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Global Mobility – Where I Am, Why It Matters?

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Agenda

- Introduction - What We Will Cover Today
- Global Mobility In The Trump/Trudeau World
- Categories of Foreign Workers – Why It Matters
- Categories of Foreign Workers - U.S. Tax Considerations
- Categories of Foreign Workers – Canadian Tax Considerations
- Categories of Foreign Workers - Tax Treaty Considerations
- Permanent Establishment (PE) Risk – What is it and Why the Fuss?
- Global Mobility – Employment Taxes
- Pensions & Employee Benefits
- Foreign Reporting Issues
- Key Questions

Global Mobility In The Trump/Trudeau World

- Why increased scrutiny on cross-border workforces?
 - Increasing emphasis on global commerce
 - Governments' need for tax revenue
 - Heightened national security concerns
 - Protection of national workforce
 - Strain on social benefit programs
- Companies may find their procedures for cross-border payments, employee benefits accruals and related withholdings are inadequate and expose them to significant risk of audit, litigation, tax penalties and personal fiduciary liability.

Categories of Foreign Workers – Why It Matters

- Depending on how you hire or deploy a worker will determine tax and other employee benefit ramifications for the worker.
- Some situations require a coordination of benefits between countries. Others require complete segregation of compensation and benefits.
- Issues:
 - Shifting references to the type or nature of assignment
 - Lack of proper written contractual arrangements
 - Missed or late government filings
 - Inadequate ongoing compliance

Each can lead to unexpected and undesirable tax consequences, fines, litigation, fiduciary liability, unwelcome publicity and strained employer/employee relations affecting productivity/morale.

Categories of Foreign Workers – Why It Matters

FIRST - Employers need to:

- Properly plan and structure nature of cross-border deployment BEFORE taking action.
- Figure out short and long term goals for hiring or sending employee to foreign jurisdiction.
- Consider visa, benefits, payroll/employment laws, “permanent establishment” issues.
- One size does not fit all.
- Determine nature of hire or deployment:
 - Secondment/Foreign Correspondent (expects to return to home country)?
 - Permanent Assignee/Foreign Hire (no expectation of return to home country)?
 - Business Traveler/Dual Employee?
 - Shifting categories amongst the above?

Categories of Foreign Workers – Why It Matters

SECOND - Consider if there are specific worker's programs:

- U.S. examples:
 - Many visa categories (e.g., R, P, O, L, I, H, E) and each with several categories (e.g., .H-1B, H-2A, H-2B, L-1A, L-1B)
 - NAFTA Professional (TN)
- Canadian Examples:
 - Temporary Foreign Worker Program
 - International Mobility Program
 - NAFTA Professional (TN)

Categories of Foreign Workers – Why It Matters

THIRD - Consider:

- Nature of hire/deployment:
 - Employee
 - Independent contractor
 - Leasing company providing services
- Duration of service:
 - Short-term temporary assignment
 - Long-term
- Is it a remote worker situation - living in one country but working in another remotely (e.g., employee requesting to move to another country to follow spouse and work “remotely” for home country employer from another country)?

Categories of Foreign Workers – Why It Matters

FOURTH - Consider logistics:

- Tax treaty between the home and host countries?
- Payroll, employment and tax rules in home versus host country.
- What are employee benefits and compensation structures?
- Understand fiduciary exposure for Board, officers and other employees under local laws (e.g., ERISA).
- How to best track and record employee's location and travel.
- Determine if structure is truly expatriate or non-expatriate.
- Remember, tax residency (e.g., 183 days in U.S.) is different than place of employment which is immediate.
- LGBT employees – safety, same-sex marriage, employee benefits

Categories of Foreign Workers – Why It Matters

Type	Expatriate?	PE Risk?	Other Issues
Secondment	Yes – Employment shifts from home to host country. Loaned employee essentially.	Low.	Shadow payroll (home country pays and host does a “shadow” payroll).
Foreign Correspondent	Yes - Home country hires and pays. Place of employment is host.	High.	Generally violates payroll laws in host country. No Visa sponsor.
Permanent Assignee	No –No expectation of repatriation.	None - works for host country.	Written repatriation promise could be problematic.
Business Traveler	No – Home country hires and pays. Place of employment is home.	Low unless accidental overstay.	Short-term only. Visa required.
Dual-Employee	Yes – both countries employ (leave of absence usually).	Low if employee renders services for only host country.	Requires careful documentation. Payroll and employment law challenges.
Foreign Hire	No - hired in one country to work in another.	High risk if employed by home country.	Only works for new hires.

Categories of Foreign Workers – U.S. Tax Considerations

- U.S. persons - subject to U.S. tax on worldwide income regardless of where work performed or where the individual resides.
- U.S. persons include:
 - U.S. citizens
 - Lawful permanent residents (“green card” holders)
 - Resident aliens (substantial presence test)
 - Formula - whether person in the U.S. for 183 days during 3-year period including current year and 2 previous years (120-day safe harbor)
 - Closer connection exception and treaty tie-breaker rules may apply (e.g., Art. IV(2) of U.S. – Canada Tax Treaty for definition of “Residence”)

Categories of Foreign Workers – U.S. Tax Considerations

- Non-resident Alien Individual (“NRAI”) - subject to U.S. income tax only on U.S. source income
 - U.S. rules - income from services is sourced according to where services performed (threshold inquiry where payments made to NRAI)
 - Narrow exceptions for temporary workers and NRAI crewmembers of foreign vessels
 - Where services are performed partly in U.S. and partly out, income should be allocated on basis that “most correctly reflects” proper source of income under facts and circumstances of case (usually on a time basis, but not always)

Categories of Foreign Workers – U.S. Tax Considerations

- Non-resident aliens are subject to U.S. income tax only on U.S. source income
 - Sourcing rule does not distinguish between whether payments made to employee, independent contractor or business entity
 - Sourcing rules for options
 - Certain fringe benefits are sourced on geographical basis (e.g., principal place of work) – housing, education, transportation
 - Otherwise, apportionment on time basis (number of days)

Categories of Foreign Workers – U.S. Tax Considerations

- U.S. Income Tax Withholding – U.S. Employees
 - Employers (U.S. and non-U.S.) are generally required to withhold and report / pay over withheld amounts for payments to U.S. persons
 - Exceptions:
 - At the time of payment, it is reasonable to believe that the payment will be excluded from gross income under IRC § 911 (U.S. citizens only)
 - Local withholding applies (U.S. citizens working offshore)
 - Reduced withholding under applicable tax treaty
- Secondary liability for failure to withhold

Categories of Foreign Workers – U.S. Tax Considerations

- Income Tax Withholding – NRAI with U.S. Source Income
 - Must determine whether payee is employee (and payments are wages) or whether payee is independent contractor and Section 1441 withholding applies
 - For employees, withhold at graduated rates under Code section 3402 (subject to flat-rate withholding rules for certain supplemental wages)
 - Non-employees generally are subject to 30% withholding under Code section 1441, even though individual may be subject to tax at graduated rates – check treaty for reduced withholding
 - Determination will affect reporting and remittance mechanics

Categories of Foreign Workers – U.S. Tax Considerations

- If section 1441 rules apply, no withholding in certain circumstances:
 - Payee certifies on Form W-8ECI that income is “effectively connected income” with a U.S. trade or business
 - Properly documented treaty exception applies
 - No actual payments made
- Example
 - NRAI director (treated as an independent contractor) attends board meetings both within the U.S. and Japan and he receives non-cash fringe benefits (theater tickets) during a board meeting in Japan. All other income is deferred to later year.

Categories of Foreign Workers – U.S. Tax Considerations

- Documentation Requirements for Reduced Withholding
 - Domestic law exception (e.g., Section 911) only if valid W-4 and Form 673 provided
 - Form W-8BEN to substantiate status of payee (NRAI) and treaty eligibility
 - Form 8233 to claim withholding exemption under applicable treaty
- FATCA has made the documentation compliance rules considerably more complicated

Categories of Foreign Workers – Canadian Tax Considerations

1) **FIRST**, determine if there is tax treaty between home and host countries.

TAX TREATIES WITH U.S.

- Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital (as amended by Protocols to September 21, 2007)
- Intergovernmental Agreement for the Enhanced Exchange of Tax Information Under the Canada-U.S. Tax Convention (February 5, 2014)

TAX TREATIES WITH OTHER COUNTRIES

- Over 93 in force
- 4 pending
- 7 under negotiation/renegotiation

Categories of Foreign Workers – Canadian Tax Considerations

SECOND, understand the implications based on category of worker.

- May be subject to same tax deductions as Canadian residents – e.g., federal/provincial income tax, employment insurance premiums, CPP/QPP contributions.
- Certain Social Security Agreements between Canada and other countries - designed to co-ordinate pension programs in two countries for those who lived or worked in both (See Article XVIII of Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital)
- If home country has tax treaty with Canada, all or part of Canadian-source income may be exempt from federal and provincial tax. For example:
 - For U.S. residents working in Canada, less than \$10,000 or present in Canada for 183 days or less and paid by employer that is not a resident of, or has a permanent establishment, in Canada
 - Certain refundable tax credits (5013-SB T1 General – Schedule B “Allowable Amount of Non-Refundable Tax Credits – Non-Resident of Canada)

Categories of Foreign Workers - Tax Treaty Considerations

Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital Certain Provisions:

- Employment income (Art. XV)
 - Wages derived by resident from employment taxable only in State of residence unless the employment is exercised in the other state
- Pensions and Annuities (Art. XVIII)
 - Residence taxation with respect to pensions and annuities arising in the other contracting State
 - Source country taxation limited to 15%
 - Social security payments taxed only in residence country
- Savings clause (Art. XXIX(2))

Permanent Establishment (PE) Risk – What is it and Why the Fuss?

- Essentially a corporate and tax presence imposed by the source country on the foreign entity deemed to be doing business in the source country due to the nature, length and type of activities performed by expatriate employee(s).
- U.S./Canada – might trigger federal, state, provincial and local corporate and tax filings
- From PWC survey of 200 multinational corporations in US/Europe:
 - 89% are paying more attention to issue of PE
 - 86% indicate that increased mobility triggers heightened PE risk
 - 63% agree that tax authorities are becoming more aggressive in assessing PE

(Source “Permanent Establishments 2.0” PWC 2013)

Permanent Establishment (PE) Risk – What is it and Why the Fuss?

- Question of whether employees and contractors working in foreign country will trigger PE in that country
 - Fixed place of business through which business is carried on (office, branch, place of management, etc.)
 - Presence of an agent with authority to conclude contracts may trigger PE
- Question arises who is agent working for (especially if operating under secondment arrangement)?
- Consequence of PE:
 - Attributable income may be taxable by source country
 - May trigger an income tax return filing requirement (even if no taxable income)
- Inadvertent triggering of Services PE (Art. V(9) of U.S./Canada Treaty) – must know rules for counting numbers of days home-country employees are present in foreign country
- Domestic law context may (and likely will) employ different rules (e.g., U.S. trade or business / ECI rules)

Permanent Establishment (PE) Risk – What is it and Why the Fuss?

- Treaties generally exclude activities of a preparatory or auxiliary nature
- For example, activities that don't rise to PE under U.S./Canada Treaty:
 - Building or construction site project lasting less than 12 months
 - Installation or drilling rig lasting less than 3 months in a 12-month period
 - Use of facilities to store, deliver, or display goods
 - Use of facilities for the purchase of goods or to collect information
 - Advertising, supply of information, scientific research or similar activities which have preparatory or auxiliary character
 - Combination of these activities need not be preparatory or auxiliary in character in order to avoid PE

Permanent Establishment (PE) Risk – What is it and Why the Fuss?

- The foreign sub solution
- Use of secondment arrangements - who's the employer?
- Problems arise when positions inconsistent for
 - Qualified plan coverage
 - Employer deductibility of wage expenses
 - Social Security Tax Withholding
- Form and substance of secondment arrangement (*Striker*)
 - Terms of assignment reflect intent of the parties
 - Tax equalization to home country
 - Home country control over secondee (e.g., exclusive right to discharge)
- Other considerations and best practices for secondment agreements

Global Mobility – Employment Taxes

- U.S. FICA Tax Withholding
 - Generally required for wages paid by any employer for services within the U.S., regardless of employee's citizenship or residency status
 - Exception for NRAs temporarily present in the U.S. under certain types of visas
 - Exception for certain temporary foreign agricultural workers
 - Generally required for services performed outside the U.S. by U.S. citizens and residents if paid by American employer
 - The term “American employer” includes U.S. corporations, U.S. government, U.S. residents, and partnerships where 2/3 of the partners are U.S. residents
 - Also includes service under a U.S. government contract for foreign member of U.S.-based controlled group

Global Mobility – Employment Taxes

- U.S. FICA Tax Withholding
 - Not required for employment with foreign affiliate of U.S. employer, except as provided by totalization agreement or a Section 3121(l) agreement
- Bilateral Totalization Agreements (more common)
 - Prevents double taxation where both countries provide for coverage
 - Permits social security credits in both countries to be added together
 - Especially useful for temporary assignments, where a minimum period of service is required for social security benefits
 - Not available for local hires
 - Only available in about 25 countries (including U.S. – Canada Totalization Agreement)

Global Mobility – Employment Taxes

- U.S. – Canada Totalization Agreement (1984)
 - Coverage (Art. V): Persons subject to residence State laws when working in host country if period of work \leq 60 months (or longer with mutual consent)
 - Competent Authority agreement provisions
 - Benefits eligibility (Art. VII & VIII): Credit for time worked in residence State (totalization provision)
 - Miscellaneous provisions:
 - Mutual assistance
 - Information sharing, confidentiality provisions

Global Mobility – Employment Taxes

- Section 3121(l) Agreements (less common)
 - American employer must have at least a 10% interest in the foreign affiliate
 - Agreement is irrevocable
 - Provisions apply to all U.S. citizens employed by the foreign affiliate, including local hires
 - American employer is responsible for withholding and paying the employer and employee share of FICA taxes
- Income tax treaties rarely address social security taxes

Global Mobility – Employment Taxes

- Common audit issues – employees who work in multiple countries
 - Be prepared to substantiate time spent/work performed in each location or reason to allocate U.S. versus non-U.S. source income on other than a time basis
 - NRAI withholding documentation (W-8BEN and treaty claims)
 - Tax equalization payments and how withholding is calculated
 - Mechanisms for depositing payroll taxes

Pensions & Employee Benefits

CONSIDERATIONS

1) Retirement Plans

- Does home/host country have tax treaty addressing pension matters?
- Does treaty provide beneficial treatment regarding pension accruals, distributions?
- Continue/freeze participation under home pension plan?
- Consider wrap-around arrangements?
- Availability of other state/provincial/local retirement programs?
- Social Security
 - Totalization Agreement (US/Quebec/Canada)
 - Canada (CPP/QPP/OAS).
 - US (OASDI)

Pensions & Employee Benefits

CONSIDERATIONS

2) Health Care

- Government provided or private insurance– eligibility/cost?
- Private insurance (Canada permits employer-provided in addition to universal healthcare e.g., private/semi-private hospital rooms, cosmetic surgery, prescriptions o/s of hospital)
- Mandated coverage (U.S. - Affordable Care Act) (Canada – Canada Health Act via Provincial programs)
- Non-discrimination testing/rules.
- Who pays? Stop-loss issues.
- HSA's and other health arrangements? Portability?
- Cross-border coverage?

Pensions & Employee Benefits

CONSIDERATIONS

3) Equity Compensation

- Stock grant/options considerations – restricted stock, options, phantom units, SARs, RSUs, ESPP, global plan?
- Tax implications – e.g., U.S. - NSO/ISO treatment. Canada - Section 7 ITA considerations.

4) Executive Compensation

- Country specific executive and deferred compensation tax rules (e.g., US 409A, 280G, 162(m)).
- Bonus, incentive, profit-sharing, commission, retention, severance and other compensation plans.

5) Fringe Benefits

- EAP, life Insurance, educational/adoption assistance, etc.

Pensions & Employee Benefits

6) Expat Benefit Programs:

- Moving expenses, hardship pay
- Housing/car allowance
- Tax prep/equalization payments
- School tuition, driver, flights home
- Club memberships
- Immigration/legal services
- Taxation issues

Pensions & Employee Benefits

Private Pension Plans

- U.S.: Governed by federal law “Employee Retirement Income Security Act of 1974” (ERISA)
- Canada : Governed by Provincial law and Federal law for entities subject to federal jurisdiction and Yukon, Northwest Territories and Nunavut
- Striking similarities between ERISA, Canadian pension legislation and tax treatment under IRC and ITA

Public Pension Plans

- U.S.: Old-Age, Survivors, and Disability Insurance (OASDI)
- Canada – Canada Pension Plan (CPP), Quebec Pension Plan (QPP), Old Age Security (OAS).

Pensions & Employee Benefits

TYPES OF RETIREMENT PLANS

U.S.

- 401(k) – defined contribution
- Pension plan/cash balance plan – defined benefit
- Individual Retirement Accounts (IRAs)

Canada

- Registered Retirement Savings Plans (RRSP)
- Pension plans – defined benefit
- Retirement Compensation Arrangements (RCAs)
- Registered Retirement Income Fund

Pensions & Employee Benefits

UNIQUE U.S. CONSIDERATIONS - ERISA

- Covers all pension and benefit plans other than church plans, government plans and foreign plans.
- Imposes personal liability on fiduciaries.
- Onerous reporting, disclosure, testing, fiduciary and funding requirements.
- Litigation-prone

UNIQUE CANADIAN CONSIDERATIONS

- Variety of Provincial laws – complexities when employees in multiple jurisdictions (e.g., vesting periods vary across Canada). Immediate vesting (Ontario, federal, Quebec, Manitoba). Two- year vesting (Newfoundland, New Brunswick, Saskatchewan)

Pensions & Employee Benefits

Private Pension Plan Considerations

- Employer determines eligibility for plan participation
 - Most plans exclude nonresident aliens.
 - Can probably exclude other groups – but need to check plan language first (may need to amend plan before alien begins work).
 - Usually can continue to include citizens in home country plans, even if they are working abroad.
- Need to review/amend plan language ahead of time.

Pensions & Employee Benefits

Consider opportunities to participate in multiple jurisdiction pension arrangements?

- Employees may be able to participate in both host and home country retirement arrangements.
- Foreign plan may have higher contribution limits and may be made in addition to home country contribution limits.
- Annual earnings in a foreign plan may be tax exempt from income in home country.
- Income Tax Treaty must provide exemption from tax on earnings in retirement plan (e.g., Article 18.1 of U.S./U.K. Income Tax Treaty provides that pension earnings may be taxable as income only upon distribution).

Pensions & Employee Benefits

EQUITY GRANTS

- If non-U.S. employees with equity awards come to the U.S., the sourcing rules of Code section 861 apply
- Taxation is determined based on days in the U.S.
- Double taxation may be an issue
- National Association of Stock Plan Professionals (NASPP) has a Global Stock Plan portal with resources on a country-by-country basis (www.naspp.com/international)

Foreign Reporting Issues

- Wage statements for non-U.S. jurisdictions
- Host country employment contract requirements
- Host country visa application requirements
- Foreign country business registration requirements, thresholds

Key Questions to be Asking

- Where are we sending home-country employees and are tax/totalization treaties available?
- Numbers and duration home-country employees will be in host country? Material risk of PE? Tracking system in place?
- Appropriate written agreements executed.
- Are travelers U.S. persons?
- What tasks will be performed in the host country and for whom?
- Will travelers remain eligible for benefits plans, home-country social security benefits? Filings? Disclosure?
- What other perks will they receive and how will perks be taxed?
- Are there foreign reporting obligations?
- Protections for boards, officers, others under statutes like ERISA re pension and other liabilities.

Questions?

