It is no secret that international employee assignments are a complex matter. To achieve an optimal structure, a strategic approach accommodating labor, tax, social-security and immigration laws is required. In some cases, a tension may appear between tax- and labor-law implications. In order to avoid a tax-permanent establishment in the host country, home companies tend to structure international assignments in a way that may give rise for concerns under employee leasing laws of the host jurisdictions.

Generally, there are two forms of employee assignments from a labor-law perspective: a) in the framework of the provision of services and b) in the framework of employee leasing. The latter is often subject to national requirements for registration, licensing, certification, financial guarantees or monitoring. Noncompliance with the requirements normally triggers various adverse consequences for companies: financial penalties, management liability, drawbacks in potential labor-law disputes and disqualification in public procurement procedures, etc.

International assignments are not exempted from such requirements. Moreover, national laws concerning employee leasing often contain mandatory provisions for the jurisdictions involved that have an impact on cross-border activities. This is another reason why companies not specializing in commercial employee leasing try to avoid the application of employee leasing laws.

As a consequence, finding the balance between tax- and labor-law implications presents one of the core tasks for management when planning and designing international employee assignments.

Recent labor-law challenges in Germany: the concept of “employee leasing”

Companies conducting employee leasing in Germany require a license. However, the concept of employee leasing under German law may vary from the one in the home country and trigger uncertainty as to the proper qualification of (international) assignments to Germany.

Starting on April 1, 2017, employee leasing in Germany is explicitly defined in Section 1 (1) of the German Law on Labor Leasing (Arbeitnehmerüberlassungsgesetz, AÜG) as the assignment of employees by the contractual employer to a user employer to perform temporary work while being integrated into the work organization of the user employer and bound by his or her directions. Apart from certain statutory exceptions, the maximum leasing period should not exceed 18 months (Section 1 (1) of the AÜG).
The above definition clarifies that employee leasing in Germany is not limited to commercial employee leasing and may encompass any international assignment. It does not seem to be a helpful qualification tool in the following situations:

- Often the degree of integration of the assigned employee into the work organization of the user employer (here the host company) evolves in the course of the assignment regardless of the initial intention of the parties.

- International assignments are often characterized by the shared exercise of supervision through the home and host company. In many cases, the assigned employee performs services on behalf of both companies. A clear allocation of services may be difficult.

According to German law, the formal content of contractual arrangements between the parties is not decisive; it is the actual execution of contracts that should determine the character of assignments. As the examples (above) show, the actual performance of international assignments may appear difficult to fit into the recognized forms of employee assignments.

In cases of intercompany assignments, companies often make use of the group privilege doctrine pursuant to Section 1 (3) No. 2 of the AÜG (Konzernprivileg), which implies that the AÜG is not applicable to employee leasing between companies in a single group within the meaning of Section 18 of the German Stock Corporation Act (Aktiengesetz, AktG) if the employee is not hired and employed for the purpose of leasing. Therefore, group companies whose purpose is to hire out personnel to other group companies cannot make use of this privilege. Furthermore, the Konzernprivileg requires that the intercompany assignment is limited in time (not necessarily limited to 18 months) and a repatriation of the assigned employee to the home company is intended. Therefore, group companies whose purpose is to hire out personnel to other group companies cannot make use of this privilege.

Obligations of the companies involved

Starting on April 1, 2017, the home and host company are obliged to disclose the assignment as employee leasing in the underlying intercompany agreement in cases of employee leasing (Section 1 [1] of the AÜG), and the home company must inform the leased employees about the character of their assignment (Section 11 [2] of the AÜG). Apart from any financial penalties, violations of these obligations trigger the same legal consequences as cases involving the conduct of employee leasing without a license or in exceeding the maximum leasing period. Pursuant to Section 9 No. 1a of the AÜG, the contractual relationship between the home company and the assigned employee is deemed invalid and an employment relationship with the host company is established unless the assigned employee exercises his or her objection right.

The consequences are twofold:

- Companies can no longer avert sanctions in cases of improper qualification of assignments by obtaining a precautionary license – the practice in the past.
- Companies must clarify the character of the assignment in advance; they bear the full risk of improper qualification since there is no binding preliminary procedure to determine the status of the assignment before the competent authorities in Germany.

Successful management

Step 1: Clarify the character of assignments in advance

Should the planned assignments trigger employee leasing, companies must also consider the requirements of the home country when clarifying the character of the assignment. German audit authorities may require compliance with the home country’s laws in order to approve assignments to Germany under the AÜG.

Step 2: Choosing the proper contractual setup

Secondment agreement with the home company

Domestic secondment agreements are a popular contractual tool for international assignments. Social-security considerations and the application of the more familiar domestic law account for this trend.

From an employee-leasing perspective, this tool remains appropriate in the following scenarios:

- Assignments in the form of the provision of services.
Assignments in the form of privileged employee leasing (Konzernprivileg) provided that the assignment is fixed term (not necessarily limited to 18 months) and a repatriation opportunity of the assigned employee is ensured.

Assignments in the form of nonprivileged employee leasing provided that both the secondment agreement and the intercompany agreement are limited to the maximum leasing period of 18 months and identify the assignment as employee leasing in addition to the license requirement.

In the first two scenarios, companies are well advised to provide for the objection of the assigned employee to the fictional establishment of an employment relationship with the host company in the secondment agreement should the audit authorities unexpectedly qualify the assignment as employee leasing.

The best approach to dealing with the uncertainties about the proper qualification of assignments is, however, to either treat assignments as cases of unprivileged employee leasing or to conclude a local contract with the host company.

**Local contract with the host company**

Conclusion of a local contract is the way to proceed if companies want to avoid employee-leasing restrictions or if the requirements for legal employee leasing cannot be fulfilled.

In addition, this contractual tool offers the following benefits:

- It creates legal clarity for the parties regarding the applicable law by avoiding the application of both home and host jurisdictions. In light of the European Commission’s proposal to apply the labor law of the host country to assignments over 24 months (see Proposal for Amendment of the Directive 96/71/EC concerning posting of employees as of March 8, 2016), this contractual tool is the preferable option for long-term assignments. This also applies to privileged employee-leasing scenarios.
- It does not hinder the retention of social-security coverage and benefits from the home country in the prevailing number of assignments.
- The tax deductibility of business expenses is not noticeably reduced by the conclusion of a local contract.

**Summary**

Given the statutory sanctions in cases of noncompliance with the AÜG, companies are strongly advised to proactively tackle aspects of employee leasing in international assignments to Germany. Determining the character of the assignments may appear to be a difficult task for companies due to the various uncertainties characterizing the concept of employee leasing in Germany, nevertheless companies have considerable leeway to structure assignments in a way that keeps their exposure to employee-leasing risks manageable. Choosing the proper contractual setup is one of the steps forward toward successful management.

In many cases, the conclusion of a local contract with the host company appears to be the preferable option in a cross-border context.

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