

Morgan Lewis



# Managing the Global Workforce

Webinar Series 2014

## International Assignments: Structuring and Managing for Business Success

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# Today's Presenters



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# BlueSky

- “BlueSky” is a medical device company that develops and markets ophthalmic medical devices.
- The company, founded in Princeton, NJ, has focused on the U.S. market but sees opportunities to expand in Europe and Asia.
- BlueSky has entered an agreement to purchase a small ophthalmic medical device developer – Bright Eyes – located outside of London.

# BlueSky

- As a part of the agreement, BlueSky's Head of R&D, Adam Smith, will spend roughly six months a year working in the UK over the next three years with Bright Eyes's development team.

# Employment Issues

- Fundamental differences between U.S. employment law and most other countries in Europe, Latin America, and increasingly in Asia
  - 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 regulation by the state or by trade unions or works councils

# Employment Issues

- 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
- Data privacy laws

# Employment Issues

- Noncompetes may need continuing compensation to be enforceable
- Changes in the legal or corporate structure of the employer typically do not affect the vested rights of employees
- 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

# UK Employment Issues

- As Adam will be working both in the United States and in the UK, what is his UK employment status?
- Should BlueSky draft an employment contract for Adam's employment in the UK? What are the key elements that should be in the contract?
- Other employment law concerns?

# UK Employment – Separation Issues

- What happens if Adam resigns?
- What if Adam is dismissed?
- No “at-will” employment in the UK
- Right to contractual notice and severance in the UK?
- Where can he bring a claim?

# UK Immigration

- Does Adam Smith require a UK work permit?
- What are his UK immigration options?
- May Adam initially be able to come to the UK to transact business/fact finding as a business visitor?

# UK Immigration

- To enable Adam to work in the UK, he will need explicit work authorization.
- Multiple entry long-term intracompany Certificate of Sponsorship.
- Initially issued for up to three years, can be extended for another two or issued for five years from outset.

# UK Immigration

## Five Years On and Future Planning

- In the event that UK operation is going well after five years:
  - Adam will have to leave upon expiration of work authorisation; or
  - Continue with dual role and, provided he is paid a minimum of £153,500 (or equivalent in five years), scenario can be extended for up to nine years maximum; or
  - If he becomes based full-time in UK, secure a Tier 2 (General) Certificate, again only applicable if he earns more than £153,500.

# Employee Benefits and Executive Compensation

- Compensation and benefits are different from those in the United States.
- May be mandated benefits.
- Accrued rights and entitlements are protected.
  - May need to consult with employee representative.
  - May need employee consent to amend.
  - Clawbacks and restrictive covenants may not be enforceable.
- Can you offer U.S.-style benefits?

# Employee Benefits and Executive Compensation

- Offering Equity Plans subject to local law requirements.
  - Securities Laws
  - Taxation and Withholding
  - Exchange Control
  - Data Privacy
  - Labor Laws

# Employee Benefits and Executive Compensation

- What is the impact of Adam's work arrangement on his compensation and benefits?
- What is the impact on the Company?

# Employee Benefits and Executive Compensation

- Should Adam's compensation structure remain the same?
- Will Adam be subject to taxation in the UK?
  - To what extent?
- U.S. taxpayers are subject to U.S. taxation on worldwide income.
- Consider Tax Equalization and other expatriate benefits.
- Employer must withhold taxes in both countries.

# Employee Benefits and Executive Compensation

- What about social security?
- Can Adam continue in 401(k) and other benefit plans?
  - Will he be covered under U.S. health plan?
- Will he be taxed in the UK on tax-qualified benefits?
- What about any equity awards?

# Employee Benefits and Executive Compensation

- Does the foreign assignment trigger a taxable presence for the Company?
  - Top risk in cross-border context.
  - Risk of double taxation.

# U.S. Immigration

- BlueSky has expanded further and now has a small development branch in Singapore. The Singapore development team has been working on BlueSky's newest product.
- BlueSky wishes to bring one of the Singaporean developers, Sophia Lim, to the United States to prepare for the launch of the product.
- Sophia was hired by BlueSky less than one year ago. What are her visa options?

# U.S. Immigration

- H-1B Specialty Occupation Visa?
  - Position Must Require Degree/Equivalent Experience
  - H-1B Cap Problem: May Not Be Able to Start Work Until October 1, 2015
- L-1 Intracompany Transferee?
  - One Year of Employment Abroad
  - Heavy USCIS L-1B Specialized Knowledge Scrutiny
- H-1B1 Visa for Singaporeans/Chileans?
  - Must Have Singaporean Citizenship
  - “Specialty Occupation” Analysis
  - May Apply Directly at Consulate
  - No Cap Issue

# Expansion Into Germany

- BlueSky's new CEO believes that the company needs a German presence if it is going to increase sales in Europe's largest market.
- BlueSky decides to move its U.S.-based Sales & Marketing Director, Gary Becker, to Frankfurt.
- Gary will be located full-time in Germany for three years and will build a sales and marketing operation in Germany by hiring local talent.

# Germany Immigration

- Will Gary be required to have a German residence/work permit?
- What are his German immigration options?
- May Gary initially be able to come to Germany to do limited business (e.g., client meetings) as a business visitor?

# Germany Immigration

- To enable Gary to work in Germany, he will need a German residence/work permit.
- Gary may qualify for an EU BlueCard:
  - A German university degree, recognized foreign university degree, or foreign university degree comparable to a German degree
    - *Requires analysis in detail*
  - A German employment contract with an annual salary of at least €47,600
- No labor market test.
- Initially issued for up to four years.
- As a U.S. citizen, Gary may enter Germany and apply for his residence/work permit from there.

# Germany Employment Issues

- Gary's employment contract or offer must be submitted to the immigration authority for review.
  - Terms and conditions should be in line with common German practice
  - Limited freedom of contract (detailed judicial control clause by clause)
- Gary will be enrolled in the German social security system
  - Pension insurance (U.S.-German Social Security Agreement)
  - Unemployment insurance
  - Health and nursing care insurance

# Germany Employment – Hiring Local Staff

- Perform background checks before extending employment offers
- Use local employment contracts (German or bilingual) instead of U.S.-style offer letters
- Require a local payroll provider
- Be aware of employee thresholds:
  - 5 employees may establish a works council
  - 10+ employees on a regular basis mean statutory termination protection for all employees in Germany with at least six months of service

# Germany Employment – Separation Issues

- No “at-will” employment in Germany
- Right to contractual notice period, statutory minimum notice periods
- Written termination notice or agreement
- Specific reasons required where employees enjoy statutory termination protection
  - Operational reasons
  - Conduct-related reasons (breach of contract)
  - Personal reasons
- No statutory severance, but often negotiated severance in separation agreements or labor court settlements

# Questions?



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