Global HR Hot Topic

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"Floating" Employment Toolkit

How to Engage an Employee, Consultant or Telecommuter in a New Foreign Country Without Registering a Local Payrolling Employer Entity

When a multinational business or nonprofit decides to launch a presence in some foreign market where it has never done business before by opening a new local office, a new facility or a new factory, its path is clear: The organization marches into the new market flying its flag and heads straight for the local authorities, where it registers a branch, representative office or subsidiary so it can transact business legally, buy or rent real estate, and employ and pay staff locally. Then the multinational finds out, and follows, the local rules of the road that regulate how to do business and employ people.

But what about the business or nonprofit that, for whatever reason, needs to *tiptoe* into some new country, unable or unready to register a full-fledged legal entity presence for transacting business in-country and payrolling staff legally? Imagine, hypothetically, a Montana machine tool shop that wants to try out its first Saskatchewan sales agent. Or think of a small Washington, DC nonprofit that wants to hire a work-from-home grant writer who happens to live in London. Or consider a Fortune 500 multinational with facilities in 36 countries that has a valued Director of Public Affairs who announces that, for urgent personal reasons, she needs to move abroad for a year and telecommute—maybe she is a "trailing spouse" married to someone going on an expatriate assignment, or maybe she has a sick parent abroad. But what if she has to move to Trinidad, which is not among this company's overseas jurisdictions?

We might call these scenarios examples of "floating" employment arrangements: An organization based in one country (for our purposes, the United States) has an employee, consultant, agent or telecommuter floating by himself in some foreign country, unanchored to any locally registered business affiliate that can issue a legal local payroll. Floating employment arrangements of this nature have been exploding lately because technology facilitates them. Decades ago, a lone wolf could not feasibly work solo from home in some foreign outpost where the employer had no presence, because in those days staff needed dedicated office space, secretaries, back-office support and fluid communication with the home office. Now, obviously, even a top performer might successfully telecommute from anywhere in the world with just a computer, smartphone, printer, express courier delivery and maybe Skype video conferencing. But these floating employment arrangements are inherently unstable, often pushing the boundary of legal compliance. And never forget: The same technologies that facilitate floating employment arrangements also arm the host-country authorities who police illegal business, tax, payroll and employment practices.

While these floating employment arrangements are legally fragile, businesses and nonprofits increasingly find themselves in the awkward position of having to use them, having to hire or transfer staff (or tolerate a valued employee moving) to some foreign

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jurisdiction where the organization neither does business nor issues payroll. The easy legal advice here is to tell the organization it has to go into its new target country all-in, launching a stand-alone, full-fledged operation, taking the so-called "greenfield" approach by licensing a local office or facility that can legally transact business and (with the help of an outsourced payroll provider) legally pay wages. Invest the resources necessary to comply with local corporate, tax, licensing, immigration and employment laws. This is good advice. The inverse—recommending that an organization sneak into a foreign country taking illegal shortcuts—is bad advice.

Still, sometimes a business or nonprofit has compelling reasons—budget, timing, logistics, accommodating a valued employee—to enter a new foreign market *without* taking the all-in greenfield approach. That organization needs to craft a careful strategy so as not to break host-country law, much less commit a crime. Here we discuss how to craft that strategy, how to resolve the corporate establishment, tax, licensing, immigration, payroll and employment law hurdles that pop up when a business or nonprofit tiptoes into some new country engaging the services of an on-the-ground employee, consultant or telecommuter *without* registering a local payrolling entity.

Because the all-in greenfield approach is always optimal legally, here we discuss second-best alternatives more than best practices. Some of the strategies we discuss, in some scenarios, might not be air-tight, and might require a tolerance for legal risk. Where legal risk gets too great, opt for the fall-back greenfield approach. Go into the country all-in. Fully register.

Our discussion breaks into four parts: (A) the case for compliance (B) corporate registration and tax law ("permanent establishment") (C) licensing law and (D) immigration, payroll and employment law. The final section on employment law addresses practical strategy, offering five alternate ways to structure a floating employee relationship.

A. The Case for Compliance

Before addressing how a business or nonprofit can legally structure a floating employment arrangement in a new foreign country without registering a local payrolling employer entity, we need to pause to make the *case for compliance*, because these are inevitably low-key arrangements where compliance is not the top priority. Most all countries, from the United States, Canada, Europe, the Middle East and Japan to the poorest corners of Asia, Latin America and Africa, impose corporate, tax, licensing, immigration, payroll and employment mandates on entities that let staff work from a place of employment (even if just a home office) on local soil. Some jurisdictions make employing and payrolling floating staff fairly easy. For example, in Alberta and other Canadian provinces, France, Ethiopia, Ghana and Switzerland, a foreign employer can often come in, make some fairly straightforward filings with local government agencies and be able to issue a legal payroll to a locally working employee. Mexico, too, will let a foreign employer without a local business presence come in, make some filings and payroll someone working locally—but in Mexico these filings are hugely complex and can cost tens of thousands of dollars in legal fees and take months to complete. But jurisdictions like these that offer a viable path for a foreign employer without a local business presence to payroll someone working locally are perhaps the exception. Many countries (five examples: Brazil, India, Romania, Spain, United States) make it all but impossible for a foreign employer without a local business license—a local branch, representative office, subsidiary—to come in, employ someone and legally pay wages. Often, payroll laws merely require an employer to make tax and social security reporting, withholding and contributions. But without the taxpayer identification number that comes with corporate registration, complying with payroll laws may be logistically impossible. (By the way, using an outsourced payroll provider is no work-around here, because payroll providers merely make payroll payments on behalf of the actual employer.)

While floating employment arrangements therefore raise significant legal compliance challenges, in this context getting internal approval at the employer business or nonprofit to take the steps necessary to comply with host-country law can sometimes be frustrating. Because these arrangements are meant to be low-key and unobtrusive, often the manager or team at headquarters proposing these assignments wants to keep its head down, keep costs low, and "just do it" without involving lawyers, accountants or naysayers. The manager or team proposing some small or short-term (but inevitably urgent) overseas assignment always seems to face a time and budget crunch, and has little patience for working through theoretical bureaucratic challenges under host-country law that seem extraneous to the operational mission—especially if the manager or team somehow has concluded that the risk of detection is fairly low. Think, for example, of a sales manager or team that urgently needs to support a new customer in some foreign country, or a nonprofit administrator who has already signed off on some peripatetic employee's request to telecommute from abroad. 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, much less commit a crime. And besides, taking shortcuts here sometimes ends 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 (not to mention that willingly flouting the law, even foreign law, is inconsistent with most multinationals' core values and codes of ethics, and can trigger reputational risk).

Still, the US proponent of some small or short-term program, local hire or telecommuting arrangement in a new country may dig in and insist on taking a "quick and dirty" approach. The proponent may even volunteer to "accept the risk" of non-compliance. This gesture, noble and magnanimous as it may at first seem, does not change the analysis. The employer's legal duties in this context are non-delegable. Host-country law enforcers will go after the organization, not some functionary safely back at headquarters who, in some long-forgotten meeting or email, may have claimed he would "accept the risk" personally.

Often the easiest way to help an American understand the magnitude of the compliance challenge in a floating employment arrangement is to flip the discussion for a moment and ponder, hypothetically, the inverse scenario. Imagine an employee, consultant or telecommuter working on *American* soil for some *foreign* entity that otherwise transacts no business stateside. For example, consider a hypothetical Canadian small business or English charity employing someone full time who just moved to (say) Portland or St. Louis, maybe to carry out some customer service function or maybe just to telecommute. Does the Canadian or British employer have to register to do business in Oregon or Missouri? Does it have to file a US corporate and Oregon or Missouri state tax return at the end of the fiscal year? Does it have to check that this employee has a US visa or can work legally in the United States? Does it have to comply with US federal and state tax, social security, unemployment and workers' compensation payroll mandates (reporting, withholding, contributions)? And, assuming the employee's job duties are non-exempt under the US Fair Labor Standards Act, does the hypothetical Canadian or English employer have to pay overtime for extra hours worked in a Portland or St. Louis home office?

Of course, every American with any business sophistication knows the answer to many or all of these questions is quite likely "yes." Indeed, in this scenario the hapless Canadian or British employer risks committing US federal tax fraud, immigration violations and infractions of US social security, state unemployment and workers' compensation laws and federal and state employment laws. Certain of these violations might be crimes.

If you would never advise a Canadian or British organization to let a floating employee trigger breaches of these American rules, then you should not advocate employing someone overseas in a way that violates the host country's corresponding laws.

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

The first substantive legal issue a US business or nonprofit confronts when sending some employee, consultant or telecommuter into a new country is complying with the host country's corporate establishment and corporate tax laws—the so-called "permanent establishment" problem of corporate presence or "doing business" (even if on a nonprofit basis) in a foreign host country. This issue, a matter of corporate and tax law, is completely separate from employment law, but this issue arises in the employment context when an employee, consultant or telecommuter starts working in some foreign jurisdiction where the employer otherwise does not do business, has no locally registered corporate presence and files no corporate tax returns.

Organizations tend to operate abroad through staff with "boots on the ground." For example, even a huge dot-com with a popular online presence in some foreign jurisdiction, but with no employee who actually works there, might not be held to transact business in that country. On the other hand, even a small business or nonprofit with just one or two employees, consultants or even telecommuters living and working in some foreign jurisdiction may well be held to be "doing business" in-country.

Why should a foreign country's corporate and tax laws kick in just because some American business or nonprofit sends in (or hires locally) someone, maybe just a telecommuter, to work quietly from a local home office, perhaps on US headquarters matters with no obvious connection to local commerce and, perhaps, generating zero income from the local economy? The answer is that jurisdictions impose corporate establishment and corporate tax requirements as a condition of operating locally. And our floating employment scenario might constitute operating locally. Because most all countries want to know who is doing business in their borders and want to collect taxes, this permanent establishment issue is a challenge most everywhere, even in countries with unique legal systems like China (*see* China State Administration of Taxation Bulletin #19, effective June 1, 2013).

For that matter, permanent establishment plays out this same way stateside. Imagine, for example, an Italian consulting company employing a high-paid consultant who telecommutes full time—interfacing only with Italian headquarters, exclusively in Italian—from a high-rent condominium in Aspen, Colorado. This consulting company might break US and Colorado law if it is not registered to do business in Colorado and if it never files US or Colorado corporate tax returns. (This is not to mention the completely separate legal exposure on the immigration and payroll side, if the consultant is an Italian with no US visa and if the consulting company payrolls her from Italy, depositing her paycheck in an offshore Italian account, heedless of US I.R.S., social security and Colorado unemployment and workers' compensation reporting, contribution and withholding mandates.)

When a business or nonprofit tiptoes into a new foreign country with, say, a local employee or consultant working a temporary customer service assignment or grant-funded research project—or

even just a telecommuter begging to work from a new overseas home for personal reasons—the first inquiry to make should be the permanent establishment question: *Will our overseas legal presence be small enough that local law lets us ignore host-country business registration and corporate tax obligations? Or does this in-county floating staff person trigger a requirement that we register a local corporate entity (branch, representative office, subsidiary) and file corporate tax returns?*

This inquiry implicates the fundamental question of whether the US organization "does business" in the host jurisdiction. Generally, local law will require an entity that "does business" in-country to register a local corporate entity or "establishment" (branch, representative office, subsidiary) and file corporate tax returns. Often, almost by definition under local law, to employ a full-time employee in a country necessarily means the employer "does business" locally—sometimes even if the employer is a US §501(c)(3) nonprofit and sometimes even if the employee exclusively serves overseas headquarters without generating income from the local economy.

Two aspects of the "doing business" issue merit further scrutiny: nonprofit "doing business" and telecommuter/support staff "doing business".

- **Nonprofit "doing business"**: A US §501(c)(3) nonprofit is not a "business," and so it might see foreign rules that regulate "doing business" as inapplicable to it. Not so fast. An entity's tax status is separate from whether its activities in a country trigger the local definition of "doing business." Besides, a US §501(c)(3), when it sets off abroad, is just like any for-profit business until the host country confers on it local nonprofit status (just as a foreign nonprofit registered as tax-exempt under, say, Australian, Brazilian or Congolese law does not enjoy US §501(c)(3) status).

- **Support staff/telecommuter "doing business"**: Sometimes a US organization will insist that a support person or telecommuter working from home in a foreign country who exclusively supports US headquarters—with no obvious involvement in host-country commerce and generating no local-source revenue—cannot possibly be "doing business" in-country. In some situations, in some jurisdictions, this analysis will fly. But not always. Host-country corporate tax law might see a support person or telecommuter (especially one working full time) as an income-earning center of business activity, even though he toils on foreign projects for a foreign master. After all, presumably this worker's local efforts generate revenue for the foreign employer, and, of course, this worker acts as a local consumer and uses local public services—police, fire, schools, trash pick-up, sewage (surely he flushes the toilet). Even if some US employer entity is convinced that its lone woman posted in, say, Mozambique or Germany generates no local income, how can Mozambique's or Germany's tax agency verify that position until it sees a corporate tax return? Compare this floating employee to a famous poet or painter who lives and writes or paints from a beachfront studio in a tropical country—but who publishes all her poems with foreign presses or sells all her paintings through foreign galleries. The tropical country might take the position that the artist creates her work locally and so she "does business" locally and is therefore subject to the same corporate and tax rules as other less lucrative local businesses, even though all the efforts of her work get exported.

So our core question here becomes: When does a business or nonprofit with an employee, consultant or telecommuter working alone in some foreign country trip the host jurisdiction's definition of "doing business" and become a so-called "permanent establishment" that must register as a local corporate entity and file local corporate tax returns? The answer depends on the specific facts, yes, but it especially depends on the definition, under local law, of "doing business." This vital 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; these include getting a listing in an Alberta telephone directory, taking out an advertisement showing an Alberta address, empowering an agent, soliciting business, owning land or (unhelpfully) "otherwise carr[ying] on business in Alberta".

- *Malawi* deems only those businesses with a local established "place of business" as "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 hosts a local employee, or a telecommuter's home office.

- *Mexico* deems an organization with a local physical presence (which might be a floating employee's home office), and an organization with a local agent holding a power of attorney, as "doing business" locally and susceptible to having 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 locally (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* deems an organization to be doing business locally, and therefore 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 can determine when a foreign organization does business locally and therefore triggers 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 having permanent office space, employees and independent accounting.

Like it or not, a business or nonprofit that puts an employee, consultant or telecommuter into a new foreign country who ends up triggering the local definition of "doing business" may have an in-country permanent establishment. That organization, even if a US §501(c)(3), likely must register a local in-country corporate presence (branch, representative office, subsidiary) and file local corporate tax returns, or else face legal sanctions and reputational risk. No one envies the hapless American supervisor whose modest overseas initiative (or acquiescence to a one-off foreign telecommuting arrangement) triggers consequences so steep.

C. Licensing Laws

The corporate/tax issue of permanent establishment aside, the next legal hurdle confronting a business or nonprofit with staff in a new foreign country is *industry/sector licensing*. In every country on Earth, local laws regulate certain business activities and sometimes require a license. A one-off local floating employee/consultant/telecommuter could trigger these laws.

In US states and municipalities, for example, electricians, hairdressers, gun sellers, dog breeders, dry cleaners and even people who paint stripes on parking lots can need industry-specific licenses. Jurisdictions everywhere require industry-specific licenses in regulated sectors like banking, telecommunications, professional services, broadcast media, construction and security. An engineer may not be able to work in Brazil (for example) without a special engineering license, and a law firm might not be able to let a lawyer telecommute from a home in Brazil, India or South Korea because of strict foreign-lawyer licensing rules. Even nonprofits can need government permission to do charity work in certain jurisdictions, particularly where the mission does not align with local public policy—think of gay/lesbian associations, Christian churches and Jewish organizations in Arab countries or political organizations in China. In addition to industry-sector licensing, in some instances certain *activities* of all industries need special government registrations—personal data processing in France and Romania, for example, and commercial drivers' licenses most everywhere.

D. Immigration, Payroll and Employment Laws

Corporate registration/tax (permanent establishment) and licensing aside, the final and perhaps most complex legal problem that confronts a business or nonprofit that needs to post staff in some foreign country where it otherwise does no business is the *employment law* cluster of issues. How does an employer with some employee floating alone in a foreign country comply with host-country immigration, payroll and employment laws when the organization is not even registered to do business in-country, much less to sponsor a local visa or issue a legal local payroll? The answer breaks into three parts: first, complying with host-county *immigration and payroll* laws; second, heeding host-country *employment* laws; third, selecting among the *five ways to structure a "floating" employment relationship*.

1. Immigration and payroll laws

A US business or nonprofit that lets a floating employee, consultant or telecommuter work from some foreign country where the employer is not registered to do business must—from day one of the overseas engagement—have a ready answer for host-country enforcers who might charge the organization with committing local immigration and payroll crimes. The risk here should be clear to Americans, because the US federal government imposes tough criminal sanctions in this very same context: Stateside, employing an illegal alien can be a crime, as can be making unreported offshore income payments and dodging social security contributions. When setting up and paying staff in a new foreign country, treat local immigration and payroll compliance as seriously as you would stateside. Avoid criminal activity. Start by finding out what the host country's immigration and payroll laws require in the floating employment context.

Immigration and payroll requirements differ significantly depending on whether the employee who will work in the new country will be a *business traveler*, an *expatriate* or a *local*:

- **Business traveler:** A business traveler working abroad is a home-office employee who shoots out to handle a discrete set of tasks, staying in-country briefly or intermittently enough that his "place of employment" never becomes the host jurisdiction. The business traveler remains a home-country-

based employee on home-country payroll, visiting the foreign jurisdiction on a limited stay. Business travelers include short-term telecommuters who work overseas only briefly, up to, say, a few months.

The challenge here is the so-called "stealth expatriate" problem—the nominal business traveler who overstays the outside boundary of a business trip and so, under local law, ends up with a host-country "place of employment." The day that, under host country law, a business traveler crosses the line and become a locally based employee is the day host-country immigration and payroll laws kick in. (For the employer to withdraw into denial and pretend its overseas employee remains a business traveler changes nothing; the relevant analysis is a question of host-country law, not employer characterization.)

Actually, though, *immigration* laws often kick in earlier. Even a business traveler working abroad on just a short stay who properly remains on home-country payroll may need a host-country visa or work permit. Many countries do not let business travelers enter on tourist status because they come to work, not tour. France requires visas or work permits for people working in-country for over 90 days—so a business traveler working in Paris on a 13-week business trip without a visa/work permit becomes an illegal alien (euphemistically, an "undocumented worker").

- **Expatriate:** A business expatriate is someone who worked for the employer in a home country but who has now moved abroad to work for that same employer temporarily in a new country, and who expects to be "repatriated" home later. (Do not confuse business expatriates with employees eligible for company expatriate benefits: Even a telecommuter who moves abroad for personal reasons—say, a "trailing spouse" married to another employer's expatriate or an employee who needs to care for a sick parent overseas—is a business expatriate, even if ineligible for company expatriate benefits.)

  An expatriate who does not happen to be a local host-country citizen needs a visa/work permit. And an employer must payroll an expat in a way that complies with host-country payroll laws (local tax/social security reporting/withholdings/contributions). An overseas (say, US) employer not registered to do business in the host country that has no local taxpayer identification numbers might not be able to issue a legal in-country payroll for the expat in its own name. (Using an outsourced payroll provider is no work-around here, because providers issue payroll in the employer's name.)

  Sometimes headquarters gets a creative idea for a shortcut, like paying an expat in cash or on headquarters' own (foreign, offshore) home-country payroll. Avoid these work-arounds if they violate local law, as they often do—particularly when they constitute a local crime, as they may. Separately, payrolling a US expat might also have to comply with certain aspects of *US* payroll laws. (*See* our *Global HR Hot Topic* of April 2012.)

- **Local:** A US businesses or nonprofit sometimes takes its first steps into a new country by engaging some local native to develop the new market, or sometimes just to telecommute from his foreign home doing headquarters business (such as when the US organization recruits a foreigner to come work at headquarters but cannot get him a US visa). Other times a US organization enters a new market by sending in someone to move abroad permanently and work as a local, with no expectation of later being repatriated home.

  The easy piece with floating employee *locals* is that they are often host-country citizens who do not need visas. The primary compliance challenge with locals is the exact same payroll law compliance problem we just discussed as to expats: making local tax/social security reporting/withholdings/contributions. Again, a headquarters employer entity not registered to do business locally with no local taxpayer identification numbers might not be able to issue a legal local payroll (even with a payroll provider). While headquarters may think up some creative work-arounds like paying locals in cash or on the headquarters "offshore" payroll, best avoid a shortcut that violates local law. It may be a crime.

2. Employment laws

Beyond complying with immigration and payroll laws, a US organization with staff working abroad must comply with the full suite of local host-country employment protection laws—local wage/hour laws, mandatory benefits laws, health/safety laws, holiday/vacation laws, discrimination/harassment laws, severance pay laws. Local host-country employment protection laws almost always apply by force of public policy, so an employee (even an expatriate) usually cannot opt out of them even if he consents to an employment-at-will arrangement or a US choice-of-law provision. (*See* our *Global HR Hot Topics* of August 2012 and September 2012.)

In addition, an expat who is a US citizen and who works for a US-based business or nonprofit simultaneously enjoys rights under US employment discrimination laws. And remember: Even a floating employee nominally classified as an independent contractor will be held to enjoy all rights under host-country employment protection laws—if a local court or agency later declares he was a misclassified de facto employee. (*See* our *Global HR Hot Topic* of July 2011.)

3. Five ways to structure a "floating" employment relationship

Having discussed the immigration, payroll and employment law challenges confronting a business or nonprofit that tiptoes into a new country by employing a worker, consultant or telecommuter on local soil without registering to do business or to payroll wages locally, the practical question becomes: What is the organization to do? How can a business or nonprofit have it both ways, benefiting from its in-country worker's labor without assuming the host-country burdens of registering and payrolling local staff?

There is no single "magic bullet" answer. A lot depends on the circumstances. For example, a business sending expats out to work long-term assignments will select a different compliance strategy from a nonprofit hiring a short-term in-country foreign local representative. Or a nonprofit partnering with a foreign host-country entity and migrating some of its own US employees onto its partner's local payroll will select a different compliance strategy from a business "going it alone" in a new foreign country.

While there is no "magic bullet" strategy for how a business or nonprofit can comply with all foreign immigration, payroll and employment laws in a floating employment scenario, there are *five options*. When sending out or hiring someone to work in a foreign country where the employer is not registered to do business or to payroll wages, consider these five options and select the one that best meets the specific operational, budget and legal compliance needs. The five options are (i) "flying under the radar" (ii) business traveler (iii) consultant/independent contractor/agent (iv) "leased employee" or "shadow payroll" and (v) direct employment.

i. **"Flying under the radar":** A non-compliant cross-border employment structure that is too common among businesses and nonprofits employing staff in foreign countries where they are not registered to do business or payroll wages is just to put the in-country worker on home-country payroll, or even to pay wages (especially to blue collar locals) in cash, not through any payroll at all. Employers choosing this option frequently flout immigration requirements, employing overseas expatriates as illegal aliens. And these employers also tend to ignore host-country wage/hour, vacation and other local employment laws. These employers simply cross their fingers and hope to "fly under the radar" of local enforcers.

   This approach is so common in floating employee scenarios that we list it here so as not to deny the reality that this is an all-too-common structure for postings to countries where employers are unregistered. Obviously the drawback to this approach is that it is blatantly illegal, often criminal, and it threatens reputational risk, code of ethics violations and bad publicity. So avoid it. Even where the risk of detection might at first seem low, an illegal in-country posting may ultimately catch the attention of local regulators. Sometimes a disgruntled ex-employee blows the whistle later.

ii. **Business traveler:** Where a floating employee is not a local hire but someone moving into the overseas location, and where the organization can confine the employee's time on the ground in the host country to a short period of several months or less, then the employee's "place of employment" might remain the home country. He works abroad on a business-trip basis. (*See* discussion above at "Business traveler".) The business traveler structure simplifies the visa/work permit piece, and it likely resolves the payroll law compliance challenge entirely (plus it minimizes permanent establishment and licensing risk). Business traveler status is an excellent option where the employee really will work in the host country only for a short period. Unfortunately, this structure is rarely viable because floating employees usually stay abroad for too long, and also because this structure does not work for local hires.

iii. **Consultant/independent contractor/agent:** A common and dangerously attractive strategy for engaging a services provider in a country where a business or nonprofit is not licensed to do business or to payroll wages is to confer on the worker a label like "consultant," "independent contractor" or "agent"—to select a *non-employee* classification meant to sidestep host-country payroll and employment laws entirely. This structure is particularly attractive to institutions engaging *locals* in the new foreign county (independent contractor status is a tough sell to a headquarters employee being transferred in as an expatriate). While attractive, the consultant/contractor/agent structure is fragile because of the high risk of misclassification under host-country law. The challenge is *legitimately* classifying a nominal consultant, contractor or agent who, under host-country law, does not work locally as a de facto employee. (*See* our *Global HR Hot Topic* of July 2011.) Sometimes the nature of the host-country work is a good fit for legitimate contractor classification, but often this strategy looks more like a subterfuge. In most countries the tests under local law that distinguish a genuine independent contractor from a misclassified de facto employee are surprisingly similar to the US common law and I.R.S. tests—presumptions tilt toward employee status regardless of how cleverly the parties may document their arrangement. (And even a properly classified contractor does not completely eliminate host-country permanent establishment and licensing law risk.)

iv. **Leased employee or "shadow payroll":** A handy way to engage staff abroad in a country where an employer does not otherwise operate is by using a local third-party nominal employer—the so-called "leased employee" option. The local third party (maybe a manpower services or temp agency like Manpower, Adecco or Kelly Services or maybe an actual local business partner company that already works with the US organization) hires the worker onto its own local payroll and then provides ("seconds") his services over to the US organization, the beneficial employer, through a business-to-business services contract. While the leased employee approach is unpopular with employees who want the prestige of working for the mother organization, this structure offers a big advantage: The third-party nominal employer is a legitimate, registered local payrolling entity that issues a compliant local payroll. The third-party nominal employer can also help comply with local employment laws and might even be positioned to sponsor a visa and work permit (although the immigration issue is complex because the employee does not render his services for the nominal employer/visa sponsor).

A variation on the leased employee structure is to keep the employee employed and paid by the headquarters entity, but to use a nominal in-country third-party employer to issue a so-called *"shadow payroll"* that complies with host-country payroll laws, and for the payrolling entity and the employer entity to do a reconciliation. Again, though, the challenge here can be sponsoring an expatriate's visa.

One additional challenge is that some countries (Argentina, Brazil, Ecuador, Kenya, Mexico, a pending bill in Russia, others) impose laws against so-called "outsourcing", which, in some contexts, might curtail the leased employee approach. Check for this issue. (And remember that the leased employee structure does not necessarily resolve permanent establishment and licensing challenges.)

v. **Direct employment:** Earlier we mentioned that in some jurisdictions (Alberta and other Canadian provinces, Ethiopia, France, Ghana, Switzerland, others) a foreign headquarters might be able, legally, to employ and payroll locals without unduly bureaucratic registration requirements. Direct employment is also possible, but more complex, in countries like Mexico. When employing someone in one of these jurisdictions, direct employment is almost always the best option. Yet in so many other countries (Brazil, India, Romania, Spain, United States, many others), direct employment is tougher because legally to payroll someone working in-country in effect requires the employer to register a local legal entity—a branch, representative office, subsidiary—if only to get the taxpayer identification numbers necessary to issue a legal local payroll. (Again, an outsourced payroll provider is no work-around because providers issue payroll in the employer's name.) Even in these countries, registering the business and employing and payrolling local staff as direct employees is always a best practice. As we mentioned at the outset of our discussion, investing whatever resources are necessary to comply with local corporate, tax, licensing, immigration and employment laws is good advice, and the inverse—recommending an organization sneak into a foreign country taking illegal shortcuts—is bad advice.

So when a business or nonprofit will employ someone somewhere that the organization is not yet registered to do business or to payroll wages, always consider the logically (if not logistically) simplest strategy of marching in directly, flying the flag, registering to do business locally and to employ and payroll in-country staff directly. This all-in approach is not only the most compliant option, in the long run it offers practical advantages, from resolving the permanent establishment problem to simplifying visa applications to facilitating rental of office space to streamlining interactions with local government, business partners and customers.