Round the World in 60 Minutes: Current Issues & Updates for Global Equity Programs

ABA Section of Taxation Employee Benefits Committee

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Belgium: employer compliance changes for equity awards

Historically, many US-based issuers did not operate payroll reporting or withholding for equity awards held by Belgian plan participants where costs were not charged out from the U.S. parent to the local Belgian entity, and the Belgian entity did not "intervene" in the share plan administration or grant process.

Developments over the past several years in audit landscape, court rulings, tax authority positions and ultimately legislation have culminated in a requirement to report via payroll and withhold income tax and social security for equity awards in Belgium.
Income tax withholding
Historically, income tax withholding has not been required in the context of a foreign parent company granting equity awards to Belgian employees employed under a separate legal entity/subsidiary where that entity was not intervening in the administration of the share plan.

New legislation expected to enter into force on January 1, 2019, will require employers to operate income tax withholding and payroll reporting regardless of any intervention or recharge, including acting as an intermediary in the grant process. The obligation is supported by a newly introduced assumption that the Belgian employer will be considered as the grantor of remuneration.

Payroll reporting
Historically has not been required if the Belgian subsidiary is not intervening in administration of the plan and share plan costs are not charged out from the parent company to the local entity.

In line with the updates above for income tax withholding, the new legislation will require employers to report equity income via payroll in 2019.

As a transitional measure for 2018, employers should report all 2018 equity income in the annual income statement by March 1, 2019.

Social Security charges
Historically, no employee or employer social tax due where there is no intervention and no charge out. The definition of “intervention” for social tax purposes differs from that with respect to income tax.

Effective now, payment of equity income by a foreign parent company should be subject to employee and employer social tax contributions if the award is granted to reward the work performed within the framework of the employment contract or is linked to the function performed by the employee. The prior rules regarding intervention are no longer valid from local authorities’ perspective, and auditors will in practice now be required to follow the new guidance.

Vacation pay
Historically, no vacation pay contributions due because awards were not subject to social security charges.

Because awards are now subject to social security charges, single and double vacation pay contributions may be due where income is classified as a “variable” payment under Belgian law (generally, the payment must be both “uncertain” and “variable”).
Employee and Employer impact

Next steps

Payroll implementation

- Set up earnings codes for all equity awards, including review of classification as "variable" compensation for vacation pay purposes, and test operation with payroll provider

Broker withholding

- Configure and test combined effective tax withholding rate broker and stock administration platform where sell-to-cover or net share settlement is used

Cost estimate

- Estimate and socialize additional company costs resulting from new social security and vacation pay contributions

Employee communications

• Strategize and issue employee communications regarding new employer compliance obligations and impact to employee experience

By the numbers

53.5%
Approximate uncapped employer social tax contribution rate, due on equity income and vacation pay

13.07%
Uncapped portion of employee social tax rate

28%
Approximate uncapped employer social tax contribution rate, due on equity income and vacation pay

15.67%
Employer vacation pay contribution rate on "variable" pay

By the numbers
Overview of new withholding income tax for French tax residents

**In scope**
- Wages
- Non-qualifying reward programs
- Replacement income
- Pensions

**Out of scope**
- Capital gains
- Qualified reward programs
- Investment income
- Self-employment income
- Personal income

- Individual withholding rate to be communicated by the French tax authorities to the employer.
- The payer of the income must withhold and remit tax to the French tax authorities on an ongoing basis.
- In cases of non-compliance, penalties may apply to the employer as collecting agent in addition to potential penalties for the individual taxpayer.

**Income received until December 31, 2018**
French tax residents pay their income tax in the year following the year the income is received.

**Income received as of January 1, 2019**
As of January 01, 2019, French tax residents will pay income tax on their 2019 income.
(result = income tax not due on most 2018 income)
Overview of new withholding income tax for French tax residents (cont.)

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<tr>
<th>Non-Exceptional Income</th>
<th>Exceptional Income</th>
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<td><strong>Tax credit available</strong></td>
<td><strong>No Tax credit available</strong></td>
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| The tax credit will be calculated on non-exceptional income only, in order to prevent aggressive tax planning. | Some examples of Exceptional income:  
• Severance payments;  
• Corporate officer termination payments;  
• Company profit-sharing and saving plans;  
• Any income that is not deemed to be received on an annual basis (such as stock option exercises). |

Income from Equity Awards?

**Key Considerations:**
- Review whether equity awards will be considered Non-Exceptional Income or Exceptional Income.
- Top Broker withholding for income taxes.
- Determine withholding rates to be applied for income tax and social security tax (Regressive rate system).
- Payroll readiness if using third-party payroll provider.
Global Equity Grants

We will be focusing on some special requirements for equity grants in the following areas:

• European Union Prospectus Requirement
• China
• Repatriation Requirement Issues
EU - European Prospectus Directive

• The Prospectus Directive governs the EU requirements for a prospectus and its content, format, approval and publication.


• The New Prospectus Regulation repeals and replaces the Prospective Directive with effect from July 2019 (save a few provisions which were repealed in July 2017 and July 2018).
Currently, Issuers who grant securities in European Economic Area (EU plus Norway, Iceland and Liechtenstein) ("EEA") must comply with EU prospectus requirements.

The issuer must choose a home member state in the EU, as the EU prospectus requirements are implemented by regulations of the home member state.

European Securities and Markets Authority ("EMSA") has determined that non-transferable stock options are not subject to the prospectus requirements.

EMSA also determined that free awards (e.g., RSUs) are not subject to the prospectus requirements, unless the securities were explicitly provided in lieu of salary.
EU - European Prospectus Directive Requirements

• Securities granted under an employee share plan are exempted from the prospectus requirements if granted to fewer than 150 grantees in each EEA member state. A grant to 150 or more persons in ANY member states voids the exemption for ALL member states.

• A non-EU company may make grants to existing or former employees and directors without registering a prospectus, if (i) issuer’s shares are registered on a stock exchange that has equivalent regulatory oversight to the EU and (ii) issuer files an “information document” with the regulator of their EU home member state. The information document must disclose the number and nature of securities offered along with the reason for the grant.
  o This exception had no practical use for U.S. companies, as the EU never designated the NYSE as being an equivalent market.
EU – European Prospectus Regulation (July 2019)

• Issuers who offer share-based incentive programs to European employees will be exempt from prospectus obligations and no longer will need to file a prospectus with the regulatory authority of the issuer's home member state.

• Issuers would only need to make available an offering document containing basic information regarding the offering and the issuer, such as:
  o Number and nature of securities being offered
  o Reasons for the offering
EU – European Prospectus Regulation (July 2019)

• It is anticipated that non-transferable stock options and free offers of RSUs will continue to be not subject to the EU Prospectus Regulation.

• Issuers granting securities in U.K. may be subject to different requirements depending on the outcome of Brexit.
China Registration Requirements

• Grants of stock or options to employees in China must be approved in advance by the China Securities Regulatory Commission (CSRC).

• Non-PRC issuers have typically taken the position that employee stock awards (including purchases of parent stock under a stock option or stock purchase plan) are not public offers, requiring registration.
  
  o The CSRC’s definition of “public offer” is limited by its terms to offers to 200 or more purchasers (at least for domestic issuers).
  
  o The CSRC has informally advised that it does not generally view the grant of stock options to employees as a public offer.
China Registration Requirements

• As a practical matter, the CSRC has never established a process for registering non-PRC plans or a form for doing so.

• Most non-PRC companies that desire to give stock awards to their employees in China have imposed same-day sale requirements, to limit the period over which the employees are holding the stock.
China SAFE Registration

- Subsidiaries of foreign issuers offering stock options, SARs or RSUs to PRC nationals or expatriate PRC residents on the local payroll must:
  - register the plan
  - appoint a local administering agent
  - establish local foreign exchange accounts and register those foreign exchange accounts with the State Administration of Foreign Exchange (SAFE).
China SAFE Registration

- The local agent must:
  - Make quarterly filings to SAFE documenting any purchases and sales and must update SAFE if there is a major change to the plan.
  - Appoint a qualified asset manager and custodian (usually, the plan’s independent administrator or broker) outside the PRC to hold foreign securities acquired under the stock plan.
  - Provide requested documentation to the SAFE, including translations of all plan documents, a copy of the adopting resolution, a summary of the asset manager’s internal controls on improper trading, and labor contracts for the PRC employees (or other proof of employment).
  - Negotiate an annual quota with the local SAFE office on the total amount of securities purchases to be made through the foreign exchange account.
China SAFE Registration

• SAFE registration requirements generally do not apply to non-PRC residents, other than PRC nationals whose labor relationship was established within China (e.g., an award recipient has an employment agreement with a Chinese subsidiary of the Company).

• In the event that any award is exempt from SAFE registration restrictions, residents may exchange and remit up to USD 50,000 annually for the purchase of securities outside China.
Repatriation Requirements

- Some countries require that employees repatriate the proceeds from the sale of shares, making it more difficult to offer equity grants to employees working in certain countries.

- Thailand
  - Foreign currency received by employees who are residents of Thailand must be brought into Thailand and sold against Thai Baht or deposited with a commercial bank in Thailand within 360 days from the receipt date of the foreign currency.
  - If resident remits more than USD 1 million outside Thailand to purchase foreign shares, he or she must obtain prior approval from the Bank of Thailand.

- Morocco
  - Sale proceeds and dividends must be repatriated to Morocco within 30 days; however, expatriates face no registration or repatriation requirement if investments abroad are funded from an offshore account.
Repatriation Requirements

- **Russia**
  - Repatriation requirements apply when a Russian resident supplies goods, performs a service, or grants rights to use information or IP, and is waiting for payment from a non-resident.
  - However, effective January 1, 2018, Russian residents may receive proceeds from the sale of shares listed on a foreign exchange on the legally approved list (which includes NYSE), directly into foreign accounts in Organization for Economic Cooperation and Development ("OECD") or Financial Action Task Force ("FATF") countries (such as the U.S.) without first repatriating back to Russia.

- **Argentina**
  - Argentine Central bank lifted all remaining exchange control restrictions in 2017.
  - Repatriation of proceeds from the sale of underlying shares not required. However, if a grantee elects to repatriate funds, it must be transferred pursuant to Argentine Central Bank rules.
GDPR & Global Equity Programs
An Overview

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Global Data Privacy

Generally

- The collection, processing, use, and transfer of personal data is regulated and restricted in many countries.
- Approximately 117 countries currently have “omnibus” privacy or data protection laws.
- Approximately 28 countries (including the USA) currently have “sectoral” privacy or data protection laws.
- The countries with no privacy or data protection laws may still have coverage in their constitutions or otherwise.
EU General Data Protection Regulation ("GDPR")

The Road to GDPR

• Data Protection Directive 1995

• Strategy for modernizing EU data protection (November 2010)

• Proposed EU General Data Protection Regulation (January 2012)
  – 4 years of legislative work by European Parliament and Council of the EU

• GDPR adopted on April 27, 2016

• GDPR became effective on May 25, 2018

• GDPR is based on the same principles as the previous directive, but:
  – More rights for employees
  – Stricter requirements for “controllers” and “processors” of data
  – Tougher penalties for non-compliance

• One single law for the EU, but still to be interpreted nationally
“Establishment” criterion
- Based on “establishment” of controller or processor in the EU, regardless of whether the processing of data takes place in the EU

“Targeting” criterion
- Based on the processing of personal data of individuals in the EU, where the processing is related to:
  - The offering of goods or services to such individuals in the EU, or
  - The monitoring of such individuals’ behavior in the EU

Potential extraterritorial reach
• If GDPR applies to a particular controller or processor, then the relevant provisions of GDPR will apply to the processing of “personal data” by the controller or processor.

• “Personal data” is a broad concept covering any information relating to an identified or identifiable natural person, such as:
  – Name,
  – Identification number,
  – Location data,
  – Online identifier, or
  – One or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person
The 7 Principles

- Lawfulness, fairness, and transparency
- Purpose limitation
- Data minimization
- Accuracy
- Storage limitation
- Integrity and confidentiality
- Accountability
GDPR - Restrictions on Employer

Lawful Grounds for Processing Employee Data

• Processing is only lawful if:
  – Data subject has given consent
  – Necessary for the performance of a contract or to take steps prior to entering into a contract
  – Necessary for compliance with legal obligation to which the controller is subject
  – In order to protect vital interests of a person
  – Necessary for public interest or official authority
  – For the legitimate interests of controller/3rd party
Consent

- Consent, the most common previous avenue to address data collection and transfer, may no longer be a viable approach
- For purposes of GDPR:
  - Consent must be demonstrable by the controller
  - Consent must be clearly distinguishable from other matter
    - Intelligible
    - Easily accessible
    - Clear and plain language
  - Consent may be withdrawn at any time
    - As easy as to give it
  - If service is conditional on consent, then it is not freely given
GDPR

Lawful Grounds for International Data Transfers

• Data subject has given consent, after being informed of the possible risks of such transfer
• Transfer necessary for the performance of a contract between the data subject and the controller
• Transfer necessary for the performance of a contract concluded in the interest of a data subject between the controller and another natural or legal person
• Adequacy Decision
• Appropriate Safeguards
  – Binding Corporate Rules
  – Standard Contractual Clauses
    – Adopted by European Commission
    – Adopted by a supervisory authority
  – Contractual clauses authorized by a supervisory authority
GDPR

Rights of the Data Subject

- When personal data is collected, the data subject has the right to receive notice of certain information, including where applicable:
  - Identity and contact details of the controller, its representative, and the data protection officer, Purposes of the processing,
  - Legal basis for the processing,
  - Categories of data collected,
  - Recipients of the personal data,
  - Whether the controller intends to transfer the personal data to a third country or international organization and the existence or absence of an adequacy decision by the Commission or reference to the appropriate or suitable safeguards and the means by which to maintain a copy of them,
  - Retention period, and
  - Individual rights, including the right to complain to supervisory authority
GDPR

Rights of the Data Subject

• Information and Access to Personal Data
• Right to Rectification
• Right to Erasure (‘‘Right to be Forgotten’’)
• Right to Restriction of Processing
• Right to Data Portability
• Right to Object
Potential Penalties for Non-Compliance

- Fines and Penalties
  - Proportionate and dissuasive
  - Administrative violations v. violation of data subject rights
  - Maximum for administrative violations: greater of €10 million or 2% of total worldwide annual turnover of the preceding fiscal year
  - Maximum for more serious violations: greater of €20 million or 4% of total worldwide annual turnover of the preceding fiscal year
Questions