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Update: Essential Legal Considerations for International Assignments

6 May 2015
Essential Legal Considerations for International Assignments

Into SA

“inbound”

Out of SA

“outbound”
Essential Legal Considerations for International Assignments

- Employment Law
- Immigration Law
- Tax Law
Agenda

- Employment Law considerations
  - Current position
  - Challenges
  - Recommendations

- Immigration Law considerations
  - Current position
  - Challenges
  - Recommendations

- Tax Law considerations
  - Current position
  - Challenges
  - Recommendations
Employment Law considerations

- Current position
- Challenges
- Recommendations
Employment Law considerations – Current position

In any situation, the first consideration is always to determine which country’s law governs the employment relationship.

Current position in South Africa:
- **Inbound**
  South Africa’s labour law applies to all workers in South Africa, including foreign workers, and even illegal foreign workers
- **Outbound**
  South Africa’s labour law generally doesn’t apply to South Africans working abroad

South African courts consider factors linking the employment relationship to South Africa:
Employment Law considerations - Challenges

**Jurisdictional challenges to avoid:**
- Employee being in a position to choose which country’s law to rely on
- Employee being able to claim under both countries law
- Employee being able to rely on local labour law, where the employer thought same was not possible
- No clarity as to which entity (home or host country) is to fulfill employer obligations

**Work permit challenges to avoid:**
- Employee being employed without having permission to work
- Employee working illegally

**Contractual challenges to avoid:**
- Whether termination of an international assignment gives an employee the right to be employed in the home country
- Whether an employee is entitled to be repatriated if the international assignment is terminated by either party
- Whether benefits can be unilaterally changed in the event that an employee decides to take up employment in the host country at the end of an assignment
Employment Law Considerations - Recommendations

• With every international assignment, whether inbound or outbound, ask the following questions:
  • Which country’s labour law applies?
  • What are the obligations placed on the parties?
  • How to ensure compliance?

• For employment, secondment, and transfer agreements consider clauses on:
  • Who the parties are (identify who has the employer obligations)
  • Length of the assignment (Labour Relations Act changes on fixed term contracts)
  • Jurisdiction (based on what local law and foreign law states)
  • Work visa (to prevent unlawfulness but also to prevent having to pay an employee who is not entitled to work for any period of time)

• Draft a company policy on international assignments covering all aspects of international assignments (helps to prevent and mitigate disputes)
Immigration Law considerations

- Current position
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Immigration Law considerations – Current position

Recent amendments:

• Employment Services Act 4 of 2014
  • Act was signed on 3 April 2014. The commencement date is still to be proclaimed.
  • Preamble: “…to facilitate the employment of foreign nationals in a manner that is consistent with the objects of this Act and the Immigration Act“.
  • Section 8 (2) The Minister may make regulations which regulations may include-
    (a) satisfy that there are no other persons in the Republic with suitable skills to fill a vacancy;
    (b) use of public employment services or private employment agencies to assist in recruiting a suitable employee who is a SA citizen or permanent resident; and
    (c) preparation of a skills transfer plan in respect of any position in which a foreign national is employed.
  • Section 10 The Minister may make regulations requiring employers to notify the Department of—
    (a) any vacancy or new position in their establishment;
    (b) the employment of any work seeker referred by a labour centre; and
    (c) any matter necessary to promote the provision of efficient matching services.

• Immigration Act 13 of 2011 and Immigration Regulations, 2014
  • New Act effective as from 26 May 2014. Regulations signed into law on 16 May 2014.
  • Extensive changes regarding applications for work visas.
Immigration Law considerations - Challenges

• Difficulty obtaining work visas, in particular:
  • No visas for interns or students wishing to receive training in South Africa
  • Need for applicants to appear and apply in person
  • Inability to change the type of visa from within South Africa
  • Corporate Work Visa: status cannot be changed or renewed within South Africa. Applicants must prove that at least 60% of the total staff are South African citizens or permanent residents.
  • Critical Skills Visa: may not exceed 5 years and is subject to a list of critical skills the country needs.
  • General Work Visa: requires a certificate from the Department of Labour.
  • Intra-Company Transfer Visa: may need to return to home country to apply for new 4 year visa or the balance of same.
  • Section 11(2) Visitors Visa: need to provide motivation letter in support of application.

• The abovementioned challenges also result in longer processing times and increased costs and logistical issues for employers.
Immigration Law considerations - Recommendations

• In employment, secondment and transfer agreements ensure there is a work visa clause covering:
  • No employment relationship comes into being without a work visa
  • No work to be performed without a valid work visa
  • No payment for any period where no work is performed

• Take into account that it may be required to use public employment services or private employment agencies to assist in recruiting a suitable employee who is a SA citizen or permanent resident.

• Take into account that a Skills Transfer Plan may be required to be drafted and implemented and reported on.

• Bear in mind that even a foreign employee without a work visa is entitled to rely on the South African labour law. (Consolidated in legislation for the first time.)

• Through trial and error, determine which interpretation is being followed by particular foreign missions or DHA offices locally.
Tax Law Considerations

• Current position
• Challenges
• Recommendations
Tax Law considerations – Current position

SA – German Double Taxation Agreement:

Article 13 – Remuneration of a resident of Germany will be taxable only in Germany unless employment is exercised in SA, in which case income is taxable in SA.

Exceptions:
The income of the German resident working in SA is taxable in Germany; if
(i) The German resident is in SA for less than 183 in the SA tax year; and
(ii) Remuneration is paid by an employer who is not a resident of SA; and
(iii) The remuneration is not borne by a permanent establishment of the German employer in SA
Tax Law considerations - Challenges

- Employee’s social security cover in the home country can be cancelled / employee banned from cover;
- Increased tax due to residency requirements in both countries (taxes paid in host country may be credited against taxes paid in the home country);
- Increased tax on exiting Germany;
- South Africa’s tax regime can be less favourable for employees if salaries not grossed up (often referred to as tax equalization program)
Tax Law considerations - Recommendations

• Before concluding a secondment agreement, consult a tax advisor;
• Have tax calculations performed by a tax expert;
• Have the secondment agreement reviewed from a tax perspective.

Important clauses of the secondment agreement effecting tax:
• Relocation costs;
• Employer provided accommodation;
• Contributions to foreign retirement funds;
• Contributions to foreign medical aid funds;
• Currency that remuneration is paid in;
• Remuneration by way of split package for services in host and home country
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