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Navigating the Global Worksite in a Duty to Investigate Era

Mobility and Enforcement Trends

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Elizabeth Espín Stern is a partner in Mayer Brown’s Washington DC office and a member of the Employment & Benefits group. She spearheads Mayer Brown’s new global worksite management initiative. This “global people solution” offers multinational clients, in a variety of sectors including financial services, IT, defense, telecommunications and multimedia, a comprehensive compliance and risk management program in connection with their mobile workforce.



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Paul Justas Sarauskas is counsel in Mayer Brown’s Chicago office and a member of the Employment & Benefits group. As a dual USA-Italian citizen he concentrates his practice on immigration procedures throughout Europe. He is an active member of the European section of the American Immigration Lawyer’s Association and has published in AILA’s Newsletter. He was a guest professor of Italian immigration at Bocconi University in Milan and is listed in the 2013 and 2014 editions of *Who’s Who of Corporate Immigration Attorneys*.

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Laurence Dumure Lambert is a partner in Mayer Brown’s Paris office in charge of the Employment law practice. She has extensive experience both counseling clients on employment matters and representing them in litigation. She also represents industrial and manufacturing clients in restructuring and related litigation

Unprecedented Global Change

- We are living in a time of unprecedented global interdependence
- Peak job growth and project opportunities have moved from the mature to a spectrum of emerging markets, and the workforce is more mobile than ever before
- The ability to move talent “anywhere, anytime” is pivotal to success in this global economy
- At the same time, the risks associated with new market entry and mobilization of talent are substantial and complex

Heightened Demands Clash with Heightened Risk

- Demands of pricing and scale require agile deployment of teams to multiple locations, including new markets
- Increasingly, these assignments happen quickly and change often – mobility is actually mobile now
- This fluid movement raises higher risks than ever before, with “shop floor” audits becoming commonplace, ratings on compliance impacting the company’s ability to capture visas, and the potential for whistleblowers augmenting the impact of any infraction
- Legal and HR managers are caught in the middle – how to meet the business demands while controlling these heightened risks

The Domino Effect

- If the company fails to establish a reliable process for monitoring and managing visa compliance, its audit ratings will fail and visas may be denied or limited
- Absence of complete, accessible records and a protocol for sharing only “need to know” documents with government agents can open the company up to further investigation, including by labor and tax authorities
- Agents also pose challenges, both in terms of anti-corruption mandates and data security
- Confusion about how things are done can lead to whistleblower complaints, triggering civil and criminal investigation



How to Navigate in this Charged Climate

- **Global Coordination.** A coordinated global program
- **Central Information.** A central data bank to monitor and track the movement of personnel
- **Management of High-Impact Risk.** Prioritized risk management, with preventative protocols understood, accepted, and utilized
- **Integrated Delivery.** Deliberate, coordinated execution of personnel assignments, incorporating employment, tax and social insurance with visa planning
- **Certified Suppliers.** Reputable suppliers with a framework for certification of key compliance mandates, updated regularly



Accessible Data Serves Multiple Purposes

- A centralized data bank can both track movement of people, and help ensure that critical protocols are followed
- A system that incorporates visa timelines and filings, critical tax obligations, foreign worker quota restrictions, and covenants or agreements that apply to each cross-border assignment is relevant for multiple purposes, including:
 - Project management
 - Compliance record-keeping for audits
 - Communication and education



Global Trends

- Immigration reform across jurisdictions attempting to balance business needs for top talent with more of an audit and sanctions regime
- Eligibility for work permits subject to higher scrutiny, including at the ports of entry
- Assignees and accompanying family need to understand the parameters of their authorization for entry
- Business traveler options for “visitor” entries is increasingly restrictive, which can surprise your executives, who have historically traveled across borders without incident



Case Study

- Multinational company (“MNC”) headquartered in London
- Subsidiaries in France, Italy, the United States and the People’s Republic of China (“PRC”)
- Business model requires the intracompany movement of managers and professional teams across global offices
- Management promotes use of international assignments as means to cross-fertilize ideas and groom internal talent
- Legal requirements to secure work authorization for non-nationals in each jurisdiction

Spotlight on the United Kingdom



- Tier 2 Intra-company Transfer (ICT) Category
 - Employee eligibility based on employment with the MNC overseas for at least 12 consecutive months
 - UK headquarters must hold Sponsorship Licence issued by UK Visas and Immigration (UKVI), which will issue an A-rated Licence if the application is approved
 - Sponsorship Licence allows UK office to assign Certificates of Sponsorship
 - Two-step application process for employees
 1. UK headquarters assigns Certificate of Sponsorship
 2. Employee completes biometrics then applies for Tier 2 ICT visa (known as “entry clearance”) at British Consulate

Spotlight on the United Kingdom



On the Horizon

- UK Prime Minister David Cameron has pledged to cut immigration to “tens of thousands”
- Measures taken include closing of certain visa streams under other Tiers and imposing a cap on the Tier 2 General (not ICT)
- Yet, measures do not prevent EU citizens from working in the UK, and their numbers are on the rise
- Further changes to immigration legislation expected

Spotlight on France



- Work Authorization specific to intra-company transferees
- Eligibility requirements include 3-months employment overseas with group company and minimum salary requirements
- Application process
 - French subsidiary submits Work Permit application to Ministry of Labor
 - Employee applies for Visa at French Consulate
 - Employee completes post-arrival registration for residence in France

Spotlight on France



On the Horizon

- European parliament and Council of the EU have adopted Directive 2014/66 which provides for an EU-wide intracompany work permit process
- This EU Directive provides for streamlined, simplified processing for assignees and facilitates intra-EU mobility.
- Member States (but not for UK, Ireland and Denmark who opted out) must enact national law pursuant to this Directive by 29 November 2016

Spotlight on Italy



- Work Authorization requirements comprised of 3 processes
 1. Italian subsidiary applies for Employee's Work Permit (*Nulla Osta*)
 2. Employee applies for Visa at the Italian Consulate
 3. Following arrival in Italy, Employee registers for Stay Permit
- Apostille requirements require much lead time

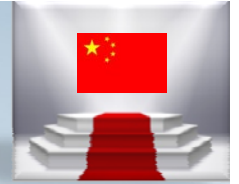
Spotlight on Italy



On the Horizon

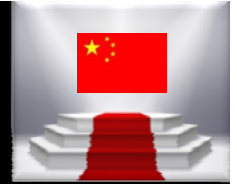
- Italy protecting its own in light of economic crisis, with new labor market test in place before a non-EU national can be hired
- Work quotas lower each year for local hires and limited to strict category of nationality (mostly developing countries with agreements with Italy) and job position (mostly for domestic caregivers and farming, positions Italians do not want)
- Notable difference in treatment by the authorities—less cooperative, more red tape, protective of Italians, and envy of high foreign salaries

Spotlight on the People's Republic of China



- Work Authorization process comprised of multi-steps that vary depending on city
 - Eligibility is formalistic, requiring Bachelor's degree and at least 2 years experience
 - Major steps of work authorization process comprised of the following:
 - PRC subsidiary applies for Employment License and Visa Invitation Letter
 - Employee applies for Z Work Visa at the PRC Consulate
 - Post-arrival, Employee completes Temporary Residence Registration with the local police and a Medical Examination at designated health center
 - Employee then applies for a Residence Permit

Spotlight on the People's Republic of China



On the Horizon

- The PRC overhauled its immigration laws, passing new legislation effective July 1, 2013
- New law expressly and more forcefully prohibits employers from engaging foreign nationals who lack work authorization, while also increasing penalties for non-compliance
- Reflects the PRC government's new focus on inbound expatriate movement, as China's economy continues to attract foreign investors
- Stricter requirements → stricter enforcement

Managing Global Business Travelers

“I fear our managers are sending people on short assignments and calling it ‘business travel’ because they are under pressure to get the project done, but don’t want the business unit to incur the costs of an official expat assignment.”

~ Company HR Manager

“Our General Counsel approached me after reading an article in the ‘Wall Street Journal’ about companies that have been targeted for improperly using visitor’s visas. He’s looking to me for assurance that this is not a problem within our company.”

~ Company HR Manager

“The \$34 million payment made by Infosys as a result of these [systemic visa fraud and abuse of immigration processes] allegations represents the largest payment ever levied in an immigration case.”

~ ICE Website

Typical Business Visitor Framework

Purpose: to conduct business for a short period of time;
not a substitute for productive employment in the host country

- Activities that the business visitor performs in the host country must benefit the employer abroad
- The foreign employer must maintain exclusive personnel authority (hire/fire/evaluate/promote) and pay the business visitor's wages
- The business visitor's time in the host country may not be billed out to a customer, as "billable" services are prohibited
- Rule of thumb: Would the company ordinarily hire/retain a local worker (employee or contract worker) to engage in these duties? If yes, visitor travel is not appropriate, and a work permit should be considered

Red Flags

- Multiple trips to the United States
- Extended stays at any point over the past year
- Direct reports in the United States
- Supervisor/reporting chain includes the United States
- Billable time
- Housing is not temporary
(i.e., own or rent apartment/home)



Best Practices

- **Implement a system** to vet business travel according to established standards – e.g., link with travel reimbursement
- **Mandate escalation** for trips over 30 days or if over 90 days cumulative over course of past year
- **Centralize** invitation letter preparation and application approval
- **Education** through established company communications – e-news alerts, ethics training for managers
- **Company policy** for both employees and third-party on-site suppliers

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