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IN FOCUS

The Trump Administration Embarks on Visa Reforms

Kathie Gaber, Partner & Chair of Business Immigration Practice Group, **Masuda Funai**, Chicago, IL

Since becoming President of the United States in January 2017, President Donald Trump has issued several executive orders *(EO)* which have dramatically affected the ability of foreign nationals to travel to the U.S. for business and pleasure. The impact of these EOs is still unknown as they are only in the infancy stage with some being challenged in the courts and others only now being implemented across the multiple agencies which handle immigration matters.

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Welcome

Luc Lamy, Chair of Alliott Group's Global Mobility Services Group

In our second issue, we review some of the issues that affect employers operating in and through some of the world's largest economies and trading blocks, including the U.S., China and the EU. Our lawyer members take the lead in this issue as they look to untangle some of the complex issues that need to be understood when doing business across borders.

The election of Donald Trump is having a profound impact on U.S. immigration policy – employers need to give these changing rules *(Executive Orders)* their full attention to avoid costly mistakes occurring when trying to deploy workers to the U.S. There is a clear trend towards the protection of U.S. workers and restricting the travel or employment of foreign individuals. Our Chicago law member believes this may only be the 'tip of the iceberg.'

In the European Union, the free movement of services and people remains a key principle. Our Belgian law member explains the importance of employers having a clear understanding of the evolving EU Directive on Secondment.

We have also put together a video playlist in which our law members explain how rules vary in their countries in terms of the flexibility foreign companies will have to make changes to the workforce of a local company that has been acquired. The underlying message seems to be tread carefully!

Our accounting members have also contributed key insights - in China, we look at the different types of social insurance being contributed to by employers and employees and compare how the rules vary between Beijing and Shanghai. And back in the U.S., our New York member outlines why expatriation from the U.S. can have significant tax consequences and why the Expatriation Tax Rules must be understood.

We hope you enjoy this latest issue - please contact Giles Brake at Alliott Group's Executive Office *(giles@alliottgroup.net)* for assistance or feel free to email me or any of my Alliott Group counterparts directly.

Luc Lamy

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The Trump Administration Embarks on Visa Reforms

In this article, **Kathie Gaber**, Partner & Chair of the Business Immigration Practice Group at **Masuda Funai** *(Chicago, IL)*, touches on the more significant changes which may affect foreign nationals who are intending to be transferred to the U.S. by their employer abroad or foreign investors who are intending to invest in the U.S.

Buy and Hire American

On April 18, 2017, President Trump signed the *Buy American and Hire American* EO with the intention of creating higher wages and employment rates for U.S. workers in addition to protecting their economic interests.

This EO mandates that all agencies administering the immigration laws of the U.S. propose new regulations, rules and guidance, as soon as is immediately practical, to protect U.S. workers. As of the date of this article, the Foreign Affairs Manual, which is used as guidance by Foreign Affairs Officers in issuing visas at U.S. embassies and consulates abroad, has been updated to specifically acknowledge that the spirit of the EO will be considered in adjudications of the most commonly issued employment based visas.

This is the tip of the iceberg and we anticipate that in the coming months, there will be many more specific rules and regulations restricting the travel or employment of foreign nationals in the U.S. However, from a practical perspective, we are already encountering numerous issues as indicated below:

Heightened focus on wages: In the context of the H-1B specialty occupation classification, positions which are designated as entry-level, thereby justifying the lowest of four assignable wage levels by the Federal Labor Department, must now justify that the duties are in fact of a basic nature. The implication is that this classification should only be awarded to the most skilled or highest paid roles. In the context of the L-1 intracompany transferee classification, if the salary *(excluding benefits and allowances)* for the U.S. assignment does not amount to at least the minimum wage in the state where the beneficiary will be assigned, this can lead to a denial

Employment of U.S. workers: In the context of E-1/E-2 Treaty Traders/Investors, consular officers are showing reticence in approving and extending visas for one and two person offices which do not employ U.S. citizens

Audits: There has been a resurgence in the use of audits by immigration and customs enforcement to ensure that a company's workforce is legal and in compliance with the Employment Eligibility Verification Form I-9 requirements of the Immigration and Nationality Act. In addition, fines increased in 2016 and violations can result in penalties of up to $1,850 per employee

On-site visits: National fraud and detection officers have extended on-site visits from the H-1B classification to the L-1 classification. Employees who are not employed at the address indicated on the petition, or who are in positions which substantially deviate from what was stated in the application, can have their petitions revoked

Temporary Business Visitors: Foreign nationals who travel frequently to the U.S. either pursuant to the visa waver program or to a correctly issued B-1 visa, are seeing heightened vetting and additional screening at secondary inspection areas. Areas of concern are:

1) overseas employees who have global responsibilities requiring them to manage a team or function in the U.S.; *2)* traveling to the U.S. on a regular basis and staying for extended periods of time *(Note: travel histories are now electronically accessible to inspecting officers during the admission process)*; and *3)* entering the U.S. for activities which may be viewed as productive employment, such as project management roles and servicing machinery. Officers can introduce expedited removal proceedings at the port, which bars entry for five years.

Takeaways

1. When establishing new companies in the U.S., the transfer of personnel should be a primary focus and not an afterthought
2. No one can guarantee visa issuance. For this reason, be sure that employees do not buy plane tickets, give up their leases or quit jobs with other employers until the visa is actually issued
3. Have a back-up plan
4. Consult with an attorney before an application is lodged or a denial is received so that the case can be as solid as possible.

For more information
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MasudaFunai

The EU Directive on Secondment:
The Key Issues Affecting Immigration

The cross border assignment of workers is an essential element of the European Union – it safeguards one of the fundamental principles that underlies its very existence: the free movement of services. **Marcel Houben**, Partner at Belgian law firm member **Peeters Advocaten-Avocats**, explains what employers must understand before seconding workers in European Union member states.

To facilitate the free movement of services, European legislators enacted Directive 96/71/EG on 16 December 1996. Furthermore, to promote the free movement of services, legislators aimed to protect the basic rights of workers and avoid unfair competition and fraud.

However, the Directive and national legislation enacted in accordance with the Directive, did not adequately meet its goals: a frequently cited sticking point in this respect was the "assignment" of workers by foreign "mail box" companies that do not engage in real activities in the home country, but merely recruit workers in the home country with the intention to employ *("assign")* them immediately in another country. Respect for (minimum) salaries and terms and conditions of employment is another issue which is often at stake.

To confront these issues, European legislators adopted Directive 2014/67/EU in 2014. The deadline for EU member states to amend national laws accordingly was fixed at 18 June 2016.

In order to tackle the problem of "mailbox" companies, the Directive supplied tools to verify the real nature of the secondment: it clearly specified that "secondment" should adhere to two essential elements:

1) The temporary employment of a worker in a country other than the country where he/she is usually employed

2) The employer is engaged in substantial activities in the latter country.

To verify whether both elements are met, a non-exhaustive list of factual elements has been established.

The Directive further focuses on measures aimed at furthering the means to control compliance with European and national regulations relating to employment as well as social security. In this respect, it should be noted that a large number of EU member states' national employment regulations are imperative and, as a result, also apply to seconded workers.

In this context, the Directive instructs EU member states to make clear and transparent information on their employment regulations *(e.g. working time, minimum salaries, etc.)* easily accessible to all employers throughout the EU. It also instructs member states to take the necessary

measures to ensure efficient cooperation and the exchange of information between various national authorities.
The Directive also gives EU member states the option to impose an obligation on employers of seconded workers that they must inform the authorities of the receiving member state about the secondment beforehand. Belgium introduced this obligation some time ago *(known as the "LIMOSA" declaration)*. And recently France and Luxembourg introduced a similar obligation. However, EU member states must ensure that this obligation does not become too burdensome and obstruct the free movement of services. European authorities have rapped Belgium's knuckles for this very reason!

EU member states can also impose an obligation on an employer of a seconded worker to appoint a liaison person who is in charge of providing all information and documentation on seconded workers as requested by the authorities of the receiving country. Belgium introduced this obligation recently and the physical person or legal entity can be located in any EU member state. France has followed suit, but in contrast to Belgium, the person must be located in France. The role of the liaison person in Luxembourg, according to national regulations, is rather limited.

In a number of EU member states *(including France, Luxembourg and Belgium)*, the contractor is held jointly liable with the subcontractor/employer of the seconded workers for ensuring that all obligations and regulations *(such as the preceding announcement and availability of the A1 statement)* are complied with and may be subject to severe fines. According to Belgium's rules, the contractor may also be held jointly liable with the employer of the seconded workers for payment of the minimum salaries.

Finally, the IMI system *(Internal Market Information System)* is now also available to EU member states. This can be used to call on the assistance of other member states to send out notifications related to these regulations to employers established in the EU member state, and to impose and collect fines.

It is therefore very clear that contractors as well as the employers of seconded workers, must be well informed about their obligations in EU member states before calling on or sending seconded workers to these jurisdictions.

For more information
Please contact **Marcel Houben** *(marcel.houben@peeters-law.be)* at **Peeters Advocaten-Avocats** in Brussels.

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Quick Overview: Social Security / Insurance for Expatriates in China

Ken Lee, Partner, Lee & Lee Associates, Beijing

An increasing number of expatriates are going to work and live in China as the country continues to develop at a fast pace. Since 2011, employers have been able to make social insurance payments for their expatriate employees working in China. This is in accordance with the guidance provided by a circular issued by China's Ministry of Human Resources and Social Security. Each city or region in China can adopt different practices. Ken Lee, partner at Lee & Lee Associates in Beijing, explains the benefits and the costs.

"The purpose of this circular is to protect the legitimate rights and interests of expatriates working in China. However, it decreases employees' net pay and increases employers' costs since the social insurance payments are borne jointly by employee and employer," comments Lee.

1 Social insurance

There are five different types of social insurance which can be contributed to, but there is also the 'Housing Fund'.

1. **Pension insurance.** Expatriates can receive a pension when they reach the official retirement age or they can withdraw cash when they leave China before they reach the official retirement age. In the latter case, they can only withdraw the employee part of the pension.

2. **Medical insurance.** A certain percentage of expatriates' medical costs are covered by statutory medical insurance. Commercial medical insurance can be paid by the employer as long as the amounts are to be included in the expatriate's salary to pay tax.

3. **Injury insurance** to cover costs related to injury in the work place.

4. **Maternity insurance** to cover the expenses related to childbirth and salary during maternity leave for a female expatriate. However, a male expatriate should also pay this.

5. **Unemployment insurance** to provide a minimum level of cover during a period of unemployment.

6. **The 'Housing Fund'.** This fund enables employees to save money towards buying property or renting a house. Only expatriates with permanent residence status in China can enjoy the housing fund.

2. Bases and ratios

In China, statutory social insurance payments and contributions towards the 'Housing Fund' are paid jointly by employers and employees with different ratios applying to each employee's total salary. If the salary is less than 60% *(minimum)* or more than 300% *(maximum)* of the previous year's average employee salary in the city, then the base shall be the minimum or the maximum, respectively. The minimum and maximum bases are adjusted each year.

The ratios are regulated by local human resources and social security bureaus. Taking Beijing and Shanghai as examples, the ratios applicable in 2017 are as below:

In Beijing, it is mandatory for employees to make social insurance contributions. However, in Shanghai, there is some flexibility. If an expatriate and his/her employer both agree not to make social insurance payments and this agreement is regulated in the employment contract, then the expatriate is not obligated to make social insurance contributions in China.

From the above, you can see that social insurance payments are a big cost for employers in China. In recent years, governments have become more aware of this situation. To alleviate the burden on employers, many cities are decreasing their social insurance ratios.

	Pension		Unemployment insurance		Injury Insurance	Maternity Insurance	Medical Insurance		Housing Fund	
	Employer	*Employee*	*Employer*	*Employee*	*Employer*	*Employer*	*Employer*	*Employee*	*Employer*	*Employee*
Beijing	19%	8%	0.80%	0.20%	0.30%	0.80%	10%	2%	12%	12%
Shanghai	20%	8%	0.50%	0.50%	0.30%	1%	9.5%	2%	7%	7%

For more information

Please contact **Ken Lee** *(klee@lla.cc)* at Alliott Group's Beijing accounting firm member **Lee & Lee Associates**.

Expatriation: The Tax Implications U.S. Tax Payers Need to Be Aware of

Hunter Norton, Tax Director, Farkouh Furman & Faccio, New York, NY

For certain taxpayers, the decision to expatriate results in significant tax consequences and a variety of issues to consider. Hunter Norton, Tax Director at New York accountants Farkouh Furman & Faccio explains. For more information, contact hnorton@fffcpas.com.

Bloomberg reports that expatriation from the U.S. has been on the upswing since 2010 with a record 2,367 people relinquishing U.S. citizenship in the fourth quarter of 2016. Although most taxpayers would never consider relinquishing their U.S. citizenship or surrendering their status as U.S. permanent residents, a certain minority of taxpayers decide to do so.

Taxpayers choose to expatriate for a variety of reasons. Hunter Norton, comments: *"The most common reasons for taking this step include long-term U.S. permanent residents whose net worth is increasing and who have an interest in residing outside the U.S. in the future, and U.S. citizens who reside abroad who want to avoid the tax compliance obligations applicable to all U.S. citizens whether or not they reside in the U.S."*

'Covered expatriates' and the revised expatriate tax regime

Norton explains that taxpayers considering expatriation should understand that there are significant tax consequences: *"In 2008, Congress enacted a revised expatriate tax regime under Internal Revenue Code ("IRC") section 877A that requires 'covered expatriates' to recognize gain in taxable income based on the appreciation in certain assets valued as of the day before expatriation as well as new withholding and reporting rules. Taxpayers considering expatriation should be advised of these rules to make an informed decision as to whether expatriation is a prudent choice."*

Expatriation Tax Rules

Special tax rules under IRC section 877A apply to expatriates who satisfy certain tests. An **expatriate** is defined as:
(1) U.S. citizen who relinquishes his or her citizenship, and
(2) any lawful permanent resident of the U.S. *(i.e. a green card holder)* who has been a lawful permanent resident for at least 8 of the 15 taxable years prior to expatriation and ceases to hold such status.

A **covered expatriate** is generally defined as an expatriate who:
(1) has an annual average income tax liability for the previous 5 years prior to expatriation of $162,000 (in 2017)
(2) has a net worth of over $2m as of expatriation date; or
(3) fails to certify compliance with all federal tax liabilities for the 5 taxable years preceding the date of expatriation.

Operation of the Expatriation Tax Rules

Covered expatriates are deemed to sell all of their assets on the day before they expatriate for fair market value and, subject to limited exceptions, must recognize any net gain as income. An exception exists for interests in 'eligible deferred compensation' which includes interests in various qualified retirement plans to which the expatriate has provided a completed Form W-8CE to inform plan trustees.

Covered expatriates who subsequently receive distributions from eligible deferred compensation plans are subject to a 30% withholding tax. Similar treatment is provided for interests in non-grantor trusts for which the covered expatriate has provided Form W-8CE to the trustee within 30 days of expatriation. Taxpayers that hold interests in certain non-eligible deferred compensation plans or tax deferred accounts such as traditional IRAs are deemed to receive a distribution from such plans or accounts as of the day before expatriation.

Congress did provide some relief in that each individual has a single lifetime exemption of $600,000 *($699,000 in 2017)* to be applied against the gain recognized on the deemed sale. Another special adjustment applies to treat the basis of assets held by long term permanent residents as not less than fair market value as of the day the individual became a U.S. resident. This adjustment does not apply to certain assets that are otherwise taxable to non-residents such as interests in U.S. real property and assets that are effectively connected to a U.S. trade or business.

Congress also allowed expatriates to defer the tax payable with respect to any property deemed sold by reason of section 877A until the due date of the tax return for the earlier of: *(i)* the date the asset is disposed by sale, non-recognition transaction or gift or *(ii)* the year that includes the date of death of the covered expatriate. Taxpayers must provide adequate security to the IRS and interest charges apply to the deferred tax amount.

Special Gift/Estate Tax Rules

Norton adds: *"Covered expatriates are also subject to special gift and estate tax rules under which any otherwise non-taxable gift or bequest received by a non-spouse U.S. citizen or resident from a covered expatriate in excess of an annual exemption amount ($14,000 in 2017) is taxable to the recipient."*

Employment Law: Firing or Removing Local Employees - What Foreign Companies Must Know

Maria Zabala

Partner, Abbantia Abogados y Asesores Tributarios, Bilbao

"It is not easy for a foreign company to let employees go. Spain's laws protect the employee, so real care needs to be exercised in terms of the type of contract that companies offer to and sign with their employees."

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YouTube Watch the full interview

Paul Marmor

Partner & Head of International Services, Sherrards Solicitors, London

"It is relatively straightforward to engage and let someone go in the UK within two years especially if there are performance or economic related issues. After the two year period, it becomes more difficult."

pdm@sherrards.com

YouTube Watch the full interview

Chris Blake

Partner & Co-chair of Corporation Transaction Group, Hahn Loeser, Cleveland, OH

"Foreign companies coming to the U.S. would be surprised to know that when they want to let employees go, it is a fairly easy process… In the majority of states, there are at-will employment laws, meaning the employment is literally at-will, and those employees can be discharged on a moment's notice."

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YouTube Watch the full interview

Nicolas Paglietti

Partner, Studio Internazionale, Rome

"In 2015, Italy introduced the Job Act to change the country's labour laws. As a result, a foreign company can now fire employees if there are justified economic reasons."

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YouTube Watch the full interview

Alliott Group's Global Mobility Services Group facilitates access to accountants, tax advisors and lawyers in many of the world's commercial centres across some 70 countries. Visit our website (www.alliottgroup.net) to find a professional or contact Giles Brake (giles@alliottgroup.net) at Alliott Group.