

Morgan Lewis

# GLOBAL PUBLIC COMPANY ACADEMY

**EMPLOYING AND COMPENSATING A GLOBAL WORKFORCE**

K. Lesli Ligorner  
Matthew Howse  
Jonathan Zimmerman  
Leslie DuPuy

**July 12, 2023**

# OVERVIEW

**I. Equity-Based Compensation**

**II. US Taxation**

**III. Cross Border Employment Issues**

The background features a dark blue field with numerous glowing, curved lines in shades of blue and orange. These lines are interspersed with small, bright white and blue dots, creating a sense of motion and depth, similar to a data visualization or a futuristic landscape.

# Equity-Based Compensation

# Equity-Based Compensation

- Equity Plan
- ESPP

# Implementation

- Plan Design and Documentation
- Administration
- Compliance Considerations
  - U.S. Law
  - Country Specific Analysis of Local Compliance

# Implementation: Plan Design and Documentation

- Plan Design
  - Global Plan
  - Discretion to modify for local compliance
  - Sub-plans
- Form Agreements
  - Country specific provisions
- Supplements to Prospectus

# Compliance Considerations

- Tax Consequences
- Securities Law Compliance
- Exchange Control
- Employment Laws
- Data Privacy
- Additional Issues for ESPP

# Compliance Considerations: Tax Consequences

- Taxation Event
  - Options: generally, tax at exercise
  - RSUs: generally, tax at vesting
  - Restricted Shares: may be tax at grant
  - ESPP: generally, tax at purchase outside of the U.S.
  - Characterization of Income
    - May be unclear



# Compliance Considerations: Tax Consequences

- Withholding and reporting
  - Who withholds and reports
  - Effect of recharge
- Social insurance
  - Employer and employee contributions
- Mobile employees
  - Tax in multiple jurisdictions
  - Tracking issues

# Compliance Considerations: Securities Law Compliance

- Varies by country
  - Registration/Prospectus
  - Exemptions for employee offerings or small offerings
  - Notice filing requirements
- Change type of award
- Annual/periodic reporting

# Compliance Considerations: Exchange Control

- Regulates foreign currency flows
- Approval
  - China
    - SAFE approval
    - Requires repatriation
- Reporting requirement
  - By employer
  - By employee

# Compliance Considerations: Employment Laws

- Plan entitlement/acquired rights
  - Clauses to protect employer
- Vesting during notice period
- Discrimination
  - Age
  - Part-time

# Compliance Considerations: Employment Laws

- Clawback/Penalty clauses
  - Enforceability
  - Effect on taxation
- Restrictive Covenants
  - Enforceability
  - Effect on taxation

# Compliance Considerations: Employment Laws

- Governing law
- Translation requirements

# Compliance Considerations: Data Privacy

- Data privacy laws restrict processing and transfer of personal data
  - Consent
  - Third party administrator

# Additional ESPP Issues

- Conversion of Payroll
- Deductions
- Approval for Payroll Deductions
- Securities Exemptions
- Approval for Payroll Deductions
- Impact of Holding Period



# Practical Tips

- Review local compliance
- Prepare securities filing if necessary
- Prepare form agreements
- Analyze tax withholding/reporting
  - Establish process
  - Tracking mobile employees

# U.S. Taxation

The background features a dark blue field with numerous glowing, curved lines in shades of blue and orange. These lines create a sense of motion and depth, resembling a digital or data landscape. Scattered throughout are bright, out-of-focus bokeh lights in blue and white, adding to the futuristic aesthetic.

**Morgan Lewis**

Global Public Company Academy

# Federal Income Taxation for U.S. Citizens/Residents

- U.S. Federal Income Tax Withholding
  - U.S. citizens, permanent residents, and resident aliens are taxed on their worldwide income, regardless of where services are performed
  - Withholding generally is required for all U.S. citizens and residents, with several exceptions:
    - A treaty provides relief and the taxpayer claims treaty relief on the appropriate forms
    - At the time of payment, it is reasonable to believe that the payment will be excluded from gross income under Code section 911 (US citizens only)
    - The payment is subject to foreign income tax withholding in a foreign country or U.S. possession (US citizens only)
    - Additional exceptions apply for services performed in U.S. possessions

# Federal Income Taxation for Nonresident Aliens

- Nonresident aliens are taxed on U.S. source income – i.e., payment for services performed in the U.S.
  - Compensation generally allocated on the basis of workdays spent within and without the U.S.
  - Stock option income generally allocated on the basis of workdays between the grant and vesting dates.
- Absent treaty relief, withholding rules for nonresident aliens are as follows:
  - For employees, withhold at graduated rates under Code section 3402 (subject to flat-rate withholding rules for certain supplemental wages)
  - Non-employees generally are subject to 30% FDAP withholding under Code section 1441, even though the individual may be subject to tax at graduated rates

# Federal Income Taxation for Nonresident Aliens

- Treaties may provide relief for individuals who are present in the U.S. for less than 183 days during the year, if the compensation is paid by a non-U.S. employer and may not be deducted by a permanent establishment that the employer maintains in the United States.
- Under a few treaties, an additional limited exception is available for work done by the treaty country resident in the U.S., where total salary for the year does not exceed a prescribed dollar minimum
- Section 861(a)(3) exception applies if all three of the following apply:
  - (i) the employer is foreign person not engaged in trade/business in U.S. or foreign office of U.S. entity;
  - (ii) the nonresident alien spends no more than 90 days in the United States in the calendar year; and
  - (iii) compensation for all work in the United States does not exceed \$3,000.

# Social Security Taxation

- U.S. FICA Tax Withholding
  - Generally required for wages paid by any employer for services within the U.S., regardless of the employee's citizenship or residency status
    - Exception for nonresident aliens temporarily present in the U.S. under certain types of visas
    - Exception for certain temporary foreign agricultural workers
  - Generally required for services performed outside the U.S. by U.S. citizens and residents, but only for wages paid by an American employer
    - The term "American employer" includes U.S. corporations, the U.S. government, U.S. residents, and partnerships where 2/3 of the partners are U.S. residents
    - Also includes service under a U.S. government contract for a foreign member of a U.S.-based controlled group
  - Not required for employment with a foreign affiliate of a U.S. employer, except as provided by a totalization agreement or a 3121(I) agreement

# Social Security Taxation

- Totalization Agreements (more common)
  - Prevent double taxation where both countries provide for coverage
  - Permits social security credits in both countries to be added together
  - Especially useful for temporary assignments, where a minimum period of service is required for social security benefits
  - Not available for local hires
  - Only available in about 25 countries
- Section 3121(l) Agreements (less common)
  - American employer must have at least a 10% interest in the foreign affiliate
  - Agreement is irrevocable
  - Must apply to all U.S. citizens employed by the foreign affiliate, including local hires
  - American employer is responsible for withholding and paying the employer and employee share of FICA taxes
- Income tax treaties rarely address social security taxes

# U.S. Citizens/Residents in Foreign Retirement Plans

- Foreign funded arrangements taxed under Section 402(b)
  - Benefits become taxable when they vest
  - HCEs taxed on trust earnings in discriminatory plans
  - Funded arrangements are not subject to Section 409A
- Unfunded arrangements may be subject to Section 409A
  - Must comply or qualify for an exemption
  - Exemptions cover broad-based foreign retirement plans, and amounts excludable by treaty or pursuant to Code section 911
  - If exempt from or compliant with Section 409A, taxation is deferred until distribution or funding, whichever comes first
  - If plan violates Section 409A, vested benefits (using a different definition of vesting than Section 402(b)) are subject to immediate income taxation, plus a 20% penalty tax and premium interest tax retroactive to the vesting date
- Common mistakes: Failure to file forms required for treaty protection



# Non-Resident Aliens in U.S. Retirement Plans

- Many plans will exclude “non-resident aliens with no US source income” from participation
  - These employees may be excluded from non-discrimination testing
  - Employers may want to exclude from participation employees who receive benefits under the retirement plans of other countries
  - Plans often limit eligibility to employees paid from a U.S. payroll
- Taxation issues may arise when non-resident aliens employed in the US participate in a U.S. qualified plan
  - Distributions are subject to 30% withholding to the extent attributable to income generated in the U.S.
  - Distributions to non-resident aliens are reported on IRS Forms 1042 and 1042-S

The background features a dark blue field with numerous glowing, curved lines in shades of blue and orange. These lines are interspersed with small, bright white and blue dots, creating a sense of motion and digital connectivity. The overall aesthetic is futuristic and high-tech.

# Cross Border Employment Issues

# Key differences between US and other countries' labor laws

- Many legal systems and foreign Labor Codes are highly protective of employment relationships
- Labor rights are in many countries protected by national constitutions; are considered “social rights”; and thus are not subject to waivers
- Social rights can be the subject of significant intervention and regulation by the state or by trade unions or works councils
- Employment “at will” not recognized
- Employment relationships are contractual in nature and presumed to be of indefinite duration
- “Just cause” requirement to terminate without compensation
- Employment periods that an employee has worked for companies of the “same economic group” are added to determine the employee’s cumulative service

# Key differences between US and other countries' labor laws

- Changes in the legal or corporate structure of the employer typically do not affect the vested rights of employees
- Automatic transfer principle - employees might transfer automatically from one employer to another as a matter of law and be subject to certain restrictions
- Territoriality: generally, the labor law of a country may be invoked by an employee if:
  - the employment agreement was executed in said country; OR
  - if the work is habitually performed in said country.
- Most Favorable Law Principle: in a contract of employment, a choice-of-law clause does not have the effect of depriving the employee of the protection afforded to him/her by minimum or *mandatory rules of law*

# Employee Terminations

- No “at-will” employment
- Statutory provisions that require employers to show good cause and give notice before dismissing employees are the norm in many countries
- Justification must be related to conduct or capacity of the employee at the needs of the company
- In some countries, employers are required to include an employee representative in the termination process
- Generally, the dismissal must be reported to an employee in writing
- A termination found to be against employment laws or regulations may be nullified → the employee could have a right to reinstatement and/or monetary compensation

# Mass Terminations

- Aside from a showing of just cause one way or another, other rules apply to a group termination. (Like the WARN Act in the U.S.)
  - A notice period is frequently required, sometimes depending on the number of employees affected
    - *In some countries, the employer may instead make a payment equivalent to the required notice period*
  - The employer may be required to do both, give notice and make a payment
  - Employer may be required to retain based on seniority
  - Special rules for transfer of a business

# Consultation

- Automatic Transfer Laws- there may be an obligation to inform and consult with elected representatives
- Works Councils- in many countries, there may be a need to consult with works councils about certain “business changes”
- Large scale redundancies- across Europe, there are obligations to inform and consult with elected representatives in relation to large scale redundancies
- Significant liabilities and implications for failing to comply with these obligations

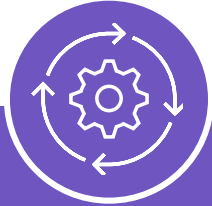
# Global Mobility

- Given the significant investment expatriation arrangements represent for employers, companies need to be aware of
  - the different legal routes to transferring an executive overseas and the implications of those routes
  - fundamental differences between U.S. labor laws and the labor laws of other countries; and
  - the risks such differences entail in the context of repatriation
  - immigration issues



# Effecting mobility

Common ways of structuring cross-border mobility and accommodating overseas working



## International secondment

The temporary assignment of an employee from one organisation to another for a specified period, usually to carry out a particular project.



## Local employment

The permanent transfer of an employee's employment to a host country. Depending on the requirements of the host country, this may or may not be to a local entity in the host country.



## Informal remote working

The temporary permitting of an employee to carry out their existing role from a country other than the country in which they are contracted to work for their employer.

# International secondments

## Temporary assignments with an expectation of return



### Advantages

Commonly offered to build relationships with third party businesses; career development; and to deploy skills and experience in new markets.



### Mandatory local laws

In advance, should consider laws of jurisdiction in which the secondment will take place. Local laws may impact the viability of the secondment.



### Paperwork

Best practice to document arrangement between: (i) seconder and the employee to be seconded; and (ii) seconder and host entity.



### Temporary only

The duration should be agreed in advance. Some jurisdictions mandate that a secondment must be for a temporary period to be valid.



### Local employment contract?

In a typical secondment, the secondee remains employed by the seconder. But local laws may require a local (temporary) employment contract.



### Tax and immigration

Need to identify whether employee can work in host country and what the tax and social security arrangements will be.

# International secondments

## Temporary assignments with an expectation of return



### Payments

In some jurisdictions, even if employee remains employee of seconder, local employment laws apply and local tax and social security payable.



### Relocation expenses

Consideration should be given to who bears the expenses of relocation, e.g., transport, shipping, housing allowances, school fees, and tax advice.



### Benefits

Local laws may mandate provision of local benefits. Global benefit policies should be checked to see if they extend to host country.



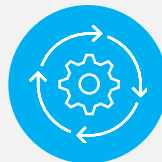
### Cross-border data transfers

Seconder and host entity may have obligations under local data laws re: secondee's personal data, esp. regarding international transfers.



### Business protections

Important to check existing confidentiality protections and post-termination restrictive covenants work in context of secondment.



### Return of the secondee

Essential to consider at the outset what will happen at the end of the secondment. Most jurisdictions require return to old job or similar.

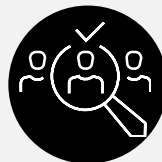
# International secondments

## Temporary assignments with an expectation of return



### Employee rights

Seconded employee may be able to bring claims against seconder or host based on rights under laws of home country and also of host country.



### Discrimination

Seconded employee likely to be protected by national discrimination laws in home country and of host country.



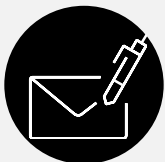
### Governing law

Irrespective of parties' choice of governing law, the mandatory employment laws of host country often override.



### Jurisdiction for disputes

Can be complex. Irrespective of parties' choice of fora for settling disputes, mandatory local laws or case law may dictate alternative fora.



### Execution

Good practice for secondment agreement to be in writing and signed. May need to be registered or filed with a government authority.



### Language

Secondment agreements can often be written in English, but local laws should be checked as they can mandate local language requirements.

# Local employment

## The employing entity

- Not always necessary to employ through a local entity
- May be possible for existing employer to continue to employ employee in new country (as an overseas employer)
- Local laws must be checked

## Contracts

- Most countries require a written employment contract
- Other countries may require a written statement with key details
- Certain countries have local language requirements

## Policies

- Local law may dictate that local policies be in place
- UK: disciplinary policy; grievance policy; GDPR-compliant data policies, H&S statement
- Policies should reflect size of local workforce

## Payroll, etc

- Essential to consider how payments will be made to employee and the withholdings that must be made for tax and social security
- May need to outsource payroll initially if no previous presence in new country

# Local employment

## Overriding local laws

- Employee will benefit from mandatory local employment laws
- Per secondments, alternative choices of law and fora likely overridden
- Must ensure package offered complies with local law (e.g., re: pay and benefits)
- Know the local rights and restrictions (esp. dismissal)

## Business protections

- Confidentiality, IP and restrictive covenants vital to protecting employers
- Local laws re: restrictive covenants vary hugely
- Important to ensure that these business protections are valid under local law

## Mandatory local registrations

- As an employer, even with one employee in a country, may be necessary to make certain local registrations (e.g., with local authorities and tax authorities)
- May also need to register with local data protection authorities

## Other compliance issues

- May need mandatory local insurances (e.g., ELI)
- Increase in local headcount may trigger additional local rights (e.g., equality quotas)
- Will need requisite immigration permissions

# 'Employers of record'

## What?

Employers of record or EORs can employ and pay local employees under an employment contract. Employees are supplied to the end-user company under a commercial contract.

## Why?

Ease, but for a fee!  
Keep headcount down  
May be useful as a temporary measure while finding feet

## Commercial considerations & terms (1)

What are the fees for general services?  
Is there a fee for client engaging individual directly?  
Is there an express clause confirming EOR is employer?

## Issue: local restrictions & rights

Local laws may restrict or prohibit the use of EORs (and comparable employee leasing arrangements), or give additional rights to employees

## Issue: protecting the business

Need to ensure business protections that kick in on termination of employment are appropriately drafted to ensure 'end user' client protected (local laws may restrict)

## Commercial considerations & terms (2)

Who will carry out suitability checks?  
What is the process to terminate an individual?  
Who picks up tab for employment claims?

# Temporary remote working abroad

## Employers continuing to receive requests

- Covid-19 left many employees asking if they could WFH abroad
- Employees asking to spend time downtime with family abroad or extend time in vacation destinations

## Employment, immigration & tax risks still apply!

- While the proposed arrangements may be a matter of weeks, it still generates the risks discussed
- The longer the arrangement, the higher the risk

## Consider putting in place a policy on handling requests

- Policy helpful for setting parameters and best ensuring consistency of treatment across staff
- May be especially useful with high volume of requests

## Recommendations

- Before accepting request, ensure role can be performed properly and lawfully in proposed country
- Depending on risk appetite, take local advice on the risks
- Document arrangement and expectations in writing
- Check whether existing insurance and benefit arrangements still work



# Biography



## **K. Lesli Ligorner**

Shanghai/Beijing

+86.21.8022.8777

lesli.ligorner@morganlewis.com

Lesli has more than 25 years of experience serving clients on a wide range of labor and employment matters, with more than 15 of those years spent on the ground in China. She advises a broad range of financial services, telecommunications, media, technology, life sciences, and general manufacturing clients on the full suite of employment issues in China, including hiring and termination, discrimination and harassment policies, training, and investigations. Lesli is admitted to practice in New York and New Jersey.

Lesli leads the labor and employment practice in mainland China and handles cross-border employment matters and internal investigations across the Asia-Pacific region. She advises on global mobility and immigration, leaves of absence, wage and hour laws, intellectual property protection, and unionization and collective bargaining.

Lesli's practice further includes compliance counseling and training covering establishment and enforcement of company policies, the Foreign Corrupt Practices Act (FCPA) and local anticorruption compliance, export controls, data protection and cybersecurity issues, and employment and anticorruption due diligence in mergers and acquisitions and related internal investigations.

# Biography



**Matthew Howse**

London

+44.20.3201.5670

[matthew.howse@morganlewis.com](mailto:matthew.howse@morganlewis.com)

As practice group leader for Morgan Lewis's labor and employment practice in London, Matthew represents clients in the financial services, media, legal, and insurance industries in High Court and employment tribunal litigation and in class actions, collective actions, and group litigation. His experience includes employment law as well as privacy and cybersecurity law. In addition to litigating both contentious and noncontentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

As part of Morgan Lewis's cross-practice Global Workforce team, Matthew helps provide integrated cross-border advice, counseling, and strategic planning across a spectrum of labor, employment, benefits, and immigration issues.

# Biography



**Jonathan Zimmerman**

Washington, D.C.

+1.202.739.5212

jonathan.zimmerman@morganlewis.  
com

Jonathan helps clients design and maintain all types of employee benefit plans and programs. His practice focuses on Internal Revenue Code and Employee Retirement Income Security Act (ERISA) compliance for retirement, health and welfare, and executive compensation plans. He has particular experience with Code Sections 409A, 162(m), and 280G, and with taxes and fees arising under the Affordable Care Act (ACA). Jonathan also devotes a large part of his practice to payroll, withholding, and fringe benefits matters. He works with clients of all sizes and routinely handles matters ranging from large transactions to day-to-day administrative questions.

# Biography



## **Leslie DuPuy**

San Francisco

+1.415.442.1247

leslie.dupuy@morganlewis.com

Leslie E. DuPuy advises clients on diverse benefits and compensation issues relating to incentive compensation, nonqualified deferred compensation, employment arrangements, tax-qualified retirement plans, severance programs, and health and welfare plans. She advises employers on compliance with the Internal Revenue Code, ERISA, HIPAA, COBRA, and other US federal statutes affecting employee benefit plans. Leslie also counsels clients on benefits issues that arise in connection with corporate transactions, such as mergers and acquisitions.

# THANK YOU

© 2023 Morgan, Lewis & Bockius LLP  
© 2023 Morgan Lewis Stamford LLC  
© 2023 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.