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GLOBAL PUBLIC COMPANY ACADEMY

ISSUES CONCERNING CROSS-BORDER EMPLOYEES

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INTRODUCTION

SECTION 01

DATA PRIVACY

The New EU General Data Protection Regulation

- New GDPR replaced the EU Data Protection Directive on 25 May 2018
- “Personal Data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person
- Personal data must be processed fairly and lawfully
- Expanded application of the EU data privacy obligations
- The GDPR will apply to processing of personal data in the context of the activities of a controller or processor in the EU
- The GDPR will also apply to controllers and processors based outside the EU territory where the processing of personal data regarding EU data subjects relates to:
 - the offering of goods or services (regardless of payment); or
 - the monitoring of data subjects’ behaviour within the EU

The New EU General Data Protection Regulation (cont'd)

- Pseudonymisation/anonymisation distinction
- Lawful processing grounds include:
 - Contractual obligations
 - Legal obligations
 - Legitimate interest
 - Consent (which must be explicit, freely given and fully informed)
- For employee data, consent is unlikely to be required
- Privacy Notice is a key document for employees:
 - Lawful basis for processing data
 - Description of data being processed and source of data
 - Data sharing e.g. benefit plan administrators or providers
 - Data transfers e.g. to US
 - Data security
 - Data privacy rights
 - Right to make a complaint

The New EU General Data Protection Regulation (cont.' d)

- International transfers: Binding Corporate Rules, model clauses, transfers to a certified organization, consent, transfer is “necessary” for performance of contract, establish, exercise or defend legal claims or for legitimate interests of controller (one-off and limited data subjects involved)
- Data Protection Officer: for controllers/processors processing substantial sensitive personal data or who have core activity of monitoring individuals on a large scale or public body
- Right to request to be forgotten, have data restricted, have data rectified or access to data
- Privacy by design: privacy safeguarding technology built-in from the start
- Actively factor privacy considerations into the design and upgrade of all systems, policies, settings which process personal data
- Privacy by default: privacy-friendly default settings until user chooses otherwise

The New EU General Data Protection Regulation (cont'd)

- Data protection impact assessment: prior to processing if high risk for individuals
- Notify data breach to supervisory authority without undue delay/within 72 hours unless unlikely to be a risk to individuals' rights
- Notify data breach to individuals without undue delay if there is likely to be high risk to individuals
- Penalties for breach of GDPR - up to higher of 4% global turnover or €20,000,000
- Individual rights to bring claims against controllers and processors

UK – Data Privacy Update

- The European Commissioner has said that UK-based organisations may find it harder than other European organisations to comply
- ICO agrees there are significant enhancements required under GDPR
- ICO's guidance "12 Steps to Take Now":
 - 1. Awareness – of key decision-makers
 - 2. Information you hold – audit?
 - 3. Communicating privacy information
 - 4. Individuals' rights
 - 5. Subject access requests
 - 6. Legal basis for processing personal data
 - 7. Consent
 - 8. Children
 - 9. Data breaches
 - 10. Privacy Impact Assessments
 - 11. Data Protection Officers
 - 12. Lead supervisory authority for cross-border processing

UK – Data Privacy Update (cont'd)

- New Data Protection Act 2018 incorporates GDPR into UK Law and includes local law provisions
- It should ensure that the UK will be deemed an “adequate” jurisdiction after Brexit (but not guaranteed)
- Consent from a child is valid at 13 years of age
- The DPA 2018 implements such derogations allowing the processing of special categories of personal data and criminal conviction data:
 - Employment, social security and social protection
 - Substantial public interest
 - Health and social care
 - Public health
 - Archiving, research and statistics
- Criminal record checks on employees or candidates remains lawful in UK

SECTION 02

**CROSS-BORDER UK
EMPLOYMENT**

CROSS-BORDER UK EMPLOYMENT

- Service for UK statutory rights such as to a redundancy payment or unfair dismissal rights will include time spent abroad for an “associated employer”:
 - Count the service abroad for two year unfair dismissal and redundancy payment waiting period
 - Exclude the service abroad for calculation of statutory redundancy payment
- Employment rights can be brought in Great Britain as follows:
 - Employees ordinarily working in Great Britain: whether this kind of employee can bring an unfair dismissal claim depends on whether they were working in Great Britain at the time of dismissal (unless they were merely on a "casual visit")
 - Peripatetic employees: a peripatetic employee's base should be treated as their place of employment (consider where the employee has their headquarters, where their travels begin and end; where the employee's home is; where the employee is paid and in which currency)
 - Expatriate employees: where an employee is working and based abroad, the fact that they were recruited in Britain by a British employer will not be sufficient to bring them within the jurisdiction but being posted abroad by a British employer for the purposes of a business carried on in Great Britain, such as a foreign correspondent on the staff of a British newspaper is sufficient
 - Equally strong connection with Great Britain: employees who do not fit into the above categories, but have "equally strong" connections with Great Britain and UK employment law, likely also to be protected

Equity-Based Compensation

- Equity Plan
- ESPP

Implementation

- Plan Design
 - Global Plan
 - Discretion to modify for local compliance
- Compliance with U.S. Law
- Country Specific Analysis of Local Compliance
- Administration

Compliance Issues

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

Tax Consequences

- Taxation Event
 - Options: generally, tax at exercise
 - RSUs: generally, tax at vesting
 - Restricted Shares: may be tax at grant
 - Characterization of Income
 - May be unclear

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

Securities Law Compliance

- Vary by country
 - Registration/Prospectus
 - Exemptions for employee offerings or small offerings
 - Notice filing requirements
- Change type of award

Exchange Control

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

Employment Laws

- Plan entitlement/acquired rights
 - Clauses to protect employer
- Discrimination
 - Age
 - Part-time
- Works Council

Employment Laws

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

Employment Laws

- Governing law
- Translation

Data Privacy

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

Additional ESPP Issues

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

Plan Documents

- Global Plan
 - Sub-plans
- Form Agreements
 - Country specific provisions
- Supplements to Prospectus

Year-End Reporting

- Annual/periodic reporting

Practical Tips

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

SECTION 03

U.S. TAXATION

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(I) 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

QUESTIONS?

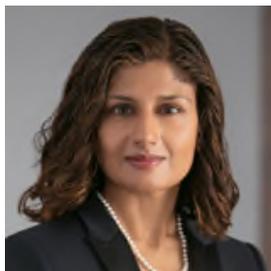
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