

Morgan Lewis

webcast

February 3, 2011

## Globalizing Your Workforce

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# Agenda

- Immigration Issues
- Employment Law Issues
- Tax Issues
- Employee Benefits and Executive Compensation Issues

# Hypo I

- Company, Inc., based in the U.S., is owned by a non-U.S. parent company (“Parent”). The Parent also has operations through various subsidiaries and divisions in 10 other countries. Company, Inc. and Parent have decided that an executive currently employed by Parent at its non-US headquarters should be moved to the United States for six months to help manage Company, Inc. and roll out a new product offering.

## Hypo II

- The employee in Hypo I has done such a great job with the new product offering, that Parent and Company, Inc. would like to make the transfer “permanent” and her family will move to the US with her.

## Hypo III

- A different Company, Inc. executive based in the US has been promoted to become a regional manager in charge of Parent's operations in all of North and South America. This promotion will require the executive to move out of the US (at least initially) to Parent's headquarters. The executive's family will move with him.

## Hypo IV

- Things have not gone well for the executive in Hypo III and his employment will now be terminated by Parent and Company and he will move back to the U.S.

# Immigration Issues

# Global Mobility: The Immigration Process

- The Most Challenging and Unpredictable Aspect of Global Mobility
- Obtaining Permission for a Citizen of One Country to Enter the Territory of Another to Work
- Two Components: Short-Term or Temporary Stays (Nonimmigrant) and Long-Term or Indefinite Stays (Immigrant)
- Nonimmigrant Process: Choose the Appropriate Visa
- Most Immigrant Processes Will Require Test of the Domestic Job Market
- Immigration Agencies Generally Hostile
- Do Not Make Plans or Promises Before Being Certain That Immigration Benefit Can Be Obtained



# Hypo I

- Immigration Issues: Temporary Transfer to U.S.
  - L-1 Intracompany Transferee Status: for Executive or Managerial Positions—Requires One Year of Employment at the Parent or Related Company
  - If No Year of Overseas Employment, H-1B Specialty Occupation Status? Position Must Require Degree; Purely Executive Positions Problematic; H-1B Cap Problem
  - E-1 Treaty Trader, E-2 Treaty Investor Status: Trade between U.S. and Overseas Country or Investment in U.S. Must Be Substantial; Registration with U.S. Consulate
  - B-1 Visitor for Business Status? OK for Startup Operations, Not OK for Established Enterprises

# Hypo II

- Immigration Issues: Moving to the U.S. Permanently
  - Multinational Executive First Preference Category—Requires One Year of Employment at the Parent or Related Company as an Executive or Manager
  - Second and Third Preference Categories—Require Test of Local Labor Market, Possible Significant Waiting Periods
  - Spouse and Children Under 21 May Also Receive Green Cards/No Benefits for Same-Sex Partners
  - At Least 6-8 Months to Complete Process
  - Once Green Card Received, Employee Can Leave You

# Hypo III

- Immigration Issues: Sending a U.S. Employee Overseas
  - A business visa in lieu of a work permit may be sufficient depending on the employee's activities
  - Work permits can take anywhere from several weeks to several months to obtain
  - A company license specifically for hiring/sponsoring foreign workers may be required before the employee's work permit application can be filed
  - At least a Bachelor's degree in a field related to the job may be required
  - Same-sex/domestic partners may not qualify as accompanying spouses
  - If U.S. Permanent Resident, assess effect on permanent residence of overseas stay

# Hypo IV

- Immigration Issues: Relocating the Employee Back to the U.S.
  - No immigration issue if employee is a U.S. Citizen or Permanent Resident
  - If national of country other than U.S., will need employment offer to be able to return to U.S.
  - Employee responsible for cancelling all work permits issued for overseas employment
  - Determine if return home transportation costs should be absorbed

# Employment Law Issues

# Employment Law Issues: Typical Arrangements

- A new agreement
  - Terminate employment with home company
  - Employee enters into new employment with host company
- A suspension of existing contract
  - Suspend employment with home company
  - Employee enters into new employment with host company
- A temporary assignment
  - Employee remains employed by home company and is temporarily “posted” with host company

# Hypo I

- Strategies for Company, Inc. (host company) to avoid becoming employer during assignment
  - Employee should not owe any duties to Company, Inc., only to Parent
  - Company, Inc. should not owe any duties to employee, only to Parent
  - Parent retains day-to-day control of employee
  - Parent carries out any performance appraisal and discipline against employee
  - Employee should not become integrated into Company, Inc.'s organization

# Employment Law Issues: Documentation

- Written assignment agreement
  - Advisable to set out parties' rights and obligations during assignment
- Confidentiality/IP agreement
  - Confirm whether employee's confidentiality/IP agreement complies with host country laws and provides adequate coverage during assignment
- Intra-group services agreement
  - Should home company and host company enter into intra-group services agreement?



# Employment Law Issues: Written Assignment Agreement

- Common provisions
  - Immigration contingencies
  - Assignment term
  - Position, duties and responsibilities
  - Compensation and payment method
  - Relocation and repatriation
  - Benefits and allowances
  - Tax liability/tax equalization
  - Termination

# Employment Law Issues: Choice of Law/Governing Law

- Consider whether assignment agreement should have a single choice-of-law provision or different choices of law
- Certain terms of employment may be governed by host country's laws, regardless of choice-of-law provision

## Hypo II

- Terminate assignment agreement
  - Cessation of all assignment-related compensation and allowances
- Terminate employment relationship with Parent
  - Home country termination laws
  - Condition transfer on employee resignation
- Terminate intra-group services agreement

# Employment Law Issues: U.S. Employment

- Offer letter/employment agreement
  - Address one-time relocation assistance in offer letter/employment agreement
  - Adjust compensation and benefits
  - “At-will” employment
- Confidentiality/IP agreement

# Hypo III

- Temporary Assignment
  - Same strategies for Parent (host company) to avoid becoming employer
  - Same employment documentation
    - *Written assignment agreement*
    - *Confidentiality/IP agreement*
    - *Intra-group services agreement*

# Employment Law Issues: Mandatory Employment Rights

- Host country's mandatory employment rules apply
- European Union's Posted Worker Directive
  - Working conditions in effect in a member state are applicable both to workers from that state & to those from other EU countries posted to work there
  - Working conditions include work hours, rest periods, paid annual holidays and minimum salary

# Employment Law Issues: Other Employment Considerations

- Extra-territorial application of home country laws
  - Home company may have continuing obligations to comply with home country laws while employee is working abroad
- Data privacy legislation
  - Disclosure and transfer of employee's personal information between home company and host company must be in accordance with applicable data privacy laws

## Hypo IV

- Termination of assignment/employment
  - Does “at-will” concept apply during foreign assignment?
    - *Many countries do not recognize “at-will” employment*
  - Which country’s laws apply if employee is terminated abroad?
  - Retain right to repatriate employee to home country prior to expiration of assignment term



# Tax Issues

# Overview of International Tax Concepts

- For the Employer
  - Will the employee's activities trigger a taxable presence for Employer in the foreign location
    - *One of the top tax risks in the cross-border context*
    - *Risk of double taxation for the employer*
  - Differing standards throughout the world
    - *Range of different terminology: Branch vs. "Rep Office"*
    - *Treaty standard of "Permanent Establishment"*

# Overview of International Tax Concepts

- For the Employer
  - Treaty standard for “Permanent Establishment” (PE)
    - *Fixed place of business – very low threshold*
    - *Carries on business activities – specific and limited exceptions, including:*
      - Facility for the storage, display or delivery of goods;
      - Maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise;
      - Maintenance of a fixed place of business solely for the purposes of collecting information for the business or any other activity of a “preparatory or auxiliary character.”
    - *Certain agents can trigger PE status*

# Overview of International Tax Concepts

- For the Employer
  - U.S. standard for determining taxable presence
    - *Federal considerations – U.S. trade or business*
    - *State considerations - Nexus*
    - *Potentially subject to treaty modification/limitation – for federal only!*

# Overview of International Tax Concepts

- For the Employee
  - Will the employee become subject to taxation in the foreign jurisdiction?
    - *To what extent? Local country source income or worldwide income?*
    - *Practically, how is this monitored?*
  - Differing standards of “residency” throughout the world
    - *Treaties typically contain detailed rules concerning tax residency.*
  - Issue of taxation in “home” country

# Overview of International Tax Concepts

- For the Employee
  - U.S. taxpayers are subject to U.S. taxation regardless of their place of residency
    - *Partial exclusion of certain foreign source income and housing allowance*
    - *Foreign tax credit may be available in whole or in part for foreign taxes paid*
  - No treaty override for U.S. taxpayers – “Savings Clause”

# Overview of International Tax Concepts

- For the Employee
  - U.S. taxes the worldwide income of “U.S. Persons”
    - *Includes U.S. citizens and residents*
  - Nonresident aliens are generally subject to U.S. taxation on their U.S. sourced income only.
    - *Exclusion for compensation from personal services if the nonresident alien is:*
      - Temporarily present in the U.S. for not more than 90 days during the taxable year;
      - The compensation does not exceed \$3,000 in the aggregate; and
      - Such employment is for certain designated taxpayers.

# Overview of International Tax Concepts

- For the Employee
  - U.S. federal standard of “U.S. Person” for individuals:
    - *U.S. citizens*
      - Including dual citizens
    - *Lawful permanent residents*
      - The “Green Card Test”
    - *Resident aliens with “substantial presence” in the U.S.*
      - At least 31 days during the calendar year; and
      - 183 total days in the U.S. during the current year and prior two taxable years (1<sup>st</sup> preceding year 1/3 days; 2<sup>nd</sup> preceding year 1/6 days)



# Overview of International Tax Concepts

- For the Employee
  - Treaty standard for “residency” under the U.S. Model Treaty
    - *A person is a “resident” of a country for tax purposes if under the laws of that country she is liable to tax there by reason of her domicile, residence, citizenship, or any other criterion of a similar nature.*
    - *Tie breaking rules:*
      - Resident only where “permanent home” is available;
      - Resident only where her “center of vital interests” are located; and
      - If abodes are in both locations, or neither, the country where she is a national.

# Hypo I

- For Parent
  - Does the U.S. assignment trigger a taxable presence for the Parent in the U.S.?
    - *Differing federal and state standards*
    - *Can the risk be mitigated through the use of a secondment (or similar) agreement?*
- For the Employee
  - Is U.S. residency status triggered?
    - *Treaty vs. non-treaty treatment*
    - *Difference of worldwide vs. U.S. source income exposure*

## Hypo II

- For Parent
  - Does the U.S. assignment trigger a taxable presence for Parent in the U.S.
    - *Generally not an issue if employee becomes a direct employee of Company, Inc.*
- For the Employee
  - U.S. residency status likely triggered
    - *Employee subject to worldwide taxation by the U.S.*

# Hypo III

- For the Company
  - Does the foreign assignment trigger a taxable presence for the Company in the country where Employee is assigned?
    - *Local country issue, subject to Treaty application*
    - *Can the risk be mitigated through the use of a secondment (or similar) agreement?*
- For the Employee
  - Is foreign tax residency status triggered?
    - *Will the employee be subject to taxation in the foreign country, and if so, on what basis (worldwide or local source)?*
    - *Is there any exit tax exposure in the foreign jurisdiction?*
    - *Does a Treaty provide any relief?*
    - *U.S. Persons remain subject to U.S. federal taxation. Consider U.S. state tax issues as well.*

# Hypo IV

- For the Company
  - Generally not an issue
- For the Employee
  - Was foreign tax residency status triggered?
    - *Is the employee subject to taxation in the foreign country, and if so, on what basis (worldwide or local source)?*
    - *Is there any exit tax exposure in the foreign jurisdiction?*
    - *Does a Treaty provide any relief?*
    - *U.S. Persons remain subject to U.S. federal taxation. Consider U.S. state tax issues as well.*

# Employee Benefits Issues

# Employee Benefits Issues

- Types of Employee Benefits
  - Pension and deferred compensation
  - Health and welfare
- U.S. Regulation of these Plans
  - Voluntary system
  - Tax Implications of these plans
  - Pension and deferred compensation subject to very complicated rules
    - *Qualified vs. non-qualified plans*
- Non-U.S. Regulation – need to consider
  - Are there mandated benefits
    - *Are taxes required*
    - *Can parties contractually agree not to provide the benefits*
  - Tax implications
  - Avoiding double taxation on deferred compensation

# Employee Benefits Issues

- Pension and Deferred Compensation
  - Need to address – for both in-bound and outbound transfers, need to consider both regulatory and plan terms regarding:
    - *Eligibility*
    - *Vesting*
    - *Accrual*
    - *Employee contributions*
    - *Distributions*
    - *Non-discrimination testing*
    - *Maximum benefit limitations*
    - *Coordination with other Plans*
    - *Administrative issues – such as*
      - Loan repayments
      - QDROs
      - Disclosure materials



# Employee Benefits Issues

- Health and Welfare Plans
  - Health Plans
    - *Access to coverage/insurance*
    - *Open enrollment issues*
    - *Coordination with home plan*
    - *What about the rest of a family*
  - Other Welfare Plans
    - *Severance*
    - *Reimbursement plans*
    - *Disability plans*
    - *Tuition assistance*
    - *Allowances*

# Hypo I

- Employee Benefits Issues
  - Pension and Deferred Compensation - Check terms of each plan to ensure not receiving duplicate benefits
  - Check home country to ensure that not required to maintain mandated benefits
  - Will the executive participate in the U.S. health plans
  - Will 401(k) deferrals be recognized by home country
  - Ensure there is no duplication in service for defined benefits
  - Ensure that vesting credit is continued

# Hypo II

- Employee Benefits Issues
  - Ensure that plans contemplate permanent movements
  - Check home country rules to ensure that mandated benefits no longer accrue
  - Will need to move whole family on US health benefits – need to consider open enrollment issues
  - Is there a way to transfer account balance plans to the US
  - Ensure that there is no termination event from Parent that triggers a severance payment
  - How to account for benefits that cannot be replicated in the US?

# Hypo III

- Employee Benefits Issues

- First check for mandated benefits – are they mandated just based on work in the country?
- If no mandated benefits, will the employee continue on U.S. pension and deferred compensation – does plan properly account for this
- Will the host country recognize the deferral of compensation
- Ensure that there is no termination event from Parent that triggers a severance payment
- For welfare benefits, is there a satisfactory level of health insurance coverage? Will the executive need a special international policy for himself and family?

# Hypo IV

- **Employee Benefits Issues**
  - Did assignment agreement contemplate termination
  - Which company's severance policy will control
  - Will COBRA be offered?
  - Will the company pay any expenses associated with transferring back to the US?
  - Are there any rules of the host country that required mandated severance or other termination benefits or notice?

# Executive Compensation Issues

# Equity Compensation Issues

- Assume equity granted by Parent
- Tax
- Social security
- Other legal issues

# Equity Compensation - Taxation

- Global reach of U.S. tax rules
- Tax treaties
- Social security totalization agreements



# Hypo I

- **Equity Compensation - Taxation**
  - If subject to U.S. tax, then tax on income from equity award attributable to the U.S.
  - Parent employer must withhold income taxes

# Hypo II

- **Equity Compensation - Taxation**
  - U.S. tax resident
  - Subject to U.S. income tax and FICA on all income
  - Equity award income subject to tax in home country at least for period employed in home country

# Equity Compensation - Taxation

- Subject to tax in multiple jurisdictions
  - Timing of tax event may vary by country
- Amount subject to tax may vary by country
  - Sourcing rules may vary by country
  - Treaty rules
  - Trailing liabilities (tax even if not in country at taxable event)
  - Withholding in multiple jurisdictions on same income
  - Tax equalization agreements

# Equity Compensation - Taxation

- FICA applies unless totalization agreement
- State taxes apply

# Hypo III

- **Equity Compensation - Taxation**
  - Taxed on worldwide income including equity award income as U.S. citizen or tax resident
  - Also subject to tax in host country
  - Same issues on multi-jurisdiction tax
  - Must withhold U.S. taxes
    - *Exception available for U.S. citizens (but not residents) if income in foreign country is subject to mandatory withholding (varies by country)*

# Equity Compensation - Taxation

- Complex rules require system to collect information to track and calculate amount of income by jurisdiction
- Need withholding and reporting mechanism in each jurisdiction
- Determine exemptions from income tax and FICA

# Equity Compensation - Taxation

- Type of information to collect:
  - Citizenship
  - U.S. or foreign residency status
  - Time spent in each country during period of vesting or period to exercise (depending on sourcing rules)

# Equity Compensation - Taxation

- Other Tax Issues to Consider
  - Section 409A
  - Section 457A
  - Impact of Cross-Charge Agreements
  - Employer Deduction



# Equity Compensation - Legal Issues

- Securities Laws
  - U.S.
    - *Rule 701*
    - *S-8 registration statement*
  - Non- U.S.
    - *Prospectus/Notification/Approval*
    - *Need for exemption*

# Equity Compensation - Legal Issues

- Exchange Control
- Labor Law
  - Acquired rights
  - Anti-discrimination
  - Forfeiture

# Questions?

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