New York Law Journal
GC New York
WWW.NYLJ.COM
An ALM Publication
VOLUME 245—NO. 28
THURSDAY, FEBRUARY 10, 2011

INTERNATIONAL EMPLOYMENT

Accidental Expatriates: Potential Global Mobility Hazard


By **Erika Collins** And **John Hamlin**

A significant issue facing global corporations is the potential for liability created by "accidental expatriates"—employees who travel overseas on what are intended to be brief business trips or short assignments. They are usually not included in their organization's global mobility expatriate programs, and whose time overseas is extended long enough or cumulates over time to bring about potential violations of host country immigration, tax and Social Security laws. Recently, the instances of accidental expatriates are on the rise. There are several reasons for the increase in these types of employees.

First, some overseas business trips or assignments initially intended to be short term may, through unforeseen business circumstances, be extended (sometimes indefinitely). The managers for these employees and/or employees who travel overseas on a regular basis may not realize the point at which extensions of these overseas stays trigger violations of immigration laws and obligations under personal and corporate tax laws and Social Security regulations.

Second, corporations may attempt to avoid the costs of transferring employees overseas for long term assignments through their expatriate programs and instead send employees on temporary, short-term assignments or periodic trips that become lengthy or which cumulate a problematic number of days. Assigning employees overseas for longer periods through corporate expatriate programs can be significantly more costly than using local employees or workers on multiple brief trips for the same work.

Third, corporations have more and more difficulty convincing some employees to accept long-term overseas transfers because of the resulting dislocation and inconvenience to them and their families. Therefore, corporations may send these employees on short-term assignments or allow these employees to work overseas part-time and commute back to their home country, where they maintain a primary office.

The growing sensitivity of governments around the world both to immigration compliance and to potential sources of additional tax revenue has contributed to greater scrutiny of the activities of "accidental expatriates." Tax and immigration authorities are increasingly aware of potential compliance issues and the opportunity for enhanced revenues from taxes and penalties that some short-term employment assignments can create. Further, a growing emphasis on risk management and regulatory compliance has prompted many companies to focus on the potential dangers of insufficient monitoring of extended business travel and short term assignments.


iSTOCK/NYLJ

In this sphere, however, many corporations have found it difficult to implement controls to avoid violations of tax or immigration laws and to protect directors and employees from criminal liability.

Key Compliance Risks

Violations of Tax and Social Security Laws. Tax and Social Security laws vary significantly from country to country, and there may or may not exist tax treaties between countries, which means that it is not always simple to determine whether and at what point a foreign worker's activities will trigger tax liability for the individual or the employer.

Generally, a country where an individual works can impose income and Social Security taxes, although this can depend on the number of days a year the individual is present within the host country and on the nature of the treaty, if any, in force between the host and the home countries.[1] If the individual is subject to income and Social Security tax, it is incumbent upon the employer to withhold those amounts and convey them to the appropriate tax authorities within the host country.

Many countries, including the United States, have entered into what are known as "totalization agreements" with other nations for the purpose of avoiding double taxation of income with respect to Social Security taxes for their citizens working abroad. If there is a totalization agreement in place between the country to which the employee is traveling and the person's home country, then it may be possible to avoid paying Social Security in more than one country, provided that the proper certificate of coverage is filed with the appropriate Social Security authorities.

Such a certificate, however, can only be filed for employees who are acknowledged expatriates who are anticipated to work abroad for no more than five years. On the other hand, accidental expatriates will at some point be likely to incur Social Security contribution obligations in both countries.

In addition to an individual employee's liability for personal income and Social Security taxes, the activities of an accidental expatriate may create a "permanent establishment" for the parent company. A permanent establishment may result in corporate tax liability for the home country employer with respect to the income attributable to the individual employee's activities through the permanent establishment.[2] Any corporate tax liability will depend upon the host country's rules (which often are complex) with respect to the attribution of income related to the activities of the employee.

Many countries assess monetary penalties for non-compliance with tax laws, and some may also attempt to impose criminal sanctions, particularly if there is a perceived pattern of non-compliance.

Violations of Immigration Laws. With an increase in terrorist threats and incidents, many countries have tightened immigration controls. In addition, especially in light of the recent global recession, many countries are increasingly protective of their own workers and more likely to exclude foreign workers by not granting visas or work permits. Accidental expatriates may initially travel to foreign countries on short notice, often not in compliance with host country work permit requirements and often without even a proper business visit visa. Employees on international business trips are usually limited as to the activities in which they can engage while on a tourist visa or even a business visit visa, which may allow a visitor to attend business meetings but may not allow the performance of services (i.e., such as sales or sales support) in most host countries without a work permit.

Many countries impose on companies and individuals substantial fines for failure to comply

ERIKA COLLINS *is a partner in the employment department of Paul Hastings and chairs the firm's international employment practice. She is based in the firm's New York office.* JOHN HAMLIN *is chief employment counsel at Marsh & McLennan Companies.*

with immigration laws, and criminal sanctions may be pursued. In some instances, individual violators may even face deportation. Although not the usual sanction, in some countries immigration law violations can result in a company being prohibited from future sponsorship of international employees, and repeated violations may result in a ban on an employer doing business in the host country.

Potential Reputational Damage and Other Risks. Failure to comply with immigration and tax laws can generate significant reputational damage, both externally and internally, which is difficult to quantify. Facing criminal liability for failure to comply with tax and immigration laws can result in a public relations nightmare, particularly risky for public companies. In addition, business partners may avoid relationships with immigration and tax law violators, and employees may not want to take the risk of incurring personal liability (as well as the significant administrative burden) for unintentional tax and immigration violations.

Additionally, to the extent accidental expatriates are deemed to be susceptible to the immigration and tax laws, they may also be subject to and protected by the labor and employment laws of the host country in addition to the laws of their home country. Furthermore, to the extent the accidental expatriate has ever raised questions regarding her status, there may be a record that could support a potential whistleblower claim.

Hypothetical

The following hypothetical illustrates the potentially drastic consequences—monetarily, criminally, and to reputation—resulting from an "accidental expatriate."

"X Corp" is a large international corporation with corporate entities in the United States and several other countries. In 2004, the X Corp U.S. business sent a U.S.-based employee to France, where X Corp had a small office and a French corporate entity, to assist with sales work related to a large customer of one of its U.S. departments for what was intended to be a brief period of several weeks. However, because U.S. management identified an opportunity to expand its relationship with the French customer, the U.S. employee extended her stay in France. From 2004 through 2009, the employee continued to work part-time in France conducting work on behalf of X Corp.'s U.S. sales department operations, spending an increasing amount of her time working in France.

During this period, the employee stayed on X Corp.'s U.S. payroll, reported to X Corp.'s U.S. supervisors in the U.S., maintained an office and residence in the U.S., but spent an increasingly significant amount of time—eventually well over half of every year—working in France on behalf of X Corp. The employee processed all of her French expenses through the X Corp. U.S. expense program.[3] The X Corp. U.S. Human Resources and Global Work Force departments were unaware that the employee was spending significant time working in France, that the employee was not seconded to X Corp.'s French corporate entity through the company's expatriate program, and that no manager or business leader in the U.S. or in X Corp.'s French office identified a legal issue related to this arrangement.

Despite the significant activities of the employee in France and the substantial amount of time the employee spent there, neither the employee nor X Corp. paid any taxes or made any Social Security contributions to the French government based on the employee's activities and employment in France.[4] Further, for the first several years, the employee did not obtain the proper work permit or visa documents to work in France, exposing the employee and X Corp. to additional liability, including the risk of criminal prosecution for violations of immigration laws. As a result of the employee's work in France, coupled with the failure to pay taxes, X Corp. was forced to pay significant amounts in back taxes, Social Security, interest and penalties to the French government.[5]

As the above hypothetical illustrates, an accidental expatriate situation can be very costly and can become more problematic and damaging (and more difficult to fix) the longer it continues. As such, once a corporation's compliance and/or legal departments become aware of an accidental expatriate situation, the organization should move immediately to remedy and resolve the situation in a way that avoids criminal sanctions, limits the corporation's financial exposure, and complies with international laws going forward.

A corporation must understand, however, that engaging in such "clean up" activity may take an enormous amount of work by many people. For example, the process may involve reconstructing an accidental expatriate's whereabouts and determining the revenue attributable to the employee's activities abroad. Such remedial action may involve significant time and resources, including expenditures on external lawyers, accountants, tax professionals, and immigration experts. In addition, it may be prudent for a corporation to avail itself of amnesty opportunities, if any are available, for protection from civil or criminal prosecution.

> Many countries impose on companies and individuals substantial fines for failure to comply with immigration laws, and criminal sanctions may be pursued. In some instances, individual violators may even face deportation.

Ultimately, to avoid costly mistakes in this area, corporations should proactively seek solutions for any current accidental expatriate problems and create programs for preventing such costly activities in the future. Corporations should have a system for monitoring where in the world employees are so as to track the number of days an employee is located in a particular country and to detect potential problems.[6]

Solutions

Global mobility and human resources departments in large corporations are often unaware of accidental expatriates, who can operate essentially unnoticed. In the normal course of carrying out their duties and responsibilities, HR managers and those responsible for global mobility programs usually are not in a position to prevent liability in this area.

Moreover, managers and employees often do not understand that employees on brief visits or short-term assignments whose stays are extended or who make multiple trips in a 12-month period may at some point trigger liability under foreign tax, Social Security, and immigration laws. As such, managers in particular do not take precautions to avoid these liabilities. By the time a corporation's compliance department becomes aware of issues involving accidental expatriates, significant liabilities may have already attached.

Education is one important component of any compliance program put in place to avoid liabilities associated with accidental expatriates. Corporations should provide training for managers and develop specific in-house training tailored for the relevant work force. This type of preventive training should be developed and implemented by the company, throughout each department or subsidiary sending employees abroad.

In addition, some multinational corporations use a variety of methods for auditing and controlling accidental expatriates. For example, some companies use a universal calendar system indicating where employees are located on each day. For many large corporations, however, this type of system can be complicated, unwieldy, and expensive to implement.

Other companies use a company-wide security system that provides useful monitoring to control for accidental expatriates, such as an entry and exit security card swipe system. Again, however, such a system is often too expensive, complicated or awkward for many companies to implement.

A company-wide, comprehensive travel management program, with a universal mandatory company credit card and worldwide travel vendor usage, can be one of the most simple, straightforward and effective methods for avoiding and monitoring for accidental expatriates. More and more large multinational corporations have instituted a comprehensive travel management program involving use of a single travel vendor for all travel arrangements and a single company credit card for all travel expense reimbursement. With such a system, a corporation can run reports on all overseas movement for its entire work force, including those employees who are not part of a global mobility or expatriate program and therefore most likely to become accidental expatriates.

Having a policy of mandatory participation in a global travel management program provides a company with the ability to monitor the movement and whereabouts of employees and the opportunity to prevent accidental expatriates and avoid the liabilities that accompany them.

1. There is a common rule that an individual present in a host country for less than 183 days in a 12-month period will not be subject to income tax, but this rule is not universal and will depend upon any relevant treaty between the host and home countries.

2. There are a number of factors that may be relevant to an analysis of permanent establishment depending on the law of the host country.

3. It is possible that, in these circumstances, the employee's activities may be viewed by many foreign countries' tax authorities as creating a "permanent establishment" for X Corp in the foreign country. While X Corp may maintain a foreign corporate entity, in this hypothetical and in many real situations, the employee is not seconded or transferred to that entity or employed by it, simple as that may be to arrange. Instead, the employee remains an employee of the U.S. corporate entity throughout the period abroad.

4. In many European (and other) countries, an employee becomes liable to pay foreign income tax when the employee is present in the foreign country longer than 183 days during any given year.

5. Moreover, in this sort of circumstance tax authorities in some countries, such as France, may consider a company's world wide revenues, not just those generated within their own country, in determining tax liability, greatly increasing the potential monetary consequences.

6. There are other reasons corporations should maintain systems for tracking the travel of their employees. For example, in the event of a global travel crisis, such as that created by the eruption of the Eyjafjallajökull Volcano in Iceland, or some sort of pandemic outbreak such as SARS, corporations can monitor the location of their employees who are traveling and be in a position to assist them more easily.