Prepared by AmCham member

Mobility of the workforce

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The globalization of the economy brings along the greater mobility of the workforce. Recently, migration of the workforce within corporations has increased significantly and has become an effective tool for preserving and building the corporation's knowledge. Below we address a few legal issues one should be aware of before sending an employee abroad or accepting a posted employee of another employer.

Fundamental Principles

The two basic freedoms contained in the founding treaties of the European Union, the free movement of workers and free movement of services, are fundamental principles of mobility of workers within EU. Whereas under the free movement of workers, a worker deliberately enters the labor market of a hosting Member State for an unlimited period, under the free movement of services, a worker performs work for a limited period of time on the territory of a hosting Member State, and returns to the home Member State afterwards. The latter is called 'posting'. The employment relationship between the posted worker and the posting employer continues to exist, and no new employment relationship between the posted worker and the hosting employer is created, however the posted worker is subject to the working instructions of the hosting employer.

Regulatory Framework

While the mobility of the workforce under the free movement of workers does not bring along specific legal problems, the mobility of the workforce under the free movement of services entails some sensitive legal issues and has been subject to regulation on the Community level.[1] The main issue has been the governing law, ie the law which regulates a specific employment relationship. Since labor law has always been considered a matter of social sensitivity, the Member States agreed that the most important aspects of an employment relationship will always be regulated by the law of the Member State where the employee carries out the work (lex loci laboris). These important aspects are called a "hard core" of minimum working conditions.[2] The working conditions which are not covered by the hard core of working conditions will be governed by the national rules on public private law.[3]

The mobility of the workforce also raises a few regulatory issues. The regulatory rules distinguish between Community nationals and extra-Community nationals. While, in principle, the performance of work of Community nationals in other Member State usually requires only registration at the relevant authority, the performance of work of third countries nationals requires a consent of the relevant authority (in Slovakia the residence permit, the work permit or the "blue card"). The failure to obtain these permits results in illegal residence and an invalid employment relationship. Since the obtaining of the permits is associated with a lot of red tape, the Community has adopted measures which aim to facilitate the access of third countries national to the Community labor market.[4] So far, these measures are limited to the mobility of highly qualified workers and though they eliminate some of the bureaucratic burden, they add considerable paperwork linked with evidencing the required level of education. It is therefore questionable whether these measures will reach their objective to promote and facilitate the mobility of non-Community workforce.

Another important aspect associated with the mobility of workers is the reimbursement of travel expenses of the outgoing workers.[5] Under Slovak law, if a worker is posted within the Community, the worker is entitled to travel expenses as in the case of a foreign business trip. However, the law remains silent on posting to third countries, which often causes difficulties in travel expenses calculation.

In addition, the mobility of workers is closely linked with a complex regulation of social security schemes, which often represents a stumbling block for greater mobility of the workforce.

Postings

In Slovakia, the key means of posting is the temporary assignment (dočasné pridelenie) regulated in the Slovak Labor Code.[6] The Labor Code states that if a worker is temporarily assigned to a Member State, the working conditions and the conditions of employment will be governed by the law of the Member State on the territory of which the work will be carried out. In addition, the law requires that the working conditions of a temporarily assigned worker are at least as favourable as the working conditions of a comparable worker at the hosting employer. It follows that one has to become familiar with both - the labor regulation in the hosting Member State and the working conditions of comparable workers at the hosting employer. This is inevitable in order to properly agree in writing with the employee to be assigned on a change of the working conditions within the extent of the hard core of working conditions, pursuant to the labor regulation of the hosting Member State. Further, the analyses of the competent social security scheme and the travel costs of a posted employee (in general a costs calculation) shall be made. In addition to a written agreement between the employee and the (assigning) employer, the law also requires a written agreement between the assigning and hosting employer. Apart from essentials prescribed by the Labor Code, the issues such as recovery of costs and liability are regulated in such agreement.

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1. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.
2. See section 5 (2) of the Act no. 311/2001 Coll. the Labour Code (the Labour Code).
3. e.g. if a German employer posts an employee, a Czech national, to its subsidiary in Slovakia, the hard core of working conditions will be governed by Slovak law, and the issues outside the hard core will be governed by the law determined by the provisions of the relevant international private law regulation, eg bilateral agreements; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); Act no 97/1963 Coll on International Private Law.
4. Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment; Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (COM(2010) 378).
5. Act no 283/2002 Coll on Travel Expenses.
6. Section 58 of the Labour Code.