Expatriate & Secondment Arrangements

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Housekeeping: About Anthony “Tony” Eppert

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- Tony practices in the areas of executive compensation and employee benefits
- Before entering private practice, Tony:
  - Served as a judicial clerk to the Hon. Richard F. Suhrheinrich of the United States Court of Appeals for the Sixth Circuit
  - Obtained his LL.M. (Taxation) from New York University
  - Obtained his J.D. (Tax Concentration) from Michigan State University College of Law
    - Editor-in-Chief, Journal of Medicine and Law
    - President, Tax and Estate Planning Society

Our Compensation Practice – What Sets Us Apart

- Compensation issues are complex, especially for publicly-traded companies, and involve the substantive areas of:
  - Tax,
  - Securities,
  - Accounting,
  - Governance,
  - Surveys, and
  - Human resources

- Historically, compensation issues were addressed using multiple service providers, including:
  - Tax lawyers,
  - Securities/corporate lawyers,
  - Labor & employment lawyers,
  - Accountants, and
  - Survey consultants

Our Compensation Practice – What Sets Us Apart (cont.)

- At Andrews Kurth Kenyon LLP, we have a holistic and full-service approach to compensation matters, that considers all substantive areas of compensation, including:

Housekeeping: Upcoming 2017 Webinars

- Upcoming 2017 webinars:
  - Pay Ratio Disclosure Rules: The A-Z Training Course (7/13/2017)
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  - How to Properly Design a Nonqualified Deferred Compensation Plan (10/12/2017)
  - Navigating Employee v. Independent Contractor Classifications (11/9/2017)
  - Sharing the Dream: M&A Transactions & Retaining Key Employees (12/14/2017)

- Upcoming 2018 webinars
  - To be determined
  - Suggestions welcomed!

Purpose of this Presentation

- Sending U.S. employees on foreign assignments will create a number of compensatory considerations that should be vetted from both a legal and human resources perspective

- The purpose of this presentation is to discuss issues with respect to certain expatriate agreements and secondment agreements

Background: Understanding Certain Defined Terms

- Expatriate
  - An individual is typically hired by an employer in Country 1, and later assigned to work for the same employer/affiliate in Country 2
  - The term expatriate is typically used to highlight that the employee is provided special treatment for the foreign assignment (*i.e.*, not all expatriates are covered by an employer's expatriate program or international assignment policy)

- Secondment
  - In a secondment scenario, the outbound employee is being seconded (*i.e.*, loaned) to a foreign entity even though he or she remains the common law employee of the U.S. employer
  - Generally, secondments involve the foreign entity being obligated to reimburse the U.S. employer for the compensation the U.S. employer pays to the outbound employee

- Cross border employees
  - The individual lives in one taxing jurisdiction and works in a different taxing jurisdiction

Background: Understanding Certain Defined Terms (cont.)

- Home Country
  - Generally refers to the country where the employee was working prior to the international assignment in the Host Country
- Host Country
  - Generally refers to the foreign country where the employee is assigned to work

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Types of Foreign Assignments

- International assignments typically take one of the following forms:
  - Short-term or long-term assignments,
  - Rotational assignments,
  - Permanent moves, and
  - Mobile assignments (*a.k.a.*, “global nomads” or “internationally mobile employees”)

- The employment structure of an international assignment is typically one of the following:
  - Full secondment (paid and employed by the Home Country entity)
  - Partial secondment (paid by the Host Country entity and employed by the Home Country entity)
  - Localized/Transfer (the employee is terminated by the Home Country entity and rehired by the Host Country entity)
  - Localized, but with an employment agreement with the Home Country entity that is hibernating (*i.e.*, a springing employment agreement with the Home Country entity that is temporarily suspended during the foreign assignment)
  - Global employment company (the employee is terminated by the Home Country entity and transferred to the global employment company, which in turn seconds the employee to the Host Country entity)
  - Dual employment (the employee maintains more than one employment relationship)

Whether to Adopt a Uniform Policy

- A U.S. company that intends to have more than a few employees assigned internationally will typically have a formal international assignment policy
  - A purpose of an international assignment policy is to avoid ongoing individualized negotiations, and to treat the group of internationally assigned employees in a uniform manner
  - Such policy would address many of the details of the intended assignment, including the various compensatory elements such as:
    - Base salary and cost-of-living allowances,
    - Housing allowance (*e.g.*, housing differential or free housing),
    - Hardship allowance (*i.e.*, to compensate executives who move to a Host Country with significant deterioration in living conditions, safety conditions, medical services, etc.),
    - Reimbursement of expenses related to the sale or rental of a principal residence,
    - Automobile allowance,
    - Premium payment to compensate for the inconvenience related to the move (*e.g.*, separation from family and friends),
    - An allowance to cover out-of-pocket expenses attributable to relocation to a new country (*e.g.*, shipping personal belongings),
    - School tuition for the children of the executive,
    - Spousal support to help the executive's spouse integrate to the new Host Country (*e.g.*, training in a new language, outplacement assistance, etc.), and
    - Some form of tax equalization (*i.e.*, an agreement that the executive would not pay more tax than he or she would have otherwise paid had he or she remained in the U.S.)

Foreign Assignment Agreement

- To ensure that all of the parties fully understand the nature of the arrangement, consider whether the outbound employee should execute a foreign assignment agreement with the U.S. company
  - And if the assignment is a secondment arrangement, the foreign assignment agreement could be signed by the executive, the U.S. company and the foreign entity

- The employee's job title and duties should be specifically set forth in this agreement to help avoid a successful claim of the Home Country having a permanent establishment in the Host Country

- The term of the assignment should be specified, including the start date, the ending date and any renewal provisions
  - Keep in mind that the number of days the employee spends in a Host Country could have tax implications

Foreign Assignment Agreement (cont.)

- Immigration approval
  - Ensure that the assignment is contingent upon approval by the Host Country with respect to any visa, work or residence permit

- Repatriation
  - Ensure the agreement details the costs and logistics associated with bringing the worker back to the Home Country upon conclusion of the assignment or upon a termination of the worker’s employment

- Other issues to consider
  - Determine whether the agreement must be translated into the language of the Host Country
  - For employees performing services both inside and outside the U.S., the agreement should identify and source what compensation is paid for services within and outside the U.S.
  - The agreement should address tax return preparation by the employer’s accountant
  - If a secondment agreement is intended, ensure that the U.S. employer remains the common law employer of the secondee
  - Whether any restrictive covenants would be enforced (*i.e.*, the laws of the Host Country are typically applied)

Secondment Arrangements

- Secondment agreements help document the "loaning" of the employee from the Home Country entity to the Host Country entity
  - Generally, the loaned employee need not execute the secondment agreement
  - The Home Country entity would remain the common law employer of the secondee
- Address any prior or current offer letter or employment agreement
  - Any offer letter or employment agreement with the Home Country should be either expressly allowed for or superseded by the secondment agreement
- Address any termination of the assignment within the terms of the secondment agreement (*e.g.*, terminations for cause, for Good Reason, etc.)
- Additional points to keep in mind that should be covered in most secondment agreements include:
  - Verify that the arrangement is a secondment and not some other form of expatriate assignment like a localization
  - To avoid misinterpretation in the future, be sure to identify the Home Country entity as the employer and that the Home Country entity retains control over the employment relationship
  - Describe how the secondment will end

Verify Application of Tax Treaties

- The U.S. has entered into numerous income tax treaties with other countries, a purpose of which is to minimize double taxation that could result when two countries consider an individual to be a tax resident of each of their countries
  - The tax treaty will usually contain a “tie-breaker” to determine which country has the right to tax the individual as a resident
  - The terms of each treaty vary from country to country
  - Thus, the terms of the applicable treaty (if any) should be reviewed

- Important to note is that tax treaties entered into by the U.S. and a Host Country often do not relieve the U.S. citizen from being subject to U.S. taxation
  - This is because the U.S. taxes its citizens on their worldwide income

Identify the Employer

- In the secondment situation, which entity is the "employer"?
  - The Home Country entity, or
  - The Host Country entity
- The answer (or best estimate) is found in the body of law that addresses misclassification of works (*i.e.*, independent contractor or employee):
  - However, many of the factors enunciated by the IRS address the issue the unrelated issue of whether the worker is an independent contractor
  - For example, the issue of "control" is an important issue with respect to whether the individual is an employee or independent contractor. But when asking the question of "who" is the employer, actual control is not necessary (*i.e.*, all that is required is that the company have the right to control)
- To help ensure that the Home Country entity retains its status as the employer:
  - The underlying documentation should expressly provide that the Home Country entity will remain the employer
  - The Home Country should retain the right to review a secondee's performance, to effectuate discipline of the secondee, and to discharge the secondee's employment with the Home Country

Permanent Establishment

- The issue of permanent establishment arises when the Home Country sends an expatriate to a Host Country at a time when the Home Country entity has no corporate presence in the Host Country
  - As background, and as a gross oversimplification, the existence of a permanent establishment could provide the Host Country with the ability to tax the U.S. company's "deemed profits" that are attributable to that permanent establishment
  - A careful analysis of the applicable tax treaty (if any) between the Host Country and the U.S. is typically warranted

- Verify whether a tax treaty exists between the Home Country and the Host Country. If one exists, the issue of permanent establishment will be addressed within such treaty

- Elements that could give rise to the creation of a permanent establishment:
  - Having a fixed place of business in the foreign jurisdiction, and
  - Individuals that have the authority to negotiate and conclude contracts

Permanent Establishment

- Ideas to help mitigate the creation of a permanent establishment include:
  - Contractually and operationally limit the ability of the individual to negotiate and conclude contracts on behalf of the Home Country entity; instead, the individual should only have an advisory or consultancy role
  - Use written agreements to document the relationship

Social Security Totalization

- As background, the U.S. has entered into totalization agreements with a number of countries for the purpose of avoiding double taxation of income with respect to social security taxes
  - There are approximately 25 countries to which the U.S. has totalization agreements
  - These agreements generally provide that the individual may continue on the Home Country's social security system
  - Typically limited to a period of 5 years

- The general purpose of a totalization agreement is to eliminate dual taxation from a social security perspective
  - These agreements are similar to a tax treaty
  - U.S. citizens are taxed on worldwide income, and in addition, such individuals working for a foreign affiliate of a U.S. employer would be subject to foreign social security taxes
  - However, the expatriate is likely to find that he or she will likely never contribute enough in that foreign jurisdiction to qualify for any benefits

Tax Equalization, Tax Protection or Other

- The purpose of a tax equalization program is to ensure the outbound employee will not pay more or less than he or she would have paid had he or she remained in the U.S.

- In other words, the outbound employee pays a tax equal to the amount that he or she would have paid had he or she remained in the U.S. throughout the time period in question (such is referred to as the "hypothetical tax")
  - At the end of the year, the employee's hypothetical tax is compared to his or her tax liability under both U.S. and foreign tax laws
  - If the U.S. and foreign tax liability is greater than the hypothetical tax, then the employee is reimbursed for the difference
  - However, if the employee's actual tax is less than the hypothetical tax, then the employee owes the U.S. employer the difference

- In a tax equalization program, the outbound employee has no benefit or burden associated with the foreign assignment
  - However, the cost to the employer is typically high
  - Some employers attempt to limit their exposure by imposing an annual limit on the amount of personal income covered by the tax equalization program

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Tax Equalization, Tax Protection or Other (cont.)

- In contrast to a tax equalization program, a tax protection program only reimburses the employee if he or she has additional tax liability resulting from the assignment
  - This means the employee would benefit from any assignment where he or he moved from a high-tax rate country to a low-tax rate country
  - And the employee would remain neutral if he or she were assigned from a low-tax rate country to a high-tax rate country

- Generally, tax equalization programs are more popular than tax protection programs
  - The former allows the employer to offset increased taxes (due to employees being sent to a higher tax rate jurisdiction) with tax savings (due to employees being sent to a lower tax rate jurisdiction)
  - However, tax protection programs are generally preferred by employees, especially if such employee is moving from a high-tax rate country to a low-tax rate country

U.S. Tax-Qualified Retirement Plan

- Make a determination as to whether the individual would be able to continue to participate in the U.S. employer's tax-qualified retirement plan. Compared to a foreign retirement plan, a U.S. retirement plan could offer certain tax advantages to the employee, including:
  - Pre-tax contributions
  - No current U.S. tax on employer contributions to the plan on the employee's behalf
  - No current U.S. income tax on earnings prior to distribution
  - Favorable U.S. tax treatment on distributions, such as tax-free rollovers to another qualified retirement plan

- U.S-based employers can cover employees working outside the U.S. under the U.S. tax qualified retirement plan provided that the "exclusive benefit rule" is not violated
  - The exclusive benefit rule simply provides that a qualified plan must be maintained for the exclusive benefit of the employees of the plan sponsor

U.S. Tax-Qualified Retirement Plan (cont.)

- Whether an individual is an employee of the plan sponsor is determined based upon:
  - Common law principles (including secondment scenarios) and
  - Rules governing controlled group of corporations

- Under the concept of a controlled group, all employees of all corporations/businesses that are members of the same controlled group are treated as though they are employed by a single entity
  - A parent/subsidiary controlled group will generally exist if the parent owns at least 80% of the total voting power/value of all classes of stock of the subsidiary
  - A brother sister controlled group will generally exist when 5 or fewer individuals own at least 80% of the stock in two or more corporations and at least 50% of such ownership is identical with respect to each corporation

- Foreign corporations could be a member of a U.S. corporation's controlled group

U.S. Tax-Qualified Retirement Plan (cont.)

- In instances where the controlled group rules are not applicable to cover the foreign operation (*e.g.,* the U.S. entity owns less than 80% of the foreign corporation), then Section 406 of the Code could apply to cover the individual under the U.S. tax-qualified retirement plan

- Under Section 406, U.S. citizens and residents could be covered under a U.S. tax-qualified retirement plan of an American employer while they are employed by a foreign affiliate if certain other conditions are satisfied
  - The term "American employer" is the same as for purposes of providing U.S. social security coverage to employees working abroad, which includes:
    - A partnership if 2/3rds or more of the partners are residents of the U.S.,
    - A trust, if all of the trustees are residents of the U.S., and
    - A corporation organized under the U.S. laws
  - The term affiliate means the American employer has at least 10% interest in the foreign organization (it does not apply the other way around)
  - Other conditions are listed on the next slide

U.S. Tax-Qualified Retirement Plan (cont.)

- Other conditions that must be satisfied for Section 406 to apply:
  - The American employer must have entered into a Section 3121(l) agreement (*i.e.*, Social Security agreements) to extent U.S. social security to U.S. citizens/residents employed by a foreign affiliate
  - Covered individuals cannot receive contributions from any other person under a funded deferred arrangement (though social insurance taxes from the foreign affiliate are disregarded)
  - The terms of the plan must provide coverage for U.S. citizens/residents who are employees of all foreign affiliates to which Section 3121(l) agreements apply

- Compared to Section 406, the controlled group rules are likely the first place to start because such applies without regard to whether the foreign affiliate is also covered by a Section 3121(l) agreement

- Additionally, the employer could treat the employee as being on a "leave of absence" if the foreign assignment is only temporary
  - Such is not likely a solution for internationally mobile employees

U.S. Tax-Qualified Retirement Plan (cont.)

- Addressing those instances where an internationally mobile employee is eligible to participate in both the U.S. tax-qualified retirement plan and the deferred arrangement of a foreign entity, an issue to consider is the integration between such U.S. plan and such foreign plan
  - Outbound executives are typically excluded from participating in the retirement plan located in the Host Country
  - However, in instances where the outbound executive participates in both plans, consider implementing a provision in the U.S. plan that offsets/reduces benefits under the U.S. plan from benefits paid under the foreign plan
    - However, ensure such offsetting language is highly specific. See Bandak v. Eli Lilly and Co. Retirement Plan, 587 F.3d 798 (7th Cir. 2009) (concluding that an offset was improper where the plan sponsor to the U.S. plan failed to identify the foreign plan with sufficient specificity)

Don’t Forget Next Month’s Webinar

- Title:
  - Pay Ratio Disclosure Rules: The A-Z Training Course
- When:
  - 10:00 am to 11:00 am Central
  - July 13, 2017

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