

Morgan Lewis



Managing the Global Workforce

Webinar Series 2014

Cross-Border Transactional Due Diligence

May 8, 2014

Today's Presenters



Mark Zelek
Miami



Min Duan
Beijing



Ross Friedman
Chicago



Humberto Padilla Gonzalez
Houston



Zaitun Poonja
Palo Alto



Sabine Smith-Vidal
Paris



Nick Thomas
London

Case Study

WestCo U.S.: Expanding the Widget Empire

- WestCo U.S. is a U.S. publicly traded company headquartered in San Francisco.
- WestCo owns several widget manufacturing facilities throughout the world.
- WestCo's widget operation in the United States has more than 1,000 employees, some of whom are unionized.
- WestCo wants to expand its global footprint to France, the United Kingdom, Mexico, and China.
- WestCo's executives are based in San Francisco and:
 - Devote most of their business time to the local entity
 - Are entitled to participate in WestCo's Long-Term Incentive Plan

Case Study

WestCo U.S.: Expanding the Widget Empire

- WestCo has identified Breathe and Stay Calm Widgets (BSCW) as a target for its global expansion plans.
- BSCW is a family-owned business based in Liverpool (UK).
- BSCW has manufacturing subsidiaries in Le Havre (France), Manzanillo (Mexico), and Shanghai (PRC).

Case Study

Unique Facts

- Through due diligence on BSCW, the following facts have been discovered:
 - BSCW Manzanillo's widget unit is bifurcated into two entities: a personnel services entity and an operational entity
 - BSCW Shanghai's widget unit has one-third of its employee base unregistered
 - The Head of Technological Development assigned to BSCW Liverpool and BSCW Le Havre is not an employee:
 - *He was hired as an independent contractor via his own consultancy business*
 - *This arrangement has operated unchanged for the last 14 years*
 - The CFO and COO, who are based out of BSCW Liverpool, have been assigned to a project in the United States
 - BSCW has granted equity awards to employees in all three locations

Mexico Issues

- Substance over form analysis:
 - Periodic remuneration and subordination?
 - Who is the ultimate beneficiary of the services?
 - Are the services specialized and temporary?
 - Does it make a difference if the Service Company is making a profit under the Outsourcing Agreement?
- Effects on Operating Company
 - Joint and several liability
 - Social security and tax issues
 - Profit sharing

France Issues

- Status of the Head of Technological Development:
 - A de facto employee?
 - Risk of co-employment?
- Other potential issues:
 - Asset deal versus share deal and employee TUPE-transfer issues
 - Employee representatives: works council consultation?
 - Data transfer: be careful!

UK Issues

- What is the employment status of the Head of Technological Development?
- By which entity are the senior executives employed?
- On what terms?
- Absence of post-termination restrictive covenants – genuine business risk
- Executive service agreements with appropriate covenants a precondition of sale

UK Issues (Cont'd)

- Additional covenants in acquisition agreement
- Share sale vs. asset sale – TUPE situation?
- Complications of TUPE-related dismissals and recent legal changes
- Data privacy issues
 - Employee anonymity and employee consent
 - Safe harbor
 - Contractual restrictions – model clauses
 - Penalties of up to £500,000

China Issues

- Form of engagement
 - Secondment/labor dispatch
 - *Nature of secondees' roles: auxiliary, temporary, or replaceable?*
 - *Equal pay, equal work?*
 - *Qualification/license of the legal employer(s)/labor agency(ies)*
 - Outsourcing arrangement
 - *Qualified exemption?*
 - Differentiation of outsourcing and secondment?
 - *Qualifications of service provider?*
 - Self employment
 - *Substance over form?*

China Issues (Cont'd)

- Potential liabilities
 - Unpaid personal income taxes and social contributions
 - Deemed employment?
 - Administrative penalties and civil liabilities
 - Stock deal vs. asset deal
 - *Is there any difference at all?*

Compensation-Related Issues – Equity Awards

- Were equity awards granted in compliance with local law?
 - Securities laws
 - *Prospectus, notice, approval, registration*
 - Taxation
 - *Taxable Event*
 - Tax-favored plans
 - *Reporting*
 - *Withholding*
 - *Social Insurance*

Compensation-Related Issues – Equity Awards (Cont'd)

- Exchange control
 - *Transfer restrictions, repatriation requirements, reporting*
 - SAFE
- Labor laws
 - *Discrimination, employee representative, restrictive covenants*

Compensation-Related Issues – Equity Awards (Cont'd)

- How to reduce or transfer risk of noncompliance?
 - Include in representation from BSCW
 - Covered by indemnity escrow

Compensation-Related Issues – Equity Awards (Cont'd)

- What is the treatment of outstanding awards granted by BSCW?
 - What does the plan permit or require?
 - *Accelerate, assumed, terminate, cash-out*
 - *Does BSCW board have to take any action?*
 - *Do you need employee consent?*
 - *Any notice requirements?*
 - *Need to consult works council?*

Compensation-Related Issues – Equity Awards (Cont'd)

- If awards are to be assumed:
 - *Exchange ratio*
 - *Taxation*
 - *Local compliance*
 - *Communication*
 - *Data transfer*
- If awards are to be cashed out/terminated:
 - *Payment*
 - *Reporting*
 - *Withholding*
 - *Communication*
 - *Data transfer*

Compensation-Related Issues – U.S. Issues

- CFO and COO working in United States
- Exposure to U.S. corporate taxation
 - Permanent establishment?
- Individual taxation
 - Nonresidents taxed on U.S. source income
 - *Limited exceptions under Internal Revenue Code*
 - *Treaty exemptions*
 - Allocation between United States and UK
 - State taxes
- Were tax withholding and reporting requirements satisfied?
 - Liability to employee?
 - Obtain representation?

Questions?

Mark Zelek

Miami

mzelek@morganlewis.com

305.415.3303

Min Duan

Beijing

mduan@morganlewis.com

+86 10 5876 3686

Ross Friedman

Chicago

rfriedman@morganlewis.com

312.324.1172

Humberto Padilla Gonzalez

Houston

hpadilla@morganlewis.com

713.890.5164

Zaitun Poonja

Palo Alto

zpoonja@morganlewis.com

650.843.7540

Sabine Smith-Vidal

Paris

ssmith-vidal@morganlewis.com

+33 1 53 30 44 60

Nick Thomas

London

nthomas@morganlewis.com

+44 (0)20 3201 5561

This material is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It does not constitute, and should not be construed as, legal advice on any specific matter, nor does it create an attorney-client relationship. You should not act or refrain from acting on the basis of this information. This material may be considered Attorney Advertising in some states. Any prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change.

© 2014 Morgan, Lewis & Bockius LLP. All Rights Reserved.



international presence

Almaty Beijing Boston Brussels Chicago Dallas Dubai* Frankfurt Harrisburg Houston
Irvine London Los Angeles Miami Moscow New York Palo Alto Paris Philadelphia
Pittsburgh Princeton San Francisco Tokyo Washington Wilmington