

Documenting Expatriate Reward

The remuneration of internationally mobile employees is complex to document and increasingly the subject of dispute. Juliet Carp, employment law specialist at Dorsey & Whitney (Europe) LLP, offers some practical strategies for reducing risk.

Documenting reward for expatriates is, in some respects, just like documenting reward for any other employee. The contract is there to set the parties' expectations and record the promises they are making to each other.

The contract can reduce the risk of misunderstandings leading to claims and help resolve claims when they do arise. More importantly, they can offer significant comfort to potential assignees who want to know where they stand before agreeing to go.

Who Else Will Use Them?

A host of third parties may also need to see the contract documents, including for example income tax, corporation tax, sales tax, social security, pensions and immigration authorities. Those third parties may be in a number of jurisdictions and the people who review the documents may not be familiar with applicable laws or typical expatriate arrangements. Clarity is critical.

Accompanying family members will usually have questions about where they will live, go to school etc., and the assignment will run more smoothly if the employee is able to explain accurately. Disappointed family members can be a surprisingly significant commercial risk.

Buying Power

Cash remuneration is complicated by a variety of factors that do not impinge on domestic contracts, most significantly lack of certainty about the "buying power" of pay. Expatriates are frequently offered additional promises designed to address that uncertainty, for example, tax equalisation, cost of living adjustments ("COLA") and exchange rate comfort.

Tax Equalisation

The expatriate may be subject to more than one variable tax regime and this may be further complicated by rules designed to avoid "double taxation". Many employers offer comfort by making "tax

equalisation" promises designed to make sure that the employee is no better, or worse off, than he would have been under the home country tax regime.

In practice, tax equalisation arrangements are far more complicated to administer than a "no better or worse off" principle suggests and most multinationals ask tax advisers to help with the maths, tax returns etc. Few multinationals manage to document the arrangements in a way that makes the deal clear. Which elements of remuneration are covered by the policy? Is social security covered or higher tax rates due to an employee's personal income? What happens to long-term incentives, pension or severance pay? Or if the employee dies, inherits, sells his house, or marries a host country national?

The employee can often help the employer reduce the cost of providing tax comfort, for example, by keeping records, submitting tax returns on time, helping the employer recover from local tax authorities etc. The tax equalisation agreement is an ideal place to make sure any conditions or requirements are legally binding.

These promises should be properly documented, not only because they are frequently the subject of dispute but because in most jurisdictions remuneration is highly regulated. Recovering a tax reimbursement made directly to an employee who has already received the benefit of tax equalisation can be difficult without either cooperation or careful contractual wording. If the contract wording is right cooperation usually follows.

COLA

Cost of living, inflation and exchange rates can all have an impact on the value of pay. Data is available commercially that can help employers make appropriate adjustments to pay to reflect this. This is usually done by offering an additional cost of living allowance (or "COLA") that can vary in size. There are often local restrictions on an employer's ability to adjust pay unilaterally so negative COLAs are generally avoided.

Benefits

Expatriates often also receive a range of complex benefits, for example, temporary

and permanent housing, home leave, relocation assistance, language training, and schooling for children. Again clarity is key to good relationships. Will the employee be offered a flat or a house? Will pets come too? Thinking ahead can make a big difference to clarity when things change. What happens if another child is born or school fees rise? Are flights covered when a child goes to university? What if the assignment ends in the middle of a lease, the school year etc.? What happens to the deposit?

In addition to practical decisions, the employer will need to decide whether benefits will be provided "in kind" or by way of cash allowance or expense claim. This should be carefully documented along with any tax-related requirements such as a need to keep receipts.

Employment Status

The identity of an expatriate's employer can make a huge difference to costs. For example, this may impact on tax, social security, pension, intellectual property, eligibility to participate in benefit plans etc. Terms related to remuneration can either support the identity of the preferred employer or undermine it. Bear in mind that decisions regarding, and delivery of, pay are matters for the employer.

Equality

Employers should always review reward-related arrangements for employee impact, particularly impact on employees with "protected status". Expatriate arrangements are no different in principle but, in practice, remuneration is linked to things that would not normally be appropriate in a domestic context, such as national origin or family status. Disparate impact and any explanations should be reviewed and challenged appropriately.

Other Legal Constraints

Employment law is not consistent across jurisdictions and in many cases consideration will need to be given to more than one set of rules. The key thing is to be aware of the areas where employment law is likely to have an impact, so that advice can be sought from appropriate specialists at an early stage. These may include for example:

- Mandatory collective agreements that

may set minimum terms whether or not the employer recognises a trade union, for example, providing for “13th month” salary payments

- Restrictions on an employer’s flexibility to retain discretion to unilaterally vary remuneration
- Restrictions on making deductions from pay or requiring repayments
- Termination-related laws.

Beautiful documents cannot trump underlying facts. And, of course, it is much easier to get the facts right, and ensure the documents accurately record the facts and promises made, before an assignment begins.

Prioritise

With all this complexity it makes sense to focus time, and related cost, where risk is greater. Essentially, this means focusing on areas where remuneration and benefits:

- Are high value (such as housing and tax equalisation)
- Are more likely to be subject to dispute (e.g. termination related terms)
- Are emotive (e.g. children’s schooling); and/or

- Potentially affect a large number of people over a considerable period of time (e.g. a pension clause that is repeatedly used without change or a tax equalisation policy document).

Happy employees do not usually make claims. Being open and upfront with staff and responding to queries quickly and fairly can be surprisingly effective tools to reduce legal risk. But make sure you have the paperwork to support you if goodwill is not enough.



Juliet Carp is an employment law specialist at full service law firm Dorsey & Whitney (Europe) LLP. Email carp.juliet@dorsey.com
The second edition of Juliet’s book “Drafting Employment Documents for Expatriates” will be published later this year.

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