probationary periods are recognized in many countries and proper drafting in an employment agreement will allow an employer to terminate without notice or cause during that period (e.g., in Germany of up to six months, in Turkey for up to two months, etc.). Furthermore, termination provisions that are drafted in accordance with local laws — or which refer to applicable collective bargaining agreements, work rules, etc. — will give employers the ability to discipline and/or terminate employees without notice or severance.

Employment agreements also typically outline the employee's compensation (e.g., base salary, incentive compensation) and other benefits. Outside of the U.S., and again because the concept of at will employment does not exist, it is crucial to carefully word such provisions to avoid any implications that variable compensation is a term and condition of employment that cannot be amended. Most jurisdictions also recognize the concept of “acquired rights,” which basically means that if a benefit is provided to an employee over time, it becomes an entitlement or a right that the employee has acquired. Discretionary language may be helpful, although it may have limited legal effect.

Foreign employment agreements should typically outline the employee's working hours, whereby great care should be taken to draft language that is appropriate for the employee's position. For instance, in France, certain types of employees can be bound to specific working-time arrangement distinct from the usual 35 hour working week (e.g., a 218 days’ arrangement whereby the employer only has to track days worked, not hours worked). Furthermore, foreign employment agreements often outline the employees' (typically very generous) vacation entitlements, rules on carry-over of vacation, etc.

It is not uncommon for employment agreements to contain post-termination restrictive covenants, including post-termination non-competes and employee or customer nonsolicits. The rules on the permissibility of such restrictions vary widely, from jurisdictions recognizing them if narrow in scope and duration (e.g., Australia and the United Kingdom) to jurisdictions recognizing post-termination restrictions if properly compensated (e.g., China, France or Germany) to jurisdictions not recognizing such post-termination restrictions at all, particularly post-termination non-competes (e.g., India, though laws are developing). In addition to the importance of valid nonsolicits and noncompetes to employers, the fact that in some jurisdictions such restrictive covenants have limitations on the employer and the employee’s ability to waive, it is especially important to “get it right” from the outset.
For U.S. multinational employers, it is also prudent to include language requiring compliance with the United States Foreign Corrupt Practices Act (which has extraterritorial application) or a U.S. Code of Business Conduct, although the violation of such U.S. centric rules can typically not justify discipline or termination under local laws, absent a violation of such laws. Furthermore, U.S. Codes of Conduct, while driven by U.S. legal requirements, often need amendments for international use, so not to offend local employment or data privacy laws (which of which carry criminal penalties).

Finally, foreign employment agreements typically contain choice of law and forum clauses, although absent an express agreement, the assumption is that employees can bring claims in the jurisdiction in which they performed their services, under the laws of such jurisdictions.

C. AGREEMENTS/DOCUMENTS ANCILLARY TO THE EMPLOYMENT AGREEMENT

Together or in connection with the employment agreement, foreign employees often receive ancillary agreements.

For instance, if the U.S. parent will be providing a grant of stock options, restricted stock units or other equity, then this should be communicated in a carefully worded stock option side letter – separate and apart from the local employment agreement – by the U.S. issuing parent. This separation is important to militate against the risk that the value of the equity is considered in calculation of damages for unlawful termination, or notice or severance calculations, among others. Also, maintaining the communications regarding equity with the U.S. issuing parent helps support the argument that such grant is subject to U.S. laws, not local laws.

As to the protection of confidential and proprietary information, some companies like issuing a standalone proprietary information and inventions assignment agreement ("PIIA"). A U.S. PIIA, however, should be reviewed for local law compliance, or it can result in unexpected costs (such as in China, where a carefully drafted PIIA can determine the amount of compensation to be paid for patents, whereas absent such an agreement, statutory rules apply), or possibly even insufficient assignment of IP all together. Alternatively – and this is very common in the international context – appropriate confidentiality and assignment of IP language could be included within the employment agreement.

To the extent employees participate in variable compensation plans, they will typically be provided with a commission or bonus plan in conjunction with the employment agreement. Again, such commission or bonus plans should typically be reviewed under local laws because, for instance, U.S. laws and norms on draws, claw backs and timing for payments do not translate to most jurisdictions. Further, changes to commission plans and / or the individual employees’ on target earnings and potential, cannot be made unilaterally in most jurisdictions outside of the U.S., and thus care should be taken in implementing such changes.
Finally, various foreign jurisdictions require issuance of mandatory work rules or internal regulations (e.g., Belgium for a company of any size, France for a company with 20 or more employees, Japan and Korea for a company with 10 or more employees, etc.). In some jurisdictions, any such work rules must be filed with the government authorities (e.g., Japan and Russia). To the extent such documents are required, they may be issued in conjunction with the employment agreement, or may be referenced in the employment agreement. Other jurisdictions require certain mandatory policies and procedures, such as violence and workplace harassment policies in Ontario, Canada.

D. ADDITIONAL OBLIGATIONS RELATING TO EMPLOYMENT AGREEMENTS

Even after the employment agreement has been carefully drafted, all key terms have been addressed, and ancillary documents have been issued, there are additional pitfalls.

Importantly, various jurisdictions have local language regulations, requiring employment-related documents to be issued in local language. That is the case, for instance, in Belgium, France, Quebec, Russia, etc. If employment agreements are not issued in local language, they typically can be relied upon by the employees, but the employer cannot enforce any restrictive terms outlined in the agreement (e.g., a probationary period, noncompetes, compliance with company rules, etc.).

Furthermore, some jurisdictions require that employment agreements, or at least certain key terms, are filed with government authorities. This is the case in Spain, for instance, where the employment agreement, or a “basic copy” thereof, must be registered with the National Public Employment Service.

Yet another group of jurisdictions contains other formal onboarding documentation requirements. For instance, Brazilian employees have a labor booklet, which must be stamped upon commencement of employment.

E. TERMINATING THE EMPLOYMENT RELATIONSHIP

With all this said, it comes as no surprise that terminating the employment relationship outside of the U.S. is not an easy undertaking.

In most non-U.S. jurisdictions, employees are entitled to mandatory notice and severance requirements. These requirements may differ depending upon the type of termination (e.g., a termination due to redundancy typically triggers severance pay, whereas a termination due to misconduct may not). Further, while most countries use a seniority-based system for calculating notice and severance, others have very unique formulas (e.g., Belgium’s Claey’s formula for severance, Canada’s common law notice period and China’s cap for severance).

Also, like with the drafting of the employment agreement, the drafting of an appropriate termination agreement can pose unexpected pitfalls. For instance, some jurisdictions (e.g., Brazil), do not recognize releases. In other words, while an employee can effectively acknowledge and agree that they have received all payments due and owing, they cannot release all claims (known or unknown) against the employer. Other
jurisdictions require a release of claims to be in a specific form or for the employee to be represented by counsel (e.g., UK employees need to sign a compromise agreement while being represented by counsel to properly waive their claims). In yet other jurisdictions, releases need to be submitted to the labor board, government authorities or unions for sign-off (e.g., in Mexico).

This situation is exacerbated in the situation of mobile employees. In many instances, they may be entitled to the "best of both worlds," i.e., the laws of their home jurisdiction and their host jurisdiction, or even the laws of numerous jurisdictions if they worked in various locations. U.S. citizen employees working abroad for a U.S. company or a company controlled by a U.S. company also remain entitled to protections of U.S. laws with extraterritorial application, including Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act, which poses yet another challenge to the drafters of termination documentation for such employees.

F. PLANNING AHEAD

Simply remembering that even some of the most basic U.S. concepts of employment law simply do not translate outside of the U.S. is extremely helpful in managing a global workforce. While the potential pitfalls for drafting of international employment agreements are numerous, a few key issues to watch for *When in Rome are*

- Pick the correct hiring entity
- Understand who is being hired, an employee (and type of employee), contractor, officer/director, etc.
- Identify any mobile employee issues from the outset
- Provide “best practices” employment contracts appropriate for individual positions from the beginning
- Separate U.S. equity from non-U.S. employment documents
- Carefully draft post-termination non-compete / non-solicits
- Don’t be U.S. centric (many U.S. terms/practices do not translate or are non-compliant with local laws)
- Be culturally sensitive