

The Secondment of Workers to the UK in the Financial Services Industry

Contributed by:

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It is particularly common for multinational financial services companies to send their employees and senior managers to work for UK affiliates or clients. Such mobile working arrangements can be beneficial to employers in developing new relationships and opportunities. However, there are also employment law considerations to be aware of in the context of overseas secondments. Dealing with employment matters in an environment regulated by the UK Financial Services Authority (FSA) can also add an extra layer of complexity. Additionally, the UK is in the process of reforming its immigration system for migrant workers. In this article, we examine the key employment, immigration and regulatory issues that overseas employers should be aware of when considering transferring their employees to the UK.

Employment Law Issues

One of the first issues to be determined when an employer proposes to post an employee to the UK is what type of assignment relationship is appropriate in the circumstances. There are three basic choices:

- (a) To enter into a secondment arrangement;
- (b) To agree a new local UK employment contract direct with the UK affiliate; or
- (c) To agree what is commonly referred to as a dual employment relationship.

We examine each of these options below:

Secondment Agreement

The most common assignment relationship is that of secondment. Under this type of relationship, the foreign law employment agreement continues and the secondment agreement simply varies the appropriate terms of that agreement to reflect the terms and conditions of the UK assignment. Ideally the two agreements dovetail so that there is no ambiguity about which terms and conditions apply whilst the employee is working in the UK. The secondment relationship means that the foreign entity retains a degree of control over the employee and generally gives it the

right to bring back the employee to the foreign business at the end of the secondment period. Employees also tend to favour secondment arrangements because it means they have the comfort of knowing that their original contract is still in place.

Local Employment Contract

Alternatively, the parties may decide that the employee should enter into a new UK employment contract directly with the UK employing entity. In these circumstances, the employee's previous foreign law employment contract would terminate and the new contract, whilst recognising continuous service with the overseas employer, would be drafted under English law and would solely reflect the UK terms and conditions. A local employment contract tends to be more relevant where the contemplated length of the assignment is for a longer period. The advantage of a local employment contract for the UK employer is that it gains full management and control over the individual.

Dual Employment Contracts

The final option is for the foreign employee to have two separate employment contracts, one with the foreign entity to cover any on-going work done in relation to that entity, and a second contract with the UK entity to cover any UK specific work. Dual employment contracts can have tax benefits, however, because of the particular complexities of tax law, these should only ever be put in place after specific dual jurisdiction tax advice has been sought.

Terms and Conditions of Assignment

Salary and benefits

Whichever form of relationship is eventually adopted, one of the key issues that needs to be tackled up-front is the employee's applicable salary and benefits package during the period of working overseas. Key in the mind of the employee is how much he is to be compensated for the *inconvenience* of being posted overseas. Employers therefore need to consider whether to pay the equivalent of the employee's previous salary or to scale this up

to reflect either the increased cost of living in the UK, or indeed any potential new duties required of the employee during the assignment. Will the salary level cause issues with employees within the UK entity? The employer will also need to consider whether salary should be paid in Sterling or in the currency of the employee's home country. In this respect, should the salary negotiations include a mechanism to deal with any potential salary fluctuations? The UK employer will also of course be concerned in determining which entity is responsible for paying the salary (irrespective of any charge back facility). Often the home country employer would continue to pay the employee, but would receive a fee from the host country. That said, such payment arrangements are not mandated by law and will vary with each case in hand. Tax and social security issues need to be resolved.

The employer also needs to consider whether the employee will continue to be eligible to participate in any home country bonus schemes and other benefit schemes during their stay in the UK. Careful thought needs to be given as to what is appropriate in particular circumstances. Clarity – in terms of what has been agreed – is essential.

Relocation Package and Benefits

A key element of attracting a foreign *seconded* to the UK in the first place will be a well-designed relocation package. Clarity as to what is covered is also essential. Are family, pets and possessions covered? Up to what limit? What about housing – at home and in the host country? Are cars included in the package? What about schooling and annual home trips?

Termination Issues

Whilst this may be furthest from the thoughts of the home or host employer when contemplating the scope and terms of the UK assignment, consideration should be given at the outset as to what happens at the end of the assignment. If a secondment arrangement is contemplated, an additional issue arises as to whether at the end of the secondment it is just the secondment that ends or is it in fact both the secondment and the employment itself? What about terminating during the secondment? Employers should bear in mind that during a secondment to the UK the employee will accrue English employment protection rights. Early advice on the

premature termination of a secondment is recommended. What about termination at the end of the secondment? What has been agreed should happen at the end of the secondment?

The secondment agreement should make clear what the obligations of the business are in terms of redeploying the employee. It may be the case (although not usually so) that the UK company first and foremost has an obligation to search for alternative employment for the employee within the UK organisation. More commonly, the agreement should specify that the employee will return to the overseas employer but care should be taken not to make any promises that the employee will have the right to return to his previous (or indeed to any) role. Clearly this may not be possible, if, during the term of the UK assignment, someone else has stepped into the employee's previous role or indeed if a restructuring has taken place and the role no longer exists. It is therefore advisable to confirm with the employee at the outset of the assignment that at the end of the UK assignment, discussions will take place as to a role within the home country employer, but no guarantee can be given. If termination is then contemplated, again careful and early advice is recommended, as the individual is likely to have accrued employment protection rights in the UK.

Mandatory English Law Protection

Employers must also understand that even if the overseas worker is employed in the UK under an employment agreement governed by home country law (*i.e.*, not English law), he will still benefit from mandatory English employment rules. The basic rule is that the parties' choice of law cannot have the effect of depriving the employee of the protection afforded by the mandatory rules of the country with which the contract is otherwise most closely connected. Put simply, an employee working in the UK will not be deprived of certain English law rights simply because the parties have, for example, agreed that the law of the home (or any other country) will govern the relationship. These mandatory employment rules include the English employment protection rights such as unfair dismissal rights, minimum notice period rights and anti discrimination rights.

Immigration Considerations

Importantly, immigration considerations need to be considered by the UK employer in advance of the intended start of the UK assignment. Assuming that the individual does need permission to work in the UK, the most obvious form of immigration document for the UK employer to apply for in respect of this individual is an Intra Company Transfer work permit (work permit). A work permit is issued by the UK Border Agency to allow a UK-based employer to take on a named individual in a specified job for a defined period. Importantly, it does not enable the employee to work for another employer or in a different role. This means that employers should not employ an individual on the basis that they have (or have held previously) a work permit for another employer.

To be eligible for a work permit, the UK position must be of a certain level - in other words require the individual holding the position to hold certain relevant qualifications or skills. The other key requirement is that the transferring employee should have at least six months' experience working for the overseas company and in this time they must have obtained specific essential company knowledge and experience that is not available from within the UK workforce. Provided that these factors can be established, the UK employer may submit a work permit application. As work permit applications are currently taking in excess of one month to process, employers are advised to apply early in on the relocation process. Employers must also consider that the work permit scheme, in its current form, will be abolished towards the end of 2008 but that they need to continue to work with the current scheme until then.

From November 2008, Tier 2 of the UK Government's new points-based immigration system will replace the existing work permit scheme in its entirety. Tier 2 is an integral part of the new system, which represents the Government's efforts to simplify the current immigration system by streamlining the eighty or so immigration routes that currently exist, into five broad immigration tiers. Under Tier 2, any UK employer seeking to transfer an employee from a non-EU jurisdiction must first apply for a licence to employ that worker. To be granted such a licence, employers must meet all requirements in record-keeping, reporting, and compliance to ensure UK Border Agency cooperation, as well as meeting Tier 2-specific sponsorship duties. To apply for a licence, employers must submit an

online application form and submit hard copy supporting documents within fourteen days of submitting the online application. If the application is approved, a four-year licence is granted and the employer is added to the register of sponsors, allowing them to apply for a certificate of sponsorship for immigrants. Each certificate of employee sponsorship will be assigned a reference number, which the prospective employee will take to the nearest British Consulate when applying for UK entry/immigration clearance.

Employer pledges and obligations when issuing a certificate of sponsorship include:

- Maintaining documentation relating to the foreign national employee, including contact details and copies of work eligibility documents;
- Compliance with express reporting duties, including informing the UK Border Agency of any significant change in the immigrant's circumstances, or failure to report to work for ten days or more without permission; and
- Cooperation with the UK Border Agency, including ensuring that the migrant may lawfully work in the UK and issuing certificates only to migrants who meet the criteria of the relevant tier.

Sponsorship licences may be withdrawn or downgraded if an employer fails to comply with these duties.

Regulatory Issues

There are likely to be regulatory consequences in seconding employees to a UK firm, depending on the seniority of the person being transferred and the particular functions that they will carry out.

Individual Registration with the FSA

If it is intended that the relevant individual will perform a "controlled function" under any employment arrangement then, under Section 59 of the Financial Services and Markets Act 2000 (FSMA), that person will first need to be approved by the FSA, depending on the type of firm. An arrangement includes a person being appointed to an office, his becoming a partner or being an employee (under a contract of service or otherwise). A secondment would constitute an arrangement for the purposes of Section 59 of FSMA. Failure to obtain approval from the FSA for a

person to perform a controlled function when required could result in FSA disciplinary action against the UK firm and/or the individual concerned.

Controlled functions are those functions of a financial services business that have a particular regulatory significance. The most common controlled function is the customer function. This is one which will involve the individual dealing with clients, or the property of clients, in a manner substantially connected to the carrying on of the investment business of the UK firm. An individual who acts as a broker, an investment adviser or an investment manager for instance will perform the customer function and so will need to be approved by the FSA. Other common controlled functions are the governing functions (for example, being a director or a partner of the UK firm) and the required functions (for example, having responsibility for regulatory compliance or for anti-money laundering).

There is no provision for an individual to perform the customer function on a temporary basis without approval. However, individuals may perform the other controlled functions temporarily without the need for approval. Such controlled functions can be performed for up to twelve weeks in any consecutive twelve-month period without requiring approval.

No firm will need all of the controlled functions as there are different controlled functions for different businesses. There are different requirements for individuals who are seconded to a UK branch of an existing regulated financial services firm in Europe for instance¹ and different requirements for individuals who are seconded to a UK branch of an overseas firm (not being in Europe).²

Applying to Be an Approved Person

It is the firm's responsibility to apply to the FSA on the individual's behalf for approval by completing an application form (Form A). As part of the application process, the firm will be asked to help prove that the individual:

- Meets and maintains the criteria for approval (the "fit and proper test" – this is a benchmark used to assess an individual's suitability to perform a controlled function and involves a consideration of their honesty,

reputation, competence and capability); and

- Will be able to comply with the standards required in carrying out their controlled function(s) (the "Statement of Principle" and the "Code of Practice" – these are the general standards that must be met in carrying out the controlled functions).

The fact that an individual has been registered with another regulator (for example the *Autorité des Marchés Financiers* in France or the Securities Exchange Commission in the U.S.) will not exempt the individual from the need to be approved, but it will be taken into account by the FSA in assessing the applicant's fitness and propriety.

The FSA has a statutory obligation to determine applications within three months. However, the FSA has made a commitment to complete the processing of eighty-five percent of applications within a week, depending on the nature of the application. In non-routine cases the processing will take longer.

If the FSA refuses an application, the applicant firm and/or the individual candidate can refer the matter to the Financial Services and Markets Act Tribunal.

Qualifications to be an Approved Person

Approval will only be granted by the FSA if it is satisfied that the individual candidate has the necessary skills, knowledge and expertise to carry out the function(s) s/he is to perform. There are no specific examination requirements for an individual performing a significant influence function. However, the FSA may require the individual to take a straightforward examination on UK financial services regulation which tests the individual's basic understanding of the UK regulatory environment (for example where a U.S. broker already has a relevant U.S. qualification such as a Series 7, although this will still depend on their particular experience). If an individual has little or no work experience in the financial services sector and/or will perform a customer-controlled function, they are likely to need to sit further examinations covering, in particular and where relevant, the investment business to which the customer function concerns, particularly if they will deal with retail clients.

Being an Approved Person

Once a person has become an approved person, s/he is individually regulated by the FSA and is expected to maintain the standards of conduct set out in the Code of Conduct and the Statements of Principle. The FSA can also take disciplinary action directly against the individual for regulatory misconduct.

Once a person is approved by the FSA, in the case of a multi-European firm, the FSA generally has no issue with such approved persons being permanently located at an affiliated European office,³ notwithstanding their status as an employee or *seconded* of the UK firm.⁴ Where it is intended that an individual will be based outside of the EU, the FSA may allow that individual to perform some controlled functions (e.g., compliance or some governing functions) however the FSA would not be happy with such individuals performing the customer function. The following example illustrates this point.

For commercial reasons many U.S. multinational broker-dealers often wish to use the trading desks of the U.S. parent to also accept telephone orders on behalf of clients of its UK (FSA-authorized) subsidiary. The individual brokers of the U.S. trading desk are often "seconded" to the UK subsidiary or are employed by both the UK subsidiary and the U.S. parent under a "dual hatting" arrangement, even though such brokers are physically located in the U.S. In these circumstances, the brokers would need to be registered as approved persons of the UK subsidiary as they would be performing the customer controlled function by accepting orders from clients of the UK subsidiary. It is suggested, however, that the FSA may expect such individual brokers to be physically located in the UK and not the U.S. This is on the basis that, if those individuals were to remain in the U.S., the FSA could not properly or practically exert any extra-territorial supervisory jurisdiction over those individuals.⁵

The practical effect of this is that, where it is intended that an individual will perform a customer function, they cannot be physically based outside of the EU.

Conclusion

Perhaps the most important lesson to be gleaned from the myriad of legal issues that employers need to contemplate to affect the

transfer of an employee to the UK, is "don't leave it too late". It is all too easy in the rush to put an overseas secondment in place, to overlook certain employment, immigration or regulatory matters. With careful planning, the relocation process can be flawless for both employee and employer. However, the consequences of failing to consider all issues can be costly.

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¹ Such individuals, for instance, will not need approval to be a director or partner, unless they also intend to carry out any customer functions, significant management functions or will be responsible for compliance or anti-money laundering.

² Such individuals will only need approval to carry out the governing function (only if acting as the chief executive in the UK), the required function, the significant management function (in limited circumstances) and the customer function. However, the overseas firm is required to notify certain other positions (which do not require approval) to the FSA, for instance the firm's worldwide chief executive if not in the UK.

³ This is as a result of the European investment business passport under MiFID.

⁴ The FSA would, however, normally expect the firm's money laundering reporting officer to be based in the UK.

⁵ If the individual brokers acted on behalf of the UK subsidiary, this could suggest that there was a branch of the UK firm in the U.S. which could have U.S. tax and regulatory implications.