

Global HR Hot Topic

July 2013

Structuring Expatriate Postings



Challenge:
Expatriate postings raise tough structural questions that multinationals too often overlook.

Multinationals inevitably post expatriates abroad. But in setting up expat postings, employers too often either ignore the question of how best to structure the expat assignment or else they struggle with the expat structuring issue. The reflexive or default approach to structuring expat assignments is simply to grab whatever expat assignment package got used for the last expat posting, change the names, make some tweaks and move on. (“Hey, last year we sent Carlos to Brazil—let’s use Carlos’s assignment package as a template now, for posting Susan to Paris.”) But this approach is dangerous. When posting an expatriate, focus instead on the most ideal structure for this particular assignment. (“You know, while we ‘seconded’ Carlos to our Brazilian partner last year, now we need to ‘localize’ Susan to our affiliate in Paris. So Carlos’s expat assignment package would be a dangerous model to use here. For Susan, let’s find a form for documenting an overseas ‘localization.’”)

Expatriate assignments traditionally came about when a multinational tapped an employee and assigned him to go off to work abroad for one of three reasons: to support a foreign affiliate, as a broadening assignment, or to serve as a “foreign correspondent” performing tasks overseas for the benefit of the home-country employer. But multinationals these days increasingly see these “traditional expatriate assignments” as “less effective”; multinationals are now turning to new structures like “commuter assignments, extended business travel, rotational assignments,...‘local plus’ approaches...and other alternatives.” (Eric Krell, “Easy Come, Easy Go: Weigh Alternatives to Long-Term International Expatriate Assignment,” *SHRM HR Magazine*, March 2013, at 59.) Further, in today’s global environment we are seeing more self-driven expats who ask to move overseas for personal reasons—think of a “trailing spouse” married to another company’s expatriate or an employee returning to his home country to nurse an ailing family member.

The wider range of expat postings we see today raises ever more questions of *expatriate assignment structure*. How best to structure a given expatriate assignment requires

Pointer:
There are four different expatriate structures. For each expat posting, select the structure that best meets business needs—regardless of which structure might have been most appropriate last time.

Each monthly issue of *Global HR Hot Topic* focuses on a specific challenge to globalizing HR and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case’s International Labor and Employment Law practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

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addressing four topics: (1) who is, and is not, an expatriate? (2) understanding the four expatriate structures (3) selecting among the four expatriate structures and (4) expatriate agreements. We address those four topics here.

Who Is, and Is Not, an Expatriate?

It is always dangerous, and almost always needlessly expensive, to structure a non-expatriate's employment as if he were an expatriate. Before structuring any expatriate assignment, first verify whether the candidate really is a business expatriate.

Broadly speaking, an "expatriate" is anyone who lives in a foreign (non-native) country. Relevant for our purposes, a *business expatriate* is an employee originally hired by and working for a multinational in one country whom that employer now reassigns to work temporarily abroad in a new overseas place of employment. A business expatriate always expects to return home—to be "repatriated"—at the end of the assignment. (An overseas assignee with no expectation to repatriate is a "permanent transferee," not a business expatriate.)

Watch out for false expats—internationally mobile employees who are not genuine business expats and who should therefore not get structured as expats. For example, some short foreign postings and assignments get staffed by *business travelers* who, as mere travelers, are not genuine expats. A business traveler remains employed and payrolled by his home-country employer entity, and his place of employment remains his home country. The traveler goes abroad to render services, sometimes on a "posting" or "assignment" of several months that requires a visa or work permit. But his time working abroad is short enough that the host country never becomes his place of employment, not even temporarily.

- **Stealth/accidental expats:** When a business traveler stays overseas long enough, as a matter of host-country law his place of employment shifts at some point to the host country. He then becomes a so-called "stealth expat" or "accidental expat." Stealth/accidental expat status is an internal misclassification that triggers legal problems under host-country immigration, payroll and employment laws, as well as "permanent establishment" issues. Multinationals should of course be careful to classify stealth/accidental expats as actual business expatriates. On the other hand, multinationals should also be careful not to classify mere business travelers as business expatriates.

Another example of a false expatriate is the *foreign hire*. Multinationals often recruit candidates in one country for jobs in another country. For example, American multinationals recruit security guards and technicians in the United States to work jobs overseas on compounds in the Middle East or oil fields in Africa. And Silicon Valley tech companies recruit graduates from

universities in India to come stateside to work jobs in California. These are *foreign hires*, not business expats—these employees may be emigrants and they may need visas to work in their places of employment, but they are not business expatriates because all their work for the employer is performed at one place of employment in one country. Some foreign hires get to participate in rich company expat benefits plans, but—contrary to a widespread misunderstanding among human resources professionals—eligibility under a company's expat benefits program does not convert a foreign hire into a business expatriate. Structure foreign hires as locals, even if they participate in the company expat plan.

Not all mobile employees who participate in a company expat benefits program are genuine business expatriates and, conversely, not all genuine business expats participate in company expat benefits programs. This point is vital because it is so widely misunderstood. Many organizations' human resources teams colloquially define "expatriates" as employees who participate in the in-house expatriate benefits program, the expensive package of overseas assignee goodies like moving expenses, housing allowance, tax equalization, international tax preparation, spousal support, children's tuition, car/driver, social club membership, hardship pay, flights home, expat medical insurance, repatriation costs and the like. This usage is not only inaccurate, it is dangerous: To consider as business "expatriates" everyone an organization allows to participate in its expat benefits program can lull the employer itself into misclassifying non-expats (like business travelers and foreign hires) enrolled in a company expat benefits program as actual business expatriates. Even more dangerous, this usage can lull a multinational into overlooking and mischaracterizing actual expats who do not participate in the expat benefits program (like trailing spouses and overseas telecommuters), leading to stealth/accidental expats. Always clarify internally who is, and is not, a genuine business expatriate. Never structure non-expats (like business travelers and foreign hires) as expats, even if they get to participate in an expensive expat benefits program.

Understanding the Four Expatriate Structures

Only genuine business expatriates should get structured as expats, but how best to structure an expat assignment? There is no one single best way to structure an intracompany business expatriate posting because there are four viable types of expat structures. Different circumstances point multinationals to select various options among these four. And yet in one way or another, all business expatriates (including so-called "inpatriates" coming to headquarters and "third-country nationals" moving from one overseas locale to another) end up falling into one of these four categories: direct foreign posting, secondment, temporary transfer/localized, and dual/co-/joint-employment.

1. **Direct foreign posting:** In a direct foreign posting, a business expatriate remains employed and payrolled by the home-country employer entity but his place of employment shifts to a new foreign host country. Acting as a sort of “foreign correspondent,” the expat renders services directly for the home-country entity, not for a local host-country affiliate. (An expat who renders services for a host-country affiliate is a secondee, temporary transferee or dual-/co-/joint-employee expatriate.) Direct foreign postings are easy and attractive to set up, but compliant ones are rare, because host-country immigration and payroll laws make this a fragile status tough to structure legally.
 2. **Secondment:** “Secondment” means “employee loan.” Not all secondees (lent-out employees) are expatriates, and not all expatriates are secondees. In an *expatriate* secondment, the expat remains employed by his home-country employer entity. He moves abroad to a new host-country place of employment and starts rendering services for a new host-country employer entity, usually an affiliate or joint venture partner of his home-country employer. The secondee might be payrolled by either the home or host-country entities, or by both (via a “split payroll”). Some secondees stay on the home-country payroll while the host-country entity issues a “shadow payroll” to comply with local payroll laws.
 3. **Temporary transferee/localized:** An expatriate transferee, also called a “localized” expat, moves abroad and gets both hired and payrolled by a new (host-country) employer, often an affiliate or joint venture partner of the home-country employer. The transferee resigns from his home-country employer and simultaneously signs on with the host-country entity, which usually extends retroactive service/seniority credit. While working in the new host-country place of employment, the transferee renders services exclusively for the new employer without retaining any lingering employment relationship with the old home-country employer, other than perhaps a side-letter or email addressing post-assignment repatriation expectations. Yet an expat transferee’s localization is temporary; he expects some day to repatriate and get relocated at his original home-country employer location. (A transferee who does not expect to repatriate is a “permanent transferee,” not a business expatriate.)
 4. **Dual-/co-/joint-employee:** A dual-/co-/joint-employee expatriate is an expat who simultaneously serves two masters, the home and host-country entities, essentially on a moonlighting basis—one employee simultaneously working two jobs, or working one job actively while retaining status as “on leave” from another employer entity. A dual-/co-/joint-employee expat may be payrolled by either or both employer entities (via a “split payroll”).
- **Intended dual-/co-/joint-employment:** Some dual-/co-/joint-employment arrangements get structured expressly with the expat actively rendering services simultaneously for both home and host-country entities, or else officially “on leave” from the home-country employer. Sometimes the expat actually renders services simultaneously for both entities; other times the home and host-country employers decide to structure an expat as a dual-/co-/joint-employee to keep him enrolled in home-country benefits programs.
 - **Unintended dual-/co-/joint-employment:** Some dual-/co-/joint-employment arrangements get structured ostensibly as localizations, but with the home-country employment relationship unknowingly left dormant or “hibernating,” rather than extinguished. Later, a court comes in and rules the would-be localization was actually a dual-/co-/joint-employment relationship even though the home and host-country entities had considered the expat localized. So when structuring an expat as a localized transferee, be certain to extinguish the home-country employment relationship by having the expat submit an unambiguous letter of resignation.
 - **Global employment company [GEC]:** Some multinationals employ corps of “career expats” who hop from one overseas assignment to another, spending little or no time working at any home-country or headquarters place of employment. Sometimes these multinationals incorporate—often in a tax-advantageous jurisdiction like Switzerland or the Cayman Islands—a so-called “global employment company” that employs and administers benefits for career business expats. GECs offer certain logistical advantages particularly as to pension administration, but—contrary to a widespread misperception—GECs are not expat structures unto themselves. A career expat employed by a GEC is just a secondee or dual-/co-/joint-employee in disguise. The GEC structure cannot stop the mandatory application of host-country employment protection laws, nor does it significantly simplify the expat structure issues we discuss here. A GEC is a potentially useful tool, yes, but it is no “magic bullet” of an expatriate structure of its own.

Selecting Among the Four Expatriate Structures

With these four distinct expat structures, the question becomes: Which of the structures is most appropriate for a given expat assignment? Answering this is a lot like selecting among business entity structures. Which business entity vehicle is best—sole proprietorship, closely held company, publicly traded company, limited liability company or partnership? Obviously we cannot answer this without more context, because which business entity

structure is best changes from situation to situation. When forming a new business entity, no one would dare grab a “business entity form” from last time around, change the names, tweak the wording and move on, because the last business entity formed may have been a limited liability company whereas the most appropriate vehicle this time might be a partnership. We actively select the best business entity structure each time based on specific needs—not on how we may have structured some other entity at some time in the past.

So with expat assignments, always select the most appropriate of the four expat structures for this particular assignment, without regard for whatever may have been the best selection last time. Your last expat may have gone off to a country where you have an already-operating host-country entity affiliate, whereas this current expat may be off to a place where you have no on-the-ground infrastructure. Or your last expat may have participated in your company expat benefits program, whereas this current expat may be transferring abroad for personal reasons that render him ineligible for a company package. Or else your last expat may have gone abroad to serve an overseas affiliate, whereas this current expat may be off to work as a foreign correspondent directly for the home-country entity. In posting a given expat abroad and selecting among the four expat structures, factor in three sets of variables: immigration, payroll law compliance and permanent establishment. How these three variables play out as to any given expat posting will point to the structure most appropriate for this particular expat assignment.

- 1. Immigration:** All countries impose immigration laws. An expatriate or business traveler usually needs a visa or work permit to go work in a new host country, unless he happens to be a local citizen or permanent resident. (Occasionally a US business can tap, for an expat assignment, someone at headquarters who happens to be a host-country citizen.) Unfortunately, many host countries will issue visas and work permits only to employees of local entities that act as visa sponsors. Be ready to eliminate those expat structures (usually direct foreign posting and secondment) that keep non-citizen expats employed by a home-country entity that cannot sponsor a visa or work permit in the host country.
- 2. Payroll law compliance:** American law requires that American employers do payroll reporting/withholding/contributions for employee income tax (federal and state); federal social security (absent a “certificate of coverage” under a “social security tantalization agreement” treaty); state unemployment insurance; and state workers’ compensation insurance. Even Americans who employ just a domestic servant—butler, nanny, chauffeur, gardener, nurse—often must comply with payroll mandates. Foreign employers coming into the states must comply, too. If, say, an Australian or Brazilian company were to post a Sydney or São Paulo executive to Seattle or St. Paul while keeping him on an

“offshore” (Australian or Brazilian) payroll without doing a US “shadow payroll,” that would violate American payroll laws and might even be a crime.

We Americans tend to understand this. But when we structure outbound expat assignments, we too often overlook the reciprocal issue abroad. Remember, expats living and working abroad use host-country services like roads, sewers and garbage pick-up; host countries want even temporary residents to pay their way by paying into local tax and social funds. Outside the handful of countries that impose no payroll laws, payroll laws abroad are just as important as stateside, and violating them may be a crime. Absent a shadow payroll, foreign payroll laws tend to ban offshore wage payments. This means that to keep an American working abroad on a US payroll can be illegal, even a crime.

An American employer that lacks host-country registrations and taxpayer identification numbers has a tough time complying with host-country payroll mandates. A handful of jurisdictions like Ghana let unregistered foreign employers make local payroll fairly easily, and some countries carve out very limited exceptions to their payroll laws for certain foreign nonprofits operating in-country. Absent one of these exceptions, though, legally issuing payroll in a foreign country ranges from outrageously complex to impossible for a foreign (American) employer. For example, enrolling a US employer not otherwise licensed to do business in Mexico with Mexico’s tax, social security and housing funds and agencies can take about six months and can cost tens of thousands of dollars in legal fees. The Mexican agencies will pose questions, schedule in-person meetings and probe US corporate status. Even engaging a payroll provider like ADP or Ceridian rarely helps much, because payroll providers are mere agents that issue payroll under their customers’ own taxpayer identification numbers.

Four issues factor into host-country payroll law compliance and, as such, relate to selecting an expat structure: shadow payroll, split payroll, social security totaliation agreements and home-country payroll mandates.

- **Shadow payroll.** Where a desired expat structure would keep the expat paid on a home-country payroll, but where issuing a home-country payroll risks violating host-country payroll laws, one strategy is to arrange for some host-country-registered entity (often an affiliate) to issue a “shadow payroll” that shows compensation as if paid in-country, and that otherwise complies with host-country payroll reporting/withholding/contribution requirements. After making all host-country-mandated reporting/withholding/contributions, the shadow payroll entity does a behind-the-scenes reconciliation/charge-back with the offshore payroll entity. In the eyes of the host-country government agencies that administer tax and social security laws, the expat is legally paid by the local entity.

- **Split payroll.** Sometimes the host-country entity pays an expat one chunk of total compensation while the home-country entity pays another chunk—so-called “split payroll.” Split payroll can violate host-country payroll laws, unless one of two exceptions applies: (1) the expat is a mobile employee who moves between locations and earns his home-country paycheck while physically working in the home country; or (2) the host country employer does a shadow payroll for the offshore (home-country) payroll payment. Unless one of these exceptions applies, or unless the host country imposes no payroll laws, beware of split payroll, which can be a red flag of a payroll law violation.
 - **Social security totalization agreements.** A “social security totalization agreement” is a bilateral treaty that lets an expatriate continue on his home-country social security system, usually for up to five years, if the employer registers (gets a “certificate of coverage”) and continues to make home-country social security contributions. As of 2013, the US Social Security website www.ssa.gov said the US is party to 24 of these agreements. But contrary to a common misunderstanding, social security totalization agreements only implicate social security—they do not reach income tax reporting/withholding.
 - **Home-country payroll mandates.** While complying with host-country payroll laws is obviously vital as to expats working in a host country, any expat paid on a home-country payroll may simultaneously be subject to the completely different payroll laws of the home jurisdiction. See our [Global HR Hot Topic of April 2012](#).
- 3. Permanent establishment:** A third expat structural issue is avoiding unwanted permanent establishment for the home-country employer entity. A “permanent establishment” is a corporate tax presence that law imposes on an entity held to be “doing business” locally. The expat structure challenge is where host-country law considers a home-country employer entity employing an expat in-country to be “doing business” in the host country because it employs the expat. The expat’s in-country activities on behalf of his host-country employer trigger a so-called “permanent establishment.”

Imagine for example a German organization employs a full-time expat in Chicago, but otherwise does no business stateside. The German expat telecommutes, working solely on German matters, in German, from his apartment on Lake Shore Drive. Might the US IRS and Illinois agencies take the position that this German company does business in Illinois because it employs this Chicago resident “telecommuting” full-time for German headquarters? If so, there is a permanent establishment: The German organization should register with the Illinois secretary of state and file US and Illinois corporate tax returns. (Payroll law compliance, discussed above, is a completely separate issue.) If the German company fails to register and file, it is liable for its violation, perhaps it commits a crime and it might face unknown tax liabilities. The reciprocal issue arises in the outbound

scenario, when a Chicago or other American organization employs an expat who works in Germany or somewhere else abroad. For this reason, the best expat structure may be to have the expat work for the host-country entity.

Expatriate Agreements

Having selected the most appropriate of the four types of expatriate structures for a given expat assignment, a multinational next needs to decide how best to memorialize (document) its expat assignment. There are two very different kinds of “expat agreements”: an *expat assignment agreement* between the expat and the employer (be it the home-country entity, host-country entity or both) and an *inter-affiliate assignment agreement* between a home-country employer entity and a host-country affiliate entity, to which the expat is not a party. Document an expat assignment using one or both agreements, as appropriate.

Expat assignment agreements are important in most all expat postings, whereas inter-affiliate assignment agreements tend to be necessary only in secondments and intended dual-/co-/joint-employment expat arrangements. In crafting these inter-affiliate assignment agreements, factor in balance of power issues. For example, in a secondment the nominal (home-country) employer entity, rather than the beneficial (host-country) employer entity, should wield ultimate power to make employment decisions such as setting pay/benefits, imposing discipline/termination and setting the length of the secondment.

In documenting an expat assignment, consider “hibernating” agreements and choice-of-law clauses:

- **“Hibernating” agreements.** Where an expat is localized or is a dual-/co-/joint-employee, his primary expat assignment agreement is often with the host-country employer entity. If that expat never formally resigned from the home-country employer, the home-country employment arrangement becomes dormant or “hibernating,” not extinguished. Hibernating home-country agreements “spring back to life” upon expat termination or repatriation, often complicating separations. It is always best to terminate any home-country employment agreement not meant to “hibernate,” by having the expat unambiguously resign.
- **Choice-of-law clauses:** As soon as an expat’s place of employment becomes a new country, local host-country employee protection laws (laws regulating work hours/overtime, vacation/holidays, wages/benefits, payroll, health/safety, unions, discrimination/harassment, severance) generally reach and protect the expat by force of public policy. A home-country choice-of-law clause in an expat assignment arrangement can compromise the employer’s position by implicating home-country employee protection laws without stopping the mandatory application of host-country employment laws. See our [Global HR Hot Topic of September 2012](#). Beware of home-country choice-of-law clauses in expatriate agreements.

Four Expatriate Structures *(plus one)*

Expatriate type	Description	Pros	Cons	Comments	Home entity permanent establishment risk
Business traveler <i>(not a true expatriate because place of employment remains home country)</i>	<ul style="list-style-type: none"> Home-country employer entity employs and payrolls Place of employment remains home country 	Extremely easy to administer; one of the only options where there is no host-country employer entity	Can be short-term only; high risk of stealth/accidental expat	Beware the “stealth expat”: Monitor this status closely; remember the need for a visa	Low
1. Direct foreign posting (“foreign correspondent”)	<ul style="list-style-type: none"> Home-country employer entity employs and payrolls Place of employment shifts to host country Expat usually renders services for home-country entity (not some local host-country entity) 	Extremely easy to administer; one of the only options available where there is no host-country employer entity	Violates payroll laws in most countries (unless a host-country entity issues shadow payroll); no visa sponsor	Unless the host country imposes no payroll laws (or allows nonregistered employers to issue local payroll) this structure is likely illegal	High
2. Secondment	<ul style="list-style-type: none"> Home-country employer entity employs Either home or host-country entity payrolls, or home-country entity payrolls and host-country entity does a “shadow payroll” Place of employment shifts to host country Expat renders services for host-country entity 	Fairly easy to administer and logical (if payroll is set up legally); host entity might be able to sponsor visa	Payroll law challenge (unless host entity issues shadow payroll)	Use this structure only where appropriate: Not all expats are secondees and not all secondees are expats	Low, as long as expat does not render services for home-country entity (although high in China and some other countries)
3. Dual-/co-/joint-employment	<ul style="list-style-type: none"> Home and host-country employer entities simultaneously employ (on a “moonlighting” or “leave of absence” basis) Either or both employer entities may payroll Place of employment shifts to host country Expat renders services for either or both employer entities 	Expats favor this structure; host-country entity can sponsor visa	Host-country payroll law challenges; exposes employer entities to employment protection laws of two jurisdictions	An active dual-/co-/joint-employee is payrolled by both entities; a “hibernating” or “leave of absence” expat is payrolled by host-country entity only	Moderate, if the expat renders services for or takes orders from the home-country entity
4. Temporary transfer/localization	<ul style="list-style-type: none"> Host-country employer entity employs and payrolls Place of employment shifts to host country Expat resigns from home-country employer entity A side-letter addresses future return to home-country employer entity (<i>absent an intent to repatriate, a localized transferee is not an expatriate but, rather, a permanent transferee</i>) 	Extremely compliant and low risk; cheaper (if expat is ineligible for company expat program benefits); ideal for employees going abroad for personal reasons	While employers favor localizing expats, expats themselves disfavor and resist localization	Draft “side agreement” letters (home-country entity) carefully.	None