How To Conduct a Global Human Resources or Labor Compliance Audit—Including Cross-Border Employment Due Diligence

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Globalization pushes multinationals to align ever more aspects of their internal human resources across borders. Today's multinationals globalize HR programs, workplace policies, employee benefits and staff offerings that back in another era would have been purely local. Think of, for example, global HR policies and handbooks, global codes of conduct, global intranets and HR information systems, global expatriate programs, international benefits offerings, cross-border compensation plans, regional sales incentive plans, global equity plans and supply chain codes of conduct.

Globalizing HR causes ripple effects, and perhaps the biggest ripple is compliance. Headquarters has to stay responsible for, or retain "ownership" over, whatever it has elevated from the local to the regional or global level. As soon as a multinational raises HR policies, codes, initiatives, plans or offerings to a regional or global level, compliance efforts should follow.

Effective cross-border HR compliance checks or assessments—"audit" can be a disfavored term—look into various aspects of employment compliance. A multinational has obvious incentives to verify that its international HR operations adhere to foreign laws and applicable employment agreements as well as to the growing list of "extraterritorial" laws that reach workplaces internationally. In addition, multinationals have compelling business reasons to verify their overseas operations follow in-house handbooks, codes of conduct, international HR policies and corporate values. (*See* "The Return of Global Employment Audit," Law 360, 12/21/09)

This push to review, asses or check human resources compliance across borders comes from various constituencies within a multinational organization, such as: the compliance function (obviously); upper management; the board of directors; the general counsel's office; or human resources. The push can also come from specific business units like industrial safety (assessing global safety compliance and pandemic response); global mobility (assessing visa compliance and duty of care); audit/accounting (assessing global Sarbanes-Oxley and Foreign Corrupt Practices Act compliance) or mergers and acquisition teams (due diligence assessing the human resources compliance of to-be-spun-off or to-be-acquired business units). And the procurement function increasingly needs to assess labor compliance at suppliers and contractors.

International employment compliance audits transcend human resources and implicate operations well beyond HR. For example, no one would call the U.S. Foreign Corrupt Practices Act, U.S. insider trading prohibitions or U.S. trade sanctions (trading-with-the-enemy) regulations "employment laws," but the only way a multinational can ensure it complies with these across borders is to propagate international HR policies requiring compliance, train staff on those HR policies and enforce the polices against workers who do not comply. Checking whether these steps got done right requires an audit of HR functions. All of a sudden headquarters functions with no HR responsibilities (in this case, internal functions responsible for bribery, insider trading and trade compliance) find themselves looking into human resources practices internationally.

Now understanding why multinationals need to audit HR compliance internationally, our question becomes: How? How does a multinational efficiently assess its own ongoing compliance practices across its international HR operations? How does the multinational isolate which rules apply internationally and verify that local foreign human resources operations actually comply? To answer these questions we need to analyze the six stages to a global HR compliance audit: (1) form the audit team and structure the project (2) articulate audit context and scope (3) create a master audit checklist template (4) align local-country checklists off the master (5) conduct the audit and (6) report, and implement remedial measures. After we discuss these six stages, separately we consider the closely-related issue of cross-border HR due diligence in an international M&A or outsourcing deal.

The Six Stages to a Global Human Resources Compliance Audit

In assessing internal cross-border human resources or labor compliance, break the audit project down into six stages:

Stage 1: Form the audit team and structure the project. The first step in any global HR compliance assessment is assembling the audit project team. Consider whom to involve: Consider headquarters, foreign and local human resources staff and the in-house legal and compliance functions. Consider including subject matter experts like industrial safety staff in a health and safety or crisis policy audit, the mergers and acquisition

team in a deal-related due diligence exercise or the procurement team in a supply chain labor audit. Involve any corporate audit function. Consider tapping outside counsel who might bring in the attorney/client privilege (recognizing that the privilege can be hard to preserve across borders). Consider involving an outside international HR consultant or specialist labor audit firm, especially for an international supply chain labor audit. Factor in practical issues like audit team members' language fluency, availability and reporting relationships. This said, not all global HR audits enjoy the luxury of a big team—sometimes just a single person needs to assess employment compliance across two or more countries.

International HR audit team in place, consider global project management—how to structure this particular cross-border HR assessment cost-effectively and efficiently. Consider practical issues like timing, budget and the audit team's power to gather data at overseas offices and later to implement recommended fixes. The temptation can be to take a quick-and-dirty approach, grabbing some global HR audit checklist off the shelf, diving in and just doing the audit. But this never works well because there are other steps involved (and because no one ever finds that chimerical one-size-fits-all global HR audit checklist to serve as a sufficiently detailed roadmap for this particular audit project). Each global HR audit spins off in its own uncharted direction with its own specific goals, its own pool of affected countries and its own industry-specific issues: A wage/hour audit in retail is substantially different from a health and safety audit in manufacturing, which is quite different from a bribery audit in government contracting or a contractor-classification audit in the technology sector. All these are very different from a supply chain labor audit. Embrace the fact that your particular cross-border HR compliance audit requires an organic, holistic approach and a number of discrete stages. Shortcuts in managing the project compromise audit results.

Stage 2: Articulate audit context and scope. A team embarking on an international human resources compliance assessment or check should begin by articulating the context and delineating the scope of its particular audit project. This lets you weed out all irrelevant (even if auditable) issues not in play this time.

First articulate *context.* Because HR compliance audits arise in different contexts, they end up going down very different paths. Various audit contexts include, for example: implementing a new corporate structure, preparing for a corporate restructuring, launching a merger or acquisition (spin-off or post-merger integration), responding to a lawsuit/government investigation or simply toughening internal compliance through a robust HR check-up. Some global HR audits focus internally on specific employment law challenges like payroll compliance, health/safety, wage/hour, worker data privacy, contractor classification or—increasingly—corporate social responsibility and ethics including bribery, corrupt practices, insider trading and financial controls. Meanwhile, other global HR audits focus externally on outside supplier compliance, scrutinizing whether labor practices at overseas suppliers conform to the supply chain code of conduct. As mentioned, some HR audits actually focus on employee compliance with issues separate from employment law like employees' compliance with data privacy, bribery, financial controls, trade and securities laws, or like an internal check into staff compliance with a global crisis plan. And as mentioned, international HR audits vary significantly by industry context (an HR compliance audit at an auto manufacturer is a lot different from one at a technology multinational). Consider industry-specific issues like human trafficking in construction and maritime, know-your-customer in financial and professional services and immigration in retail and manufacturing.

After articulating the context of your particular international HR audit, delineate project *scope*—how broad and how deep this HR assessment needs to be. Which countries are involved? Should this global audit focus on compliance with laws, with collective agreements, with corporate policies, with best HR practices, or with all of these? As to legal compliance, should this audit look at local laws, at headquarters-country laws that reach extraterritorially, or at both? What about checking compliance with individual and collective employment agreements? Should this audit confine itself to local host-country employees or should it also include expatriates, contingent staff, consultants, independent contractors and suppliers' employees?

Stage 3: Create a master audit checklist template. Compliance means following rules. Compliance audits focus on vital rules, which is why health and safety audits are a lot more common than dress code audits. Because the vital employment rules differ significantly across jurisdictions, leading a multijurisdictional HR compliance assessment requires isolating which important legal rules HR operations must follow. This means facilitating "apples-to-apples" comparisons across jurisdictions by crafting aligned but localized audit checklists.

Begin by drafting a single master global audit template compliance checklist. Create it organically, tailored for your particular audit project—again, because each global HR compliance audit is unique, an off-the-shelf template from some other project is at best only a starting point, and even a checklist for a similar past audit will need updating. Include in your global audit master template all topics consistent with the audit context and scope, but weed out all other topics. Depending on your audit's context and scope, topics that might merit including in the global template or checklist may include:

- **Corporate, tax and financial laws reaching employment** including employer corporate entity status, employer registrations/corporate form, dual-employer exposure, "permanent establishment" exposure from "floating employees," employee powers of attorney, directors' and officers' liability

insurance, and corporate controls on local executive power

- **Payroll laws** including tax and social security reporting and other payroll law compliance, vacation payments to sales staff and others with variable compensation, employee insurance payments, payroll deductions, withholding and contributions, contractual payroll payments like company cars, statutory payroll benefits like meal allowances, union dues check-off and other payroll payments to unions/employee representatives (which are legal outside the U.S.).

- **Local employment laws** including local laws that regulate candidate recruiting, interviewing and "onboarding," wage/hour or "working time" (including overtime and flat caps on hours), holidays/vacation, discrimination/harassment/diversity (including laws requiring hiring and accommodating the disabled), language laws requiring employee communications in the local language, internal HR complaint procedures, internal investigation procedures and termination/release/payout at separation

- **Collective labor laws and agreements** including recognition of, and negotiations and consultations with, trade unions, "works councils" and other employee representatives, union "corporate campaigns" and handling of labor disputes, plus compliance with collective labor agreements including "framework"/union neutrality agreements, collective agreements to which the employer is a party, "sectoral" collective agreements applicable by force of law (employer is not a party), "works agreements" with local works councils and any European Works Council, constitutional documents of employer-sponsored staff representative bodies, "social plans" (past reduction-in-force agreements) and agreements with workplace ombudsmen, staff committees, worker committees and worker forums, health and safety committees and other non-union employee representatives—plus multiemployer bargaining group pacts

- **Headquarters-country laws that reach staff overseas**—that is, as to a U.S. headquartered multinational, "extraterritorial" U.S. laws on audit/accounting fraud, "alien torts," bribery/foreign corruption, Sarbanes-Oxley §301 whistleblower "procedures," securities trading laws, terrorism watch list, trade sanctions and compliance with U.S. discrimination laws as to U.S. citizen staff working overseas

- **Employment claims and litigation** including threatened, pending and past court and administrative "labor claims" brought by employees, employee representatives and government agencies on behalf of employees (breaking out any group or class claims and flagging any particularly high past awards and any court orders with ongoing effect), plus government "labor audits."

- **Benefits and compensation offerings i**ncluding employee benefits, compensation/bonus/sales incentive plans, tuition and expense reimbursement plans, equity plans, company car, housing and meal plans, pension plans/schemes, medical and other employee insurance, statutorily mandated benefits including thirteenth-month pay and mandatory profit sharing, mandatory (inflation-adjusted) raises and severance pay plans— check plan funding and local effects of global plans

- **Human resources policies** including local and global HR policies, local internal workplace "regulations" and posted internal work rules, local and global employee handbooks, global health and safety protocols, crisis/pandemic plans, employee security protocols, global codes of employee conduct or ethics, performance management and succession planning systems, global employee intranet sites, whistleblower hotlines, employer-ratified industry conduct codes and insider trading, conflicts of interests policies, bribery/corruption and trade sanctions ("trading with the enemy") policies—be sure to verify that global policies got properly launched and implemented locally and check the status of any employee policy acknowledgements

- **Individual employment contracts** including local contract/offer letter templates and individual signed employment contracts with current employees, "onboarding" documents, fixed-term, part-time and probation provisions, "zero-hour contracts," restrictive covenants, intellectual property assignments, contract amendments, employee acknowledgements/consents/waivers, releases and "compromise agreements," computer-click intranet assents, "electronic signatures" and paperless execution of HR forms and enrollments—and check compliance with laws requiring written individual employment contracts or "statement of particulars"

- **Data privacy laws reaching employee data** like personnel files, emails and global Human Resources Information Systems, including: employee data notifications and consents, compliance with statutory data retention and data purging requirements, internal HR data processing policies, registrations with government data protection authorities, processing of "sensitive" employee data, employer practices accessing staff emails and computer use, employee data security, employee data breach notification, BYOD procedures, whistleblower hotline compliance with data laws, cross-border HR data transmissions and exports—and check whether data protection and data export clauses in agreements with HRIS providers meet with applicable data law standards

- **Contingent and irregular staffing arrangements** including as to contractor/consultant classification, compliance with local laws regulating outsourcing, secondees/leased/agency employees, secondment agreements with providers of seconded or "leased" employees, co-/dual-/joint-employer exposure as to contractors' staff and non-employee directors—and check compliance of payrolled employees seconded to third parties.

- **Expatriate compliance** including structure of expatriate agreements, "permanent establishment" exposure triggered by expatriates, internal expatriate program and repatriation documents, expatriate payroll compliance and visas/work permits for all non-citizen staff (even those not categorized as company "expatriates")—additionally, check for any so-called "stealth expatriates," look into any "global employment company" that may employ expatriates and check home country "emigration" laws that follow an expatriate on assignment (such as doctrines in Venezuela, Ghana, Brazil and the Philippines), and assess compliance with laws that cap the percentage of immigrants in a workplace (as in Brazil and the Middle East)

- **Duty of care,** that is, business travel safety and personal injury protection of business travelers, expatriates and regular employees in jurisdictions that allow staff personal injury claims (regular employees pose little threat of personal injury claims against the employer in jurisdictions like the United States that offer a robust "workers compensation bar" defense, but employer personal injury exposure is a real risk in jurisdictions like England that do not offer this defense)

- **Supply chain labor and monitoring labor conditions at overseas suppliers:** All the above topics address internal employment compliance auditing an organization's own staff employed on its own (worldwide) payroll, or contractors who might claim to be de facto employees. Completely separate is the additional challenge of a cross-border external employment compliance audit—monitoring labor conditions at an organization's worldwide suppliers, contractor companies and business partners even where there is no viable threat of co-/dual-/joint-employer liability. Do not confuse or conflate these two very different labor audit "constituencies."

  Three types of organizations should monitor external (supplier) labor conditions internationally: (1) those that have issued "supplier codes of conduct" or adopted industry supplier codes, (2) those subject to the California Transparency in Supply Chains Act (Cal. Civ. Code, § 1714.43), the UK Modern Slavery Act 2015 and similar laws that require attesting to suppliers' labor conditions, and (3) those party to high-risk overseas contracts like construction projects in the Middle East, or sourcing arrangements with plantations or mines in Africa or in the global shipping or fishing sector.

  - *Not always an issue:* This said, keep supply chain human rights issues in perspective and discount advice from certain consultants and activists that the United Nations Guiding Principles on Business and Human Rights, International Labor Organization declarations and other aspirational labor rights protocols somehow impose binding legal obligations on supply chains. For the most part, they do not. Most of the world's companies have not tied themselves to any supplier code of conduct or taken other proactive steps regarding supply chain or contractor labor conditions, and do not necessarily need to audit labor compliance in their supply chains.

  Every organization that has issued an international supplier labor conduct code needs a proactive plan for monitoring compliance. The alternative—issuing a supplier labor code but then ignoring whether anyone bothers to follow it—all but invites non-compliance. By definition, an organization that issues a supplier labor conduct code is just a customer that does not employ the workers its code protects. As a mere customer, a code-issuer has no regular (extra-contractual) right of access either to audit supplier employment records or to inspect supplier workplaces. This "privity of employment contract" challenge complicates supplier code compliance far beyond the internal HR audits we discussed. Think through how to audit any international supplier labor code or overseas contract arrangement early on, at the conduct-code-drafting and contracting stage. Do not expect access to supplier or contractor HR records or workplaces unless suppliers and contractors had previously granted audit rights in the purchase order or contract. Monitoring supplier codes in poor countries becomes more of a challenge, and gets tougher down each successive link in a supply chain. Indeed, specialist outsourcers and software providers have emerged in the niche business of monitoring international supplier labor codes:

Stage 4: Align local-country audit checklists off the master. Master audit checklist template in hand, we arrive at the trickiest stage: Localizing the master by spinning it off into a set of tailored but aligned local audit checklists, one for each jurisdiction subject to the audit project, anchored in local legal and contractual standards. For example, if the global master template includes "overtime pay," then each local country checklist should set out that jurisdiction's overtime hours threshold, its overtime pay rate (time-and-a-half is not universal) and address any enhanced overtime hours thresholds or enhanced overtime pay rates that in applicable collective bargaining agreements may require. If, for example, the global master template includes "public holidays," then

each local country audit checklist should list that country's statutory public holidays plus any extra holidays the employer may give are required under collective labor pacts. As another example, if the global master template includes "statutory benefits," the local Venezuela checklist (for example) should address Venezuela's cestaticket mandatory meal coupon program as well as (for example) Latin American checklists should address mandatory thirteenth month pay (agüinaldo, in Mexico) and mandatory profit sharing. If the global master template includes vacation laws, the local Brazil checklist (for example) would address that Brazilian employees must get 30+ vacation days per year and draw down vacation either in a 30-day uninterrupted chunk or a 20-day uninterrupted chunk plus a 10-day vacation time sell-back; meanwhile, the local France checklist (for example) would addresses both France's minimum vacation benefit and France's ban on vacation year-to-year roll-over.

Failing to make the local checklists this granular would leave the auditors ignorant of the standards they need to check compliance against. Needless to say, this stage requires both local legal research and a familiarity with local employment and labor agreements.

Beyond localizing topics from the master checklist for each affected jurisdiction, add into each local audit checklist all quirky local rules that, because they are inherently local, have no counterpart on the master audit checklist template. This requires involving a local lawyer or HR expert competent to issue-spot and fill gaps under local employment law. As a few random examples, a local HR audit checklist:

- for England should address employee-signed overtime opt-outs (overtime opt-outs will not be on the master audit checklist template because few other countries allow them)
- for Brazil should address funding local employee unemployment fund bank accounts ("FGTS")
- for Canada should address contractually quantifying pre-dismissal common law notice and also executing English-language communication consents in Quebec
- for Italy, Germany or Poland should address whether the internal email system and intranet platform trigger local telecommunication laws
- for South Africa should address mandatory affirmative action plans
- for Saudi Arabia should address mandatory workplace gender segregation
- for Indonesia or Korea should address the awkward issue of mandatory monthly menstruation leave

Stage 5: Conduct the audit. At last we get to the actual audit—time to go out and conduct the global HR assessment. Take the local checklists into the field and do the global HR compliance check, gathering compliance information in each jurisdiction corresponding to each item on each local checklist. Do this by addressing five topics.

First, decide how on-site audit process logistics will work. Will auditor inspections be announced or surprise? Will local management and HR cooperate? Will headquarters auditors travel onsite, or can they conduct the field piece remotely or delegate local data gathering to local HR staff? What technological solutions are available to help? Will auditors interview individual employees? How to handle local HR staff who say they will help but then fail to respond adequately? How to handle local rank-and-file staff who refuse to cooperate? Relying too heavily on local staff can compromise the integrity of the audit if local staff is unskilled in doing audits or if the audit scope includes sensitive topics that the local office might conceal from headquarters.

Second, decide how deep to plow. How granular will the audit be? Will auditors look only at policies/protocols/agreements or will they study specific employment agreements, employee-signed acknowledgements, minutes of union/works council meetings, paycheck stubs, timesheets, safety logs and the like? Will translations of local HR documents be necessary? Will auditors get access to local outside providers like payroll outsourcers and benefits administrators?

Third, address how the international audit process itself will comply with local employment and data protection laws. Should local management-side labor liaisons notify works councils or other employee representatives about the audit? Omnibus data privacy laws restrict an audit team's ability to "export" personally identifiable audit response data to U.S. headquarters. Europeans, for example, are quick to argue that their data privacy laws block many aspects of foreign headquarters' internal investigations—and in this regard, an internal audit is a form of internal investigation. So craft a strategy for exporting HR audit data legally.

Fourth, decide how to apply appropriate metrics in the audit. As an obvious example, any assessment of minimum wage compliance must account for locally applicable statutory and collectively bargained minimum wage rates. And any assessment of overtime pay or vacation compliance needs to factor in statutory and collectively bargained local overtime rates and vacation allowances. If the audit looks into workplace health and safety, decide whether to apply global health and safety standards or local workplace health and safety regulations. If the audit looks into diversity, it would be foolish to apply U.S. EEO-1–style diversity metrics to employee populations in, say, South Africa, Argentina, Japan or Finland.

Fifth, draw the line between this audit and a stand-alone investigation. Where the audit uncovers a specific act of wrongdoing that merits its own discrete investigation, stop and spin that internal investigation off as a separate project. Conducting a cross-border internal investigation into a suspicion or allegation of a discrete wrongful act is completely different from doing a cross-border HR audit.

Stage 6: Report, and implement remedial measures. The field part of the international HR audit complete, summarize the findings. The summary report should avoid identifying specific employees (to minimize data protection and defamation exposure) and account for any attorney/client privilege and evidentiary admissions issues. Think about how the report might later get used against the organization as evidence of willful noncompliance, and craft a strategy to minimize that risk. One strategy might be to avoid committing sensitive audit findings to writing. Another strategy is to involve a lawyer who confers attorney/client privilege. At least limit distribution of the audit report.

The audit team needs to propose specific remedial measures—recommended fixes—for any diagnosed compliance shortcomings. It is pointless to undergo a compliance audit to identify non-compliant shortcomings but then to take no action as to the findings. That said, be careful about how to memorialize remedial measures recommendations. Again, avoid generating documents that might later get used against the employer.

After recommending remedial measures, monitor that the team's proposed fixes actually get implemented locally. Too many audits get done right but then the audit report languishes in a drawer without ever improving compliance. An audit like that is pointless (perhaps even dangerous), because the report proves the organization knew about a non-compliant situation it did nothing to fix.

And consider how to leverage lessons learned from this audit to use commercially available technologies to enhance ongoing compliance assessment going forward. According to one forensic consultant, "companies under-utilize data analytics to support their anti-bribery and corruption compliance and monitoring activities. Only 27% of respondents at U.S. listed companies use data analytics to identify potential [anti-bribery and corruption] violations." (Inside Counsel, Nov. 2015, pg. 37)

Cross-Border Employment Due Diligence in an International M&A Deal

We saw that international audit projects spin off in their own different directions. One specific context of a global HR compliance audit or assessment is the employment due diligence piece to a cross-border spin-off, merger, acquisition or outsourcing transaction. Cross-border employment due diligence is just a specific context or application of the international employment assessments we have discussed.

Any multinational seller preparing to divest its entire operation or spin off or outsource a line of business employing staff in more than one country—that is, any seller doing a cross-border spin-off or outsourcing deal—anticipates that prospective buyers will launch a due diligence process to audit the seller's compliance with laws, policies, agreements and business practices. The buyer needs to assess what it is and is not buying and whether the purchase is worth the price. "Due diligence" is the process by which the buyer verifies that, at closing, it will acquire compliant operations (or at least it will acquire non-compliant operations sold at a discount commensurate with the costs of getting up to compliance). An M&A seller, therefore, begins the divestiture, spin-off, sale or outsourcing process by conducting a sort of internal audit assembling the materials prospective buyers will demand to see related to seller legal and business practices compliance. M&A due diligence looks into a wide range of business and legal compliance including tax status, corporate registrations, antitrust analysis, accounting practices, intellectual property rights, real estate titles, environmental compliance plus threatened, pending and past business lawsuits involving the seller.

One key part of any thorough due diligence process, but only a part, is the staffing piece—workplace due diligence into the seller's labor practices, employment law compliance and employee benefits offerings. That is the part we address here. Employment due diligence is particularly vital outside the United States because other jurisdictions tend not to recognize employment-at-will, and outside employment-at-will an M&A buyer tends to get locked into perpetuating the seller's employment conditions going forward after closing, whether by vested rights in a stock purchase, by acquired rights in an asset purchase or by some contractual arrangement amounting to a so-called "employer substitution." Further, law in all countries shifts pre-closing employment liabilities to a stock shares buyer after closing and law in many countries outside the U.S. shifts pre-closing employment liabilities to an asset buyer after closing. So prospective buyers and outsourcers need to understand and get comfortable with the to-be-acquired worldwide workforces they will inherit upon consummating the deal.

The due diligence process exists to root out noncompliant problems, so the due diligence process itself cannot afford to cause its own compliance breach. Many jurisdictions including most of Europe plus Argentina, Canada, Hong Kong, Israel, Japan, Korea, Mexico, Philippines, Singapore, South Africa, Uruguay and a growing number of others impose broad data privacy ("data protection") laws that can have unexpected consequences in the cross-border due diligence context. Electronic due diligence data rooms raise exposure under these laws if the data room offers bidders personal information about identifiable seller employees, especially where the seller hosts the data room on the cloud or otherwise makes HR data accessible across borders (even if password-protected). Bidders cannot shrug this off as the seller's compliance problem, because a seller's liability for breach of data protection laws can transfer to a buyer at closing, particularly in a stock deal. Compliance steps may require "anonymizing" data room employee information, entering into "onward transfer agreements" with bidders, entering into cross-border "model contractual clauses" agreements, collecting signed employee consents or other steps. Jurisdictions including Argentina, Hong Kong, Japan, Korea, the United Kingdom and some other omnibus data

protection law jurisdictions have issued data law guidance specific to the M&A due diligence context. Follow it.

Because employment due diligence in a cross-border M&A or outsourcing deal is essentially the same exercise as the cross-border HR compliance audits we discussed, a global employment due diligence exercise involves the same six stages as a global HR compliance audit: (1) form the employment due diligence team (part of the M&A deal team) (2) delineate the scope and depth of the employment due diligence (3) create a master employment due diligence template checklist (4) align local employment due diligence checklists for all countries at issue off of the master (5) conduct the employment due diligence and (6) report back to the deal team and use the employment due diligence results to negotiate a better deal. In addition, after closing the deal the buyer or outsourcer should leverage employment due diligence results as a resource for post-merger integration.

Of these six stages, the second and third stages—scope of employment due diligence and crafting the master employment due diligence checklist—require some further discussion anchored to the due diligence context. As to the second stage (scope), prospective business buyers in an M&A deal and prospective outsourcers will not care about immaterial aspects of the seller's staffing operations. International HR due diligence in any merger or acquisition should therefore always be subject to some defined materiality threshold. Find out what that materiality threshold is and then focus HR due diligence only on compliance problems that could exceed it.

The third stage (crafting a due diligence checklist for a specific cross-border M&A deal) helps a prospective business buyer or outsourcing provider identify what data to scrutinize and also helps a prospective business seller or outsourcing principal anticipate the categories of data prospective buyers or outsourcers will ask to see. Here is an international human resources due diligence checklist template paralleling the global HR audit checklist template above, tailored to the cross-border M&A context. From this global HR due diligence template, tailor a master human resources due diligence checklist focused on your specific cross-border M&A or outsourcing deal. (Then—stage four—align local-country due diligence checklists off of the master; next—stage five—conduct the HR due diligence; finally—stage six—report back to the deal team.)

- **Census and organization chart of employees and contingent staff.** Get a census of seller employees and directors worldwide who will transfer as part of this deal, including part-time staff and anyone out on leave. Include employees who work for the target entity and target-entity employees "seconded" out to service other organizations. Ideally this census should include dates of hire, compensation rates and job category. Identify any "shared services" employees who serve both the target unit and non-acquired units and identify the seller's contingent staff: independent contractors, consultants, agents, "leased employees" and other secondees, sales representatives, "business partner" staff dedicated to this business and anyone working from home or remotely, even overseas. Separately, get an organization chart and verify that only the employees who actually serve the target unit—regardless of title or designation—will transfer as part of the deal. (The buyer needs to avoid taking on extraneous staff.) Conversely, verify that all key workers who should transfer will indeed come over as part of the deal. (The buyer needs essential staff.)

- **Corporate employer issues.** In each affected country, identify the seller's local affiliated corporate entities that employ staff. Learn the relationships among the seller's operating entities and any "services companies" that may employ people. Be sure staff work for the correct affiliates.

- **Payroll and government filings.** Check the seller's payroll processing compliance as to deductions, withholdings, reporting, compliance with dues check-off, mandatory payments to worker representatives and remittances to agencies including government payroll tax, social, unemployment and housing funds, and government-mandated insurance analogous to U.S. workers and unemployment compensation insurance. How does the seller issue payroll? What about vacation payments to variable compensation and sales staff? Does the seller pay statutory benefits? What payments are being made directly to staff on leave, including "garden leave"? Are any employees out on leave getting state benefits charged to the employer?

- **Employee claims, liabilities and exposure.** Is the seller subject to any pending, threatened or potential unasserted employment-related grievances, claims, lawsuits, appeals, disciplinary proceedings, government agency proceedings, investigations, inspections, government workplace audits, administrative charges, unfair labor practice charges, criminal proceedings or unpaid employee judgments? What is the employment claims history over the last few years, including settlements and judgments? What is the exposure for the seller's past noncompliance with labor/employment, payroll, safety, and HR data privacy laws? What are the seller's cash reserves set aside for these claims?

- **Wage/hour compliance.** Verify compliance with wage/hour ("working time") laws, cap-on-hours laws, vacation and holiday mandates, overtime payments, travel expense reimbursements, exempt-status designations, mandatory meal breaks, toilet breaks and rest periods. Check that vacation, leave and severance payouts get calculated correctly.

- **Health and safety; duty of care.** Check compliance with health and safety laws including recordkeeping mandates. Get accident records. Get information on

duty of care/safety/evacuation and other protocols for hazardous-duty work and occupational health/safety law compliance—particularly for business travelers and expatriates but also as to regular employees in jurisdictions like England that do not offer an employer workers' compensation bar defense to staff personal injury lawsuits.

- **Language laws.** Do employee communications comply with local laws in jurisdictions like Belgium, France, Mongolia, Quebec and Turkey that require HR communications be in the local language?

- **Discrimination/harassment.** Verify compliance with local discrimination/diversity/harassment laws including laws on pay equity, mandatory training and bullying. Check compliance with affirmative action laws as in South Africa and disability quota laws as in Austria, Brazil, Germany and elsewhere. Verify compliance with the seller's own discrimination/harassment policies. Does the seller impose mandatory retirement in violation of a no-age-discrimination provision in its own code of conduct? As to harassment, check compliance in countries like Brazil and France that prohibit "abusive work environment" harassment separate from protected group status.

- **Compliance with local HR policies.** Identify and check compliance with the seller's own internal employment policies, written and unwritten. Look at employee handbooks, written work rules, workplace internal "regulations," employee handbooks and health/safety guidelines. What special terms and conditions (beyond legal minimums and above market) does the seller extend to employees? The buyer will likely have to replicate these special terms after closing.

- **Global code of employee conduct or ethics.** Check compliance with the seller's internal ethics code of conduct or ethics and social responsibility programs including any commitment to an industry code, corporate social responsibility program or so-called "framework" (global union neutrality) agreement. Do the seller's HR practices comply? If the seller's codes of conduct incorporate International Labor Organization standards by reference—rarely a good idea—be sure the operations actually comply. Will the seller's current practices align with the buyer's practices and comply with the buyer's policies and codes? Check seller practices regarding government procurement, payment procedures to government officials and compliance with anti-bribery laws and audit/accounting rules. Verify that any seller whistleblower hotline complies with Europe's tough data protection law mandates specific to hotlines.

- **Compensation and benefits.** Using a separate compensation/benefits checklist, check the seller's benefits and compensation offerings including bonus and sales incentive plans. Are these above market? Do they comply with legal minimums? Look into the seller's compensation philosophy, compensation/benefits "schemes" or plans, severance plans, retirement plans, retention plans (which are particularly relevant in an M&A deal) and perquisites like meals, housing and expatriate benefits. How do they dovetail with local mandates? For example, are severance plans cumulative with local severance benefits? Check individual pension promises, special agreements, grandfather clauses, death/disability benefits, cafeteria plans, service awards, profit-sharing and savings plans, tuition and adoption reimbursement plans, employee assistance programs, employee loans and guarantees and any unusual expense reimbursements. Understand the interplay between foreign pension plans and foreign social security in each affected country. Check compliance with local laws that mandate extra payments and benefits (like thirteenth-month pay and profit sharing in Latin America and paid meals in Venezuela). Get an accounting of any transferring plans, and study funding—unfunded, underfunded, and "book reserve" plans raise huge problems and occasionally even kill deals.

- **Equity.** Look at seller stock options, stock grants, restricted stock units, phantom stock and other equity plans as well as employee ownership programs, officer/director stock ownership and employee ownership in affiliates and entities doing business with the seller. Were grants to overseas plan participants done legally? (Expect compliance shortcomings here, because cross-border equity grants are complex.) What will happen to equity plans, awards and unexercised or unvested options after closing? Often the buyer will not or cannot replicate seller equity plans. What will it need to do instead?

- **Employee insurance coverage.** Study the employment-related insurance cover the seller provides like employee life/health/accident and medical insurance, hazardous duty/kidnap insurance for business travel, payments to state-mandated insurance funds (workers' compensation and state social security insurance), expatriate coverage and "key man" policies naming the employer as beneficiary. Consider analogous insurance needs post-closing. In an asset or outsourcing deal, consider logistics—how to replicate insurance packages by the closing date.

- **Performance management.** Study the seller's performance management and succession planning systems. Focusing on key employees, collect data on job evaluations, performance appraisals and problem employees. Where the performance management system is global, does it comply with data protection laws? Consider how to integrate seller and buyer performance management approaches after closing.

- **Labor organization relationships**. What labor organizations represent the seller's workers—trade unions, independent unions, in-house unions or employer dominated "white unions"? What about pending employee requests for union recognition or organization? Separately, collect organizational data on the seller's non-union in-house or company-sponsored labor organizations like local/national works councils, any European Works Council, health/safety committees, staff consultation committees, worker committees, workplace forums, labor/management committees and ombudsmen. How cooperative or contentious are they? Collect meeting minutes and records memorializing labor disturbances and days lost to strikes. Will the buyer have to replicate any labor groups after closing an asset or outsourcing deal?

- **Collective agreements.** Look at applicable collective bargaining agreements, "industrial awards," "work agreements," "social plans" and other written agreements with employee representatives—not only union agreements but also labor accords with local works councils, and with any European Works Council, with worker committees, health and safety committees, ombudsmen and the like. Avoid the common mistake of due diligence requests for only seller "collective bargaining agreements" (a phrase usually interpreted to include only formal union agreements, excluding informal one-off accords and arrangements with works councils). Get "social plans" (collective agreements from past lay-offs) and expired collective agreements with terms that still apply. Identify all industry ("sectoral") collective agreements that bind the seller even as a non-signatory. Does the seller participate in any multiemployer bargaining associations?

- **Individual employment agreements**. Look at individual employment contracts with staff including employment agreements labeled "offer letters," "statements of particulars," restrictive covenants, non-competes and confidentiality agreements, employee indemnification agreements, invention and intellectual property agreements, resignation letters and releases. At least check these for key executives and look at form/template agreements for rank-and-file employees. (Again, be alert to data protection law compliance.) Find out whether any parts of the workforce lack written agreements or "statements of employment particulars" where law requires them. Pay special attention to contracts with contingent workers—service providers like "temps," independent contractors, consultants and agents.

- **Employee consents.** Check individual employee consent forms, which come in many flavors. In jurisdictions like the UK and Korea, employees may have consented in writing to work overtime and in Quebec employees may have consented to receive communications in English. European employees may have (revocably) consented to employer processing of sensitive personal data, and employee data processing consents are vital India, Mexico and certain other jurisdictions. Employees worldwide may have executed payroll consents or acknowledged a code of conduct or work rules in writing. If these consents are electronic, do employee assents comply with electronic signature protocols?

- **Change-in-control clauses.** Check change-in-control, golden parachute, and other transfer-related clauses in individual and collective employment and agency agreements, including M&A-ratification provisions in any labor union contracts and European Works Council agreements, as well as HR services contracts. Find transferability clauses in independent contractor agreements. These are vital.

- **External agreements.** Do any external agreements (with third parties) limit staffing flexibility? For example, in a stock purchase, are there acquisition agreements or "social plans" from earlier seller deals that limit reductions-in-force? Has the seller signed onto any supplier codes of conduct of its customers? Is the seller a government contractor that has taken on staffing-related public procurement obligations? In the United States, for example, a buyer of a government contractor can take on big "affirmative action" obligations after closing—analogous issues might arise abroad. What about "leased employee" and secondment agreements the seller may be a party to? What about independent contractors? Separately, look at the seller's outsourcing agreements with HR service providers like payroll providers, "temp" agencies, benefits providers and whistleblower hotline providers.

- **Recent layoffs and divestitures.** What layoffs or "collective redundancies" have happened in the last few years? What divestitures of business units have occurred? Did these comply with applicable laws? What lingering obligations exist in old "social plans" or accords with government labor agencies? Any recall rights?

- **HRIS**. Look into the seller's employee data-processing and human resources information systems (HRIS). Check how HRIS and email systems comply with data protection laws, especially as to cross-border data exports. Has the seller made all required notices/communications to employees about HR data processing and collected necessary employee consents? What so-called "sensitive" staff data does the seller process? Do data protection clauses in agreements with HRIS providers meet applicable data law standards? Look at the seller's contracts with HRIS providers and consider the effect post-closing. Are the seller's routine HR data exports compliant? What about staff communications regarding whistleblower hotlines? What about BYOD? Verify that seller HRIS and email systems do not trigger

telecommunications laws in countries where this is an issue like Italy, Germany and Poland.

- **Powers of attorney.** Find out what powers of attorney the seller's employees, officers and directors hold. (These are particularly critical in Latin America, where there can be different levels of powers, some of which include the power to dispose of company assets.) Consider how these powers will need to work after closing. In an asset deal the buyer will need to reissue these. What controls does the seller's headquarters use to monitor local management's compliance with laws and corporate policies?

- **Expatriates and immigrants.** Gather information on the seller's expatriate and immigrant populations and programs. Who are the overseas secondees and other posted expatriates? Which corporate entity employs each expatriate? Identify any "stealth expatriates" outside the formal expatriate program working outside their home countries. Check that expatriate employment arrangements comply with both host and home country laws (home countries may impose employment laws with "extraterritorial" reach). Does the seller employ any expatriates through a global employment company structure? Expatriates can be very expensive, so verify that packages are not above-market. Also do an "international I-9" exercise to check the visa or work permit status of non-local-citizen employees worldwide (regardless of whether categorized internally as expatriates or local hires). Does the seller comply with laws (as in Brazil and the Middle East) capping the percentage of immigrants in a workplace? How might the structure of this M&A or outsourcing deal affect visas after the deal closes? If the seller employs staff in countries where it is not registered to do business, how does it comply with host-country payroll obligations? And check "permanent establishment"—are there "floating employees" doing business in countries where the buyer is unregistered, not paying taxes, and flouting local payroll mandates?

- **Supply chain and human rights.** Beyond due diligence into the seller's own employees, decide whether to assess employment law compliance at the employees of the seller's suppliers. Where this is an issue, get both the buyer's and the seller's supplier code of conduct, if any, and collect reports from any past social/human rights audits. Is the seller's supplier code too sweeping in scope? Collect data on labor practices in the supply chain particularly as to components and products sourced from poor countries and look at overseas construction projects. Go as far down the supply chain as necessary. Look at seller disclosures under supply chain disclosure laws like the California Transparency in Supply Chains Act and the UK Modern Slavery Act 2015. Consider post-closing exposure to workplace-context human rights claims. Consider whether the seller's supply chain practices might, after closing, breach any buyer supplier code.

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As today's multinationals globalize ever more aspects of human resources across national borders, they take on "ownership" of, or responsibility for, verifying that international HR offerings comply with laws, labor agreements and workplace policies and norms. This gives rise to a need for doing global HR compliance audits or assessments. In addition, specific scenarios like preventing corrupt practices, overseeing supply-chain compliance and conducting due diligence in cross-border M&A or outsourcing deals spawn special breeds of international employment compliance verification projects. Cross-border HR audits can be complex and can take a number of stages to complete, but are increasingly vital to today's globalized business operations.