How to Engage a "Floating Employee" to Work Remotely from a Country Where the Employer Is Not Licensed to Conduct Business or Issue Payroll

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When a multinational business or nonprofit enters some new foreign market launching a "greenfield" presence like a new local office, facility or factory, its path is clear. The organization marches into the new market flying its flag, heads for local government authorities' offices and declares its intent to transact business in-country. It registers a local branch, representative office or subsidiary and gets licensed to transact business locally, to rent or buy local real estate—and to employ and payroll local staff.

But what about the boss not yet ready to register in a new country? What about the business or nonprofit that needs to tiptoe into some new country unable or unready to register a full-fledged legal presence? Maybe the organization envisions just a tiny or temporary presence in-country. Maybe it wants to hire only a stray staffer or two to work remotely from home on headquarters tasks with no connection to the host-country market. Maybe it has just a small or temporary project or support mission in the new country, perhaps based at a customer site. Maybe it has already agreed to accommodate some valued existing employee who needs to move abroad for personal reasons, like a "trailing spouse" married to another company's expatriate or an employee going overseas to care for a sick parent.

Imagine for example a Montana machine tool shop that wants to try out its first part-time Saskatchewan or Alberta sales agent. Or imagine a Washington, D.C. nonprofit hiring a work-from-home grant writer on a six-or nine-month contract who happens to live in Dublin or Berlin. Or think of a Boston university with an archeology professor leading a dig in Africa or an Iowa college contracting with an adjunct professor to teach an on-line class or summer-abroad program for American students. Imagine a Houston government contractor bidding on a job that will involve several months of on-the-ground support work in the field in the Middle East. Or think of a Fortune 500 multinational operating in 58 countries with a key headquarters employee who has urgent personal reasons to move and telecommute from someplace outside the 58 national locations.

We might call these examples of "floating" employment arrangements—headquarters has an employee, consultant, agent or telecommuter floating off by himself in some foreign country not anchored to any in-country registered affiliate that does business locally and that can issue a legal local payroll. Floating employment arrangements like these have been popping up ever more frequently lately because technology encourages them. Decades ago, logistical barriers would have kept a lone wolf from working solo in a remote country where the boss had no legal presence and no way to offer support or links to headquarters. In the old days staff needed dedicated office space, secretaries, back-office support and fluid communications with the home office. Today, though, technology and the on-demand economy facilitate telecommuting from anywhere in the world with just a computer, smartphone, express courier delivery, and maybe videoconferencing and a printer. Today's businesses and nonprofits increasingly find themselves in the awkward position of structuring floating employee arrangements—hiring or placing staff in new foreign countries or agreeing to let workers move for personal reasons to countries where the employer does not do business or issue payroll.

The big challenge with floating employment arrangements is *legal compliance*. These relationships are legally unstable, but compliance is vital because the very same technologies that facilitate floating employment also arm the host-country authorities who police payroll, business registration, corporate tax, immigration and employment violations. The easy advice here is to insist that any boss considering a floating employment arrangement step up and register a corporate presence in the country at issue and put the overseas employee on the newly-registered local entity's payroll. But a business or nonprofit may have compelling reasons (of budget, timing, logistics or cost-effectively accommodating a valued customer or employee) to enter a new foreign market without taking this all-in approach. Often a boss needs a viable strategy for engaging overseas "floating" staff in a way that accommodates host-country law.

The good news is that if carefully structured, floating employment arrangements can be legal. We discuss strategies for resolving the payroll, corporate registration, corporate tax, licensing, immigration and employment law hurdles confronting a business or nonprofit that needs to tiptoe into some new country and engage the services of a stray employee, consultant, telecommuter or other staffer not anchored to a host-country payrolling entity. Our discussion breaks into five parts: (A) the case for compliance (B) payroll laws (C) corporate registration and tax law ("permanent establishment") (D) licensing and (E) immigration and employment law.

A. The Case for Compliance

Floating employment scenarios are inherently low-key arrangements where compliance is at best a secondary priority—if compliance were the top priority, the boss would step up and register to do business and payroll the staff in the host country. Before addressing how to structure an overseas floating employment arrangement *without* registering a local payrolling employer entity, we need to pause to make the case for compliance.

From the richest parts of North America, Europe, the Middle East and Japan to the poorest corners of Asia, Latin America and Africa, most countries impose payroll, corporate registration, corporate tax, licensing, immigration and employment mandates and extend them to foreign organizations employing staff in-country—even if an employee in-country quietly works from home on headquarters tasks unrelated to the host-country market. A common misconception is that someone working from an overseas home on tasks unrelated to the host-country market somehow stands outside the reach of host country payroll and employment law. But that is not how payroll and employment laws usually work. For example, Brazil, the Dominican Republic, the Democratic Republic of Congo, Haiti, India, Nicaragua, Romania, Spain, the United States and dozens of other countries make it all but impossible for a foreign boss without a an in-country business registration (no local branch, representative office or subsidiary) to come in, employ staff and legally payroll an employee. These countries impose laws that require employers of local staff make tax and social security reports, withholdings and contributions using the local taxpayer identification number that comes with registering locally. Payroll and employment laws tend not to carve out exceptions for local employees who happen to work for foreign bosses on headquarters tasks.

That said, some exceptional jurisdictions accommodate foreign bosses employing and payrolling local floating staff, helpfully offering exceptions to at least some local payroll and employment laws. For example, in Alberta and some other Canadian provinces, France, Ethiopia, Ghana, Ivory Coast, South Korea, Sri Lanka, Switzerland, Thailand and the U.K., a foreign organization not doing business locally—one with no local presence or "permanent establishment"—might come in, perhaps make some fairly straightforward filings with local government agencies, and issue a legal payroll to a worker employed locally. Guatemalan law, for example, defines an "employer" as an organization *doing business locally*—effectively exempting foreign employers with no Guatemalan permanent establishment. But in this, Guatemala is a rare exception, not the general rule.

When a boss decides to set up a floating employment arrangement, the pressure often is just to do it without getting bogged down in expensive and time-consuming compliance formalities. For example, imagine a sales manager urgently needing to support a new customer in some foreign country or a nonprofit administrator who signed off on some staffer's request to telecommute from abroad. Or imagine a company hiring someone to work for just a year from a new foreign country, maybe on a temporary project or supporting a one-time customer purchase. In these situations, getting internal approval and budget to comply with what may seem like remote, bureaucratic host-country payroll and immigration procedures can be all but impossible. Because floating employment arrangements are by definition low-key, unobtrusive and under-the-radar, a manager proposing one will strive to keep the situation quiet, keep costs low and keep away the lawyers, accountants and naysayers. A manager proposing a small or short-term (but inevitably urgent) overseas hire or placement usually focuses more on the timing and budget constraints than on theoretical challenges under foreign regulations that seem extraneous to the operational mission. A boss proposing an overseas assignment might even somehow have concluded the risk of detection is fairly low.

Where compliance does not seem a priority, ask: *Is this "just do it" approach a euphemistic way of condoning illegality—maybe even committing crimes?* Saving money and time are vital goals, but are no excuse to break the law. Besides, shortcuts in setting up a floating employee arrangement can end up costing more money and time than originally saved. Anyone who has ever tossed a speeding ticket out a car window understands that compliance deferred is compliance enlarged. And flouting the law, even foreign payroll and immigration law, can cause reputational risk and violate an organization's core values and code of ethics.

Still, the proponent of a one-off or short-term overseas hire or telecommuting arrangement might dig in and insist on a "quick and dirty" approach, sometimes even volunteering to "accept the risk" of non-compliance. This gesture may sound helpful but does not change the analysis, because employer legal duties are non-delegable. Host-country enforcers go after the organization, not some individual safely back at headquarters out of harm's way who in some long-ago meeting or email may have mentioned personally "accepting the risk." How can the organization collect overseas corporate and employment judgments and criminal fines from a headquarters manager who may or may not still be on the payroll—and who never signed an indemnification agreement?

To highlight how serious the compliance challenges are in a floating employment scenario, just flip the discussion and consider the *inverse* scenario. Imagine an employee, consultant or telecommuter working *stateside* for some foreign entity that otherwise transacts no business in the United States. For example, consider a hypothetical Canadian small business or English charity that for some reason needs to employ someone who, for personal reasons, will live in (say) Portland or St. Louis, working on Canadian or British tasks from a U.S. home office. Must the Canadian or British employer register to do business in Oregon or Missouri? Must the boss file U.S. and Oregon or Missouri corporate tax returns at the end of the fiscal year? Must it comply with U.S. federal and state payroll tax, social security, unemployment and workers' compensation

reporting, withholding and contribution obligations? What about federal unemployment tax? Must it I-9? And if the job duties are non-exempt under the U.S. Fair Labor Standards Act, must the Canadian or British boss pay overtime for extra hours worked in a Portland or St. Louis home office? Every sophisticated American knows the answer to some, many, most or all of these questions is "yes." Just because the Portland or St. Louis employee may work on foreign (Canadian or British) tasks does not change the answer. The hapless Canadian or British boss risks breaching U.S. federal tax, state tax, social security, federal unemployment tax, state unemployment and worker compensation laws, plus committing state corporate registration violations, state and federal corporate tax fraud, immigration violations (I-9), and breaching state and federal employment law. And we have not even asked whether the Portland or St. Louis home office meets U.S. O.S.H.A. regulations. No American would recommend that a Canadian or British boss let a stateside employee trigger so many possible breaches of American laws and possibly trigger federal U.S. tax and immigration crimes. For the same reasons, no one should advocate letting a floating employee trigger violations of payroll, corporate, tax, licensing, immigration and employment laws outside the United States.

B. Payroll Laws

Understanding that floating employees can so easily trigger important (sometimes criminal) compliance issues under host country law, we turn to the specific legal hurdles that confront a business or nonprofit tiptoeing into some new country by engaging the services of a floating employee, consultant or telecommuter in-country without registering a local employer entity. We begin by looking at *payroll laws*.

Most all countries prohibit paying workers wages in cash without leaving a local paper trail. We might call the world's laws that regulate how to tender wages *payroll laws*. These are the laws that require reporting to, withholding for, or making "contributions" (payments) to government agencies like tax and social security agencies. United States payroll laws, for example, require employers report/withhold/contribute to federal and state (and sometimes municipal) tax and social security agencies, pay federal unemployment tax, and take out state unemployment compensation insurance and workers' compensation insurance. Other countries impose analogous requirements, often with additional payroll-funded programs like Mexico's INFONAVIT housing fund and Brazil's FGTS unemployment/severance pay employee funds, not to mention most countries' employer-funded single-payor ("socialized") medical systems.

Violating payroll laws can be a "felony" (26 U.S.C §7202). Every American employer knows it would commit a crime if it paid staff in cash on an offshore payroll or otherwise off the books without reporting to the IRS, Social Security or state tax, worker compensation or unemployment compensation agencies. Indeed, any American job applicant who had the temerity to ask to be paid "in cash" or "offshore" would immediately be understood to be asking to dodge payroll laws, evade taxes and flout social security. Compliant employers would refuse.

Yet complying with payroll laws can be a chore. An industry has emerged to help employers comply—outside payroll providers like ADP, Ceridian, local accountants and in-house payroll professionals. Even so, payroll law compliance tends to be fairly straightforward and formulaic when both boss and worker are in the same country. Payroll compliance gets complex where staff work remotely or from home in a foreign country where the employer is not registered to do business.

How does a boss in country *A* comply with payroll laws when paying a worker in some country *B* where the employer has no registered corporate or payrolling presence? The payroll laws of a worker's host country place of employment generally attach regardless of the place of payroll. For example, imagine a boss in Australia or Argentina hiring someone to work for a year from an apartment in downtown Atlanta or Austin. American federal and state payroll laws reach that Australian or Argentine employer. To pay a worker in downtown Atlanta or Austin on an offshore (non-U.S.) payroll ignoring U.S., Georgia and Texas payroll laws is illegal and can be a "felony" (29 U.S.C.§7202). This tends to work exactly the same way elsewhere. If a boss in Boston or Bridgeport employs someone working from a home or customer site in, say, Brazil or Belgium, then Brazilian or Belgian payroll laws might reach the American boss. And the fact that the Brazil or Belgium worker may work on U.S. tasks is probably irrelevant—just as working on Australian or Argentine tasks is irrelevant to payroll law compliance analysis as to a someone working from a home office in Atlanta or Austin.

Maybe all this seems complicated, even unfair. But the operative policy here is logical. If a country's payroll laws exempted foreign employers, then local staff in that country might ask their bosses to payroll them offshore—savvy locals would clamor to get payrolled by a foreign affiliate or offshore business partner, to sidestep tax reporting/withholding and social security contributions. Meanwhile, though, that worker is living, working and using public services (sewage, garbage collection and the like) in the host country.

- *Place of employment*: In addressing which country's payroll laws reach a given worker, we focus on workers' *place of employment*. Place of employment is where a worker sits while working. But bosses sometimes resist this concept and argue that place of employment is less relevant to payroll compliance than place where job tasks relate to. For example, imagine an employer in Chicago with a Chicago staffer who has worked in Chicago for years but who now, for personal reasons, needs to move to (say) Cairo, from where she will work remotely from an Egyptian home, exclusively working in English on Chicago tasks with no link to the Egyptian market.

This worker will move into an Egyptian place of employment—again, her "place of employment" is where she sits while working and her workplace is changing to Cairo. The Chicago boss might hope that Egyptian payroll laws do not reach this worker because she does not work on Egyptian tasks, but remember that she will use Egypt's public services. She will put out her garbage locally and flush her toilet locally. If her work computer catches fire, Egyptian firemen will respond. If she loses her job, she might file for Egyptian unemployment benefits. This is why payroll laws (including those of the United States) tend to apply by place of employment rather than by place where job tasks relate to.

Yet "place of employment" is not always clear because some workers move around while working. Determining someone's place of employment implicates factors like: the address on business cards and emails; the parties' intent as to where the worker is based; the percentage of days the worker works in-country; and whether the worker's tasks need to be performed in-country. Counting days worked in-country is not too helpful here because whether a worker spends over 183 days—six months—in one jurisdiction during a calendar year might be dispositive as to host country income tax presence but not necessarily as to place of employment. Imagine a consultant based in Denmark works for three months on a temporary client assignment in Denver. Whether this consultant has a U.S. tax residence or owes U.S. income tax on his U.S.-sourced income tells us little about whether he has a Denver *place of employment*. He might have a Danish place of employment, working in Denver only on a business trip. Meanwhile, a Denver coffee shop might hire a barista whose place of employment becomes Denver immediately upon reporting to work—or even before, upon signing onboarding paperwork. Our Danish consultant may have worked in Denver for three months without Denver becoming his place of employment while our barista got a Denver place of employment before working even an hour. Frustrating as it may be to an employer, counting up time working at a location does not tell us someone's place of employment.

- *Social security totalization agreement:* The U.S. and some other countries are parties to bilateral "social security totalization agreements" (essentially treaties) under which bosses can get "certificates of coverage" to keep expatriates on home country social security. A certificate of coverage shuts off employer payroll obligations to host country social security. Social security totalization agreements can facilitate cross-border payroll law compliance, but they take a payrolling boss only so far. There is a common misperception that these agreements exempt a boss from *all* host country payroll laws, but actually a certificate of coverage addresses only *social security.* The boss still must comply with host country tax reporting, withholdings and even "social charges" beyond social security. For example, the U.S./France social security totalization agreement lets a French boss send a French worker under a certificate of coverage to work in the U.S. without having to make U.S. Social Security contributions. But that French employer still must report the expatriate's income to the U.S. I.R.S. and the state tax agency. It still must withhold federal and state tax. It still must pay unemployment tax and provide workers' and unemployment compensation insurance. And it still must pay FLSA overtime unless the expatriate is exempt. In short, a certificate of coverage may be only one small step in simplifying expatriate payroll.

Back to our central question of *how a boss can legally payroll someone whose place of employment is a country where the employer otherwise does not do business or have a legal presence,* there are five possible approaches: Structuring that overseas "floating employee" as (1) an employee of a local affiliate (2) employee on offshore payroll (3) "leased" employee (4) employee on "shadow payroll" or (5) legitimate independent contractor. None of these five approaches is a magic bullet that works best every time. Which of these approaches is the best fit in a given floating employment scenario depends on local law and on factual variables like: how long the worker expects to remain in-country; what ties the worker has to headquarters; how the in-country tasks relates to the local host country market; what other ties the boss has to the host country; whether the boss has an in-country business partner to issue payroll; and whether others work for the organization in the host country. Consider all five possible approaches for any floating employee assignment. Select the one that works best *this time*.

1. **Employee of a local affiliate:** The presumptive way a boss is supposed to engage and deliver pay to a worker overseas is for the organization to step up and register a corporate employer entity in the worker's place of employment—a local subsidiary, branch, or representative office. *Viola!* The newly-registered local entity legally employs the worker in-country, issuing a legal local payroll. The new entity gets a local taxpayer identification number with which it payrolls the worker locally (usually using an outsourced payroll provider—remember, a payroll provider cannot issue payroll for an employer that does not give the payroll provider its in-county taxpayer identification number). Registering is what local corporate regulators, local tax agencies and local lawyers expect foreign employers to do when they come into a country and employ and pay staff. Registration is the default approach.

   But the default approach can be slow, expensive and complex. With just a staffer or two in a new overseas jurisdiction (maybe only temporarily), corporate registration can be impractical, especially when a worker moves to the new country for personal reasons that the boss only reluctantly agrees to accommodate.

Registering makes sense when launching a "greenfield" brick-and-mortar facility in a new country. But registering is not always viable with just a stray floating employee or two. The boss may seek a simpler, cheaper, faster way.

2. **Employee on an offshore payroll:** Where corporate registration is not viable, the easiest way for headquarters to employ and payroll someone working in a country where the employer organization has no legal presence is the *offshore payroll* model: Headquarters or one of its affiliates simply hires (or keeps right on employing) the worker directly, payrolling on offshore (headquarters or affiliate) payroll as if the worker simply worked in the payrolling country. Payroll gets direct-deposited in the worker's bank account, which he the worker accesses from the host country. The boss might even pay full gross wages without making any reporting/deductions/withholdings to *any* government authorities—the payroll country may exempt the worker from its payroll laws because the place of employment is abroad. Meanwhile, the employer will not be set up to issue a legal payroll or make payroll deductions in the host country place of employment. (This gets more complex in scenarios where the home country regulates offshore payroll, like a U.S. citizen working outside the U.S. directly for a U.S.-registered employer or an expatriate from Brazil, Ghana, the Philippines or other countries that regulate payroll of expatriates working abroad.)

   Offshore payroll is *logistically* simple. The challenge is compliance with *host country* payroll laws. The country *A* employer with an employee but no legal presence in country *B* has no country *B* taxpayer identification number and so cannot possibly make country *B* payroll reporting/deductions/withholdings. Again, even an outside payroll provider needs its client's local taxpayer identification number. "Impossibility" is no excuse for evading payroll laws, because compliant payrolling is quite possible if only the boss registers as doing business in the host country.

   Even with these challenges to offshore payrolling, there are two scenarios where offshore payroll might be legal: short sojourn and host country work-around.

   - **Short sojourn:** When a worker's overseas sojourn is short enough, home country payroll works just fine. The employer takes the position the overseas stay is a mere business trip or working vacation, and the place of employment remains at home. If an American or Canadian attends a week- or month-long conference or business meeting in Italy or Hong Kong, no one would expect that traveler to get payrolled on an Italian or Hong Kong payroll, because Italy or Hong Kong do not become the place of employment. The same is true for an American or Canadian staffer working in Italy or Hong Kong for a week, a month, or maybe even longer. Whether this staffer must file a *personal tax return* in Italy or Hong Kong is a completely separate issue—personal tax residence is a legal concept unrelated to place of employment.

     The inevitable question, of course, is: *How long can a stay in a foreign country last before the county becomes the place of employment?* We already answered this question: There is no predetermined amount of time, because "place of employment" is not strictly a function of time. The "short sojourn" payrolling strategy works for short trips but gets weaker as work time abroad increases. It gets hard to defend when someone works overseas for most of a year.

   - **Host country work-around**: While the payroll laws of a country usually reach staff working in that country, some payroll laws obligingly offer work-arounds for a foreign boss with no in-country presence or place of business other than a stray local employee or two. Payroll law work-arounds are not particularly common (and American employers have no right to expect them, because U.S. law does not offer one for overseas employers of stateside-working staff). But where a work-around is available, it can be quite helpful. These work-arounds fall into two categories: foreign employer exemption and payroll law compliance option for the employer.

     - Foreign employer exemption: While payroll laws tend to attach to workers' places of employment, some jurisdictions helpfully confine their payroll mandates to in-country staff transacting business locally or occupying local premises. These payroll laws expressly or implicitly exempt offshore bosses that neither transact business in-country nor occupy in-country premises. The *worker*—a local taxpayer employed by an unregistered offshore employer not doing business locally—bears the sole burden of tax and social security filings, as if self-employed. The worker self-registers with government authorities as if self-employed.

       Guatemala, Ivory Coast, U.K., South Korea and Thailand are examples. An offshore employer conducting no business in these countries—that is, an organization that somehow manages to employ staff in Guatemala/Ivory Coast/U.K./Korea/Thailand without having a "permanent establishment" or local office—might legally pay in-country employees on home country payroll without violating Guatemala, Ivory Coast, U.K., Korean or Thai payroll law. But this exemption is fragile because it shuts down as soon as the host country can make the case that local staff

are transacting business locally on behalf of their foreign employer, or that staff's workplace has become the employer's in-country office.

Of course, in these countries the boss should get a contractual commitment from its staff committing to self-register and stay self-registered—employee non-compliance could implicate the boss in a payroll law violation.

- Payroll law compliance option for the employer: Some countries (France and Estonia are two examples) do not fully exempt foreign employers from their payroll laws but offer procedures by which a foreign employer with no in-country "permanent establishment" can come in and make a special "payroll only" registration with local tax and social security agencies. The foreign boss registers as an offshore-payrolling employer, and the country issues it a special offshore-payroller identification number with which to issue a legal local payroll every payday. (The employer will likely involve an outsourced payroll provider to handle local payroll logistics.)

In addition to work-arounds allowing for offshore payroll, there is also the *illegal* way: Pay an overseas employee on a home country payroll without complying with any express payroll law work-around. On any given day, thousands of people around the world probably work in host countries illegally on "offshore" payrolls. But this is illegal.

3. **"Leased" employee:** The third way a boss might legally engage the services of, and payroll, floating staff in some country where it has no payrolling presence is the "leased" employment model, also called "outsourcing" or "secondment": The would-be employer enters a business-to-business contract with some host country partner—a collaborating business, supplier, customer or locally-operating temporary services agency like Adecco, Manpower or Kelly Services. That in-country partner then hires and payrolls the particular worker and "leases" (assigns, outsources, seconds) his services over to the offshore principal. The offshore principal (the actual boss) has privity of contract only with the collaborating business partner, not the worker. The worker gets classified and payrolled as a local employee—not a self-employed contractor and not an employee of the offshore principal. While the worker's *nominal* employer is the in-country business partner, his *beneficial* employer (actual boss) is the overseas principal that gives day-to-day work assignments. If the employee used to work directly for the overseas principal in another country, he resigns from the principal or temporarily suspends the direct employment relationship.

   In these situations the beneficial (actual) employer always faces risk of co-/dual-/joint-employer liability, if the nominal employer breaches its duties as employer.

4. **Employee on "shadow payroll":** A fourth possible structure is "shadow payroll." A shadow-payrolling offshore boss arranges with an in-country-registered partner organization (affiliate, partner business, supplier, customer, temporary services agency or "payroll agent") to payroll the floating employee while he works in-country, just as if he worked for the payrolling partner organization. The offshore employer (the actual boss) pays the worker but the in-country payrolling partner shows the worker as employed and paid on its own local payroll. The in-country payrolling partner makes payroll reporting/withholdings/deductions, which the offshore boss duly reimburses—often adding a services fee along with the monthly reconciliation of payroll charges. On paper host country tax and social security authorities see the worker as a legally-payrolled employee employed by the local payrolling partner. Behind the scenes, though, the actual offshore employer has a business-to-business contract delegating to the in-country payrolling partner responsibility for making local payroll filings on behalf of the worker. The employment contract and expatriate documentation make clear that the worker remains employed and compensated by the actual offshore employer boss. The in-country payrolling partner merely does a pass-through payroll accommodation, reconciled monthly with a direct reimbursement from the employer. The worker and the in-country payrolling partner have no contractual relationship.

5. **Legitimate independent contractor:** The fifth and final way a boss might legally engage the services of floating staff in some country where it has no payrolling presence is the independent contractor model: The worker provides services as a legitimately-classified independent contractor who is not a misclassified de facto employee. A contractor who used to work for the organization in another country (say, at headquarters) resigns from the employer—or at least temporarily suspends the employment relationship.

   The challenge here is that in most countries independent contractor classification status is fragile and easily susceptible to being recharacterized as de facto employment. Potential traps lurk in cross-border independent contractor classification. Companies and non-profits face expensive cross-border litigation when they misclassify de facto employees as nominal contractors. Overseas independent contractor classification is its own topic that requires a detailed compliance analysis of its own.

A separate challenge is that even where a contractor might be properly classified, services providers themselves sometimes resist being classified as contractors, preferring to be payrolled employees.

C. Corporate Registration and Tax Law ("Permanent Establishment")

Having addressed payroll, a parallel and equally important threshold consideration for a boss sending, hiring or allowing an employee, consultant or telecommuter to work in a new country where the employer is not set up to do business is complying with the host country's corporate registration and corporate tax laws—the so-called "permanent establishment" issue of triggering a corporate presence or starting to "do business" (even if on a nonprofit basis) in a new foreign country. "Permanent establishment" is a matter of corporate and tax law completely separate from employment and payroll law, but the issue springs up in the employment context as soon as an employee, consultant or telecommuter starts working in some new locale where the boss has no locally-registered corporate presence and files no corporate tax return. Permanent establishment" in the floating employee context can pose a challenge most everywhere—even in countries like China with unique legal systems. (*See* China State Administration of Taxation Bulletin #19, effective June 1, 2013)

Countries tend to consider an organization as operating within their territory (for corporate registration and tax purposes) when the company has "boots on the ground." Having in-country staff on the ground can make a finding of an in-country "permanent establishment" much more likely. For example, a huge dot-com with an online presence in some foreign jurisdiction—but with no staff actually working there—might *not* be held to be transacting business locally; meanwhile, a small business or nonprofit with just one or two employees, consultants or telecommuters who live, work and get paid in a foreign jurisdiction might be held to be "doing business" in that country, sometimes even if the local staff work on headquarters tasks unconnected to the local market.

Why would a country's corporate registration and corporate tax laws kick in just because an offshore organization employs someone, maybe just a telecommuter or contractor working quietly from an in-country home office, perhaps on headquarters tasks with no substantive connection to local commerce, perhaps generating no income from the local economy? Jurisdictions impose their local corporate establishment and corporate tax requirements as a condition of "operating" locally. Countries want to know who is operating within their borders, and countries want to collect taxes. A floating employment scenario might be said to constitute "operating" precisely because the organization has "boots on the ground."

American bosses should remember that permanent establishment plays out this same way stateside. Imagine, for example, an Italian consulting company employing a couple of full-time telecommuters who interact with Italian headquarters, in Italian, from home offices in expensive condominiums in Aspen, Colorado. Who can assure this Italian company that it is free to ignore U.S. and Colorado laws on getting registered to do business and on filing U.S. and Colorado corporate tax returns? From the U.S. and Colorado point of view, this Italian company might be operating in Colorado because it has "boots on the ground," paid stuff working from Colorado (home) offices.

When tiptoeing into a new foreign country and considering the permanent establishment issue, ask whether the in-country legal presence will stay small enough that host country law does not impose business registration and corporate tax obligations. Or, on the other hand, will in-country activities trigger a requirement that the organization register a local corporate entity (branch, representative office, subsidiary) and file corporate tax returns? Whether a floating employee triggers a permanent establishment is a question of the facts and host country law. The core question here is whether the organization "does business" in the host jurisdiction. Employing staff in the country might mean the employer "does business" locally even if the employee or independent contractor exclusively serves overseas operations without generating income from the local economy. (Certainly a factory that exports all its production "does business" in its host country even though its output is not distributed domestically.) In the floating employment context, two aspects of "doing business" merit further scrutiny: nonprofit "doing business" and telecommuter/support staff "doing business."

- **Nonprofit "doing business"**: A U.S. §501(c)(3) nonprofit is not a for-profit "business" and so might see foreign "doing business" regulations as irrelevant to it. But an organization's tax status is separate from whether its activities trigger some country's definition of "doing business." Besides, a U.S. §501(c)(3), when it sets off abroad, is just like any for-profit business until the host country confers its own local nonprofit status (just as a nonprofit registered as tax-exempt under, say, Australian, British or Canadian law does not automatically enjoy U.S. §501)(c)(3) status). In short, a U.S. §501(c)(3) operating abroad faces the same "permanent establishment" issues as a for-profit. Indeed, a non-profit faces the additional hurdle of *NGO registration mandates*. Some countries including for example Cambodia, El Salvador, Haiti, Ivory Coast, and Sri Lanka might not be too concerned about the corporate permanent establishment status of a foreign non-profit with a stray employee or two in-county, but might impose strict local NGO registration mandates.

- **Support staff/telecommuter "doing business"**: Sometimes an organization assumes that staff working from home or from a customer site in a foreign country who exclusively support headquarters—that is, staff with no obvious involvement in host-country commerce generating no local-source revenue—cannot possibly be "doing business" in the host

country. In some situations in some jurisdictions, this is quite right. But not always. Host-country corporate tax law might see a support person or telecommuter (especially one working full time, and especially more than one) as a center of business activity, even if the tasks done are for a foreign boss. Transfer pricing tax issues might arise. Presumably in-country staff's local efforts generate or conserve revenue for the foreign employer and of course the staff acts as a local consumer and uses in-country public services. Besides, even if headquarters thinks its staff in the country at issue generates no local income and does not trigger a transfer pricing issue, how can the host country tax agency verify that until it sees a corporate tax return? To take this scenario to its extreme, imagine a hypothetical U.S. company with a back-office call center in India employing dozens of telephone operators answering human resources support calls for the company's U.S. employees. Obviously this U.S. company is doing business in India even though its India workers support U.S. operations and do not generate income from India.

When an organization involved in a floating employment arrangement confronts whether the arrangement triggers a permanent establishment in the host county, ask: Will the organization be "operating" or "doing business" under host country corporate laws that require registering as a local corporate entity and filing corporate tax returns? The answer depends on the specific facts and on the local law definition of "doing business." This definition varies widely from country to country, with some laws informed by the OECD Model Convention on Taxes on Income and Capital. For example:

- *Alberta, Canada,* in its Business Corporations Act, lists nine actions that constitute doing business, including getting a listing in an Alberta telephone directory, taking out an advertisement showing an Alberta address, empowering a local agent, soliciting business, owning land or (unhelpfully) "otherwise carrying on business in Alberta."

- *Malawi* holds only those businesses with a local established "place of business" to be "doing business" locally and susceptible to having to register a corporate presence. But Malawi uses a broad definition for "place of business" that might include even a government department office that hosting a local employee, or a telecommuter's home office.

- *Mexico* deems an organization with a local physical presence (which might be an employee's home office) and an organization with a local agent holding a power of attorney to be "doing business" locally and therefore required to register a corporate presence.

- *Qatar* requires every natural or "juristic person" to register before "engaging in commerce"—but Qatari commercial registration law is murky as to what "engaging in commerce" means, particularly in the context of a nonprofit or a telecommuter.

- *Singapore* deems organizations to be doing business in Singapore (and therefore subject to having to register) if they "dea[l] with [personal or real] property situated in Singapore whether by employees or otherwise." But the Singapore Companies Act sets out a long list of exceptions—actions that do not implicate an organization as "doing business in" Singapore.

- *Spain* holds an organization does business locally and therefore becomes subject to having to register if it has in-country employees, agents or a fixed place of business (which might be an employee's, agent's or telecommuter's home office).

- *Syria* sets out a list of factors that indicate when a foreign organization does business locally that trigger a local corporate registration requirement:
  - ✓ hiring workers paid by the organization
  - ✓ buying or renting local real estate in the organization's name
  - ✓ opening a local bank account in the organization's name
  - ✓ listing the organization in a local telephone directory
  - ✓ subscribing to a post office box (in Syrian parlance, a "telegraph address") in the organization's name

- *Switzerland* has a high bar in this regard: Doing enough business in Switzerland to trigger permanent establishment may require leasing office space, hiring employees and doing separate (branch) accounting.

When a floating employee triggers a host country's definition of "doing business," the organization has a deemed permanent establishment and so must register a local in-country corporate presence (branch, representative office, subsidiary). Usually the organization must also file local corporate tax returns. Failing to register a corporate presence where required can lead to sanctions under local law and sometimes corporate tax exposure on the organization's worldwide income. That said, there is a silver lining to this cloud: As soon as a boss recognizes that its floating staff trigger a permanent establishment and as soon as the employer duly registers a local corporate presence, the new corporate presence can act as the in-country *payrolling employer.* Registering in a country to address permanent establishment instantly resolves the foreign-payrolling conundrum we already discussed.

D. Licensing

Beyond payroll and permanent establishment, the third legal hurdle confronting a boss wanting to let floating staff work in a new foreign country is industry sector licensing. Every country regulates certain business activities, requiring permits or licenses. Depending on the specific work assignments, a floating employee, consultant or

telecommuter might trigger these laws, even if working remotely on headquarters tasks.

In certain U.S. states and municipalities, electricians, hairdressers, gun sellers, dog breeders, dry cleaners and even people who paint stripes on parking lots need industry-specific licenses. Many jurisdictions require licenses in regulated sectors like banking, telecommunications, professional services, broadcast media, engineering, teaching, construction and security. A floating employee or contractor who works from home on tasks regulated in the host country might a need a host-country license. For example, a law firm in the United States or England might not be able to let a lawyer telecommute from Brazil, India or South Korea, because strict foreign-lawyer licensing rules might reach that engagement. Accounting and engineering firms face similar issues in many countries. Universities hiring distance-learning faculty or study-abroad faculty overseas should verify the foreign teachers do not trigger host country education registration requirements. A news agency with a reporter in a country might need some sort of local license. A floating employee working on foreign (headquarters) tasks might sidestep the local licensing requirements, but we cannot know for sure until we check what local licensing requirements actually are.

In addition to industry-sector licensing, certain work activities across all industries need special government registrations—personal data processing in France and Romania, for example, and drivers' licenses most everywhere.

E. Immigration and Employment Law

Payroll, permanent establishment and licensing aside, the final legal hurdle that confronts a business or nonprofit posting staff in a foreign country where it is not registered to do business is *immigration and employment* law. How does a boss with staff working in some foreign country comply with host country immigration and employment laws?

First, check immigration law. When setting up and paying staff in a new foreign country, take local immigration compliance seriously. If the employer organization is not registered to do business in the host country it will not be able to sponsor a visa. A U.S. business or nonprofit that lets a floating employee, consultant or telecommuter work from a place where the worker cannot legally work needs a ready answer for host-country enforcers who might charge the organization with violating local immigration law. The risk here is clear to Americans because U.S. I-9 rules impose tough sanctions in this context. That said, sometimes the selected floating employee is already a host country citizen, so the immigration issue drops out.

Immigration requirements usually differ significantly depending on whether the employee will be a business traveler or an expatriate:

- **Business traveler**: A business traveler works abroad just for a short period, shooting out from the host country to handle discrete tasks overseas. His "place of employment" never becomes the host country and he so stays on home-country payroll. However, even a business traveler on home-country payroll might need a host-country visa or work permit to work legally during a business trip. Many countries prohibit business travelers from entering on tourist status if they come to work, not tour. France requires visas or work permits for staff working in-country over 90 days, so a business traveler in Paris on a 13-week working trip without a visa/work permit may become an illegal alien.

  A particular challenge is the "stealth expatriate," the nominal business traveler who overstays the outside boundary of a business trip and ends up with a host-country "place of employment." When a business traveler crosses the line and gets a host country place of employment, immigration requirements obviously get tricky.

- **Expatriate**: A business expatriate is an employee who originally worked for the employer in the home country but who transfers abroad to work for that same employer temporarily in a new country, expecting to be "repatriated" home later. Expatriates without rights to work in the host country needs appropriate visa/work permits. (Do not confuse a business expatriate with an employee eligible for company expatriate benefits: Even a "trailing spouse" telecommuter who moves abroad for personal reasons is a business expatriate, if ineligible for company expatriate benefits.)

Next is the issue of complying with host country *employment* laws. Most jurisdictions impose their employment protection laws by force of public policy and do not enforce waivers of local employment law or choice-of-foreign law clauses that purport to shut off local employee protection laws. So even a "floating employee" who works remotely overseas on headquarters tasks under a home country employment contract with a home-country choice-of-law clause usually can invoke the protections of host-country employee protection laws. For example, a floating employee who works overtime or gets sick, pregnant, retired or fired very likely enjoys legal rights to host-country overtime pay, sick leave, maternity leave, retirement and severance pay/notice protections, *even if* that employee once signed a home-country choice-of-law clause. Still, a floating employee who sues in a host country labor court faces service-of-process and enforcement-of-judgment challenges.

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Today's office technology facilitates "floating employee" scenarios where a boss engages the services of staff who will work from home, from the field, or from a customer site in some country where the employer is not licensed to do business or issue a legal payroll. These scenarios give rise to four kinds of cross-border legal

challenges: host-country payroll laws, permanent establishment doctrines licensing mandates and immigration/employment requirements. A boss might at first be tempted to downplay the importance of complying with these laws, but flouting foreign payroll, corporate registration, corporate tax, licensing, immigration and employment law can have severe ramifications with legal sanctions and criminal liability and endangering the company's reputation, compliance culture and integrity of the code of conduct. Compliance in these situations requires planning and strategy, but with planning and strategy compliance is indeed possible.