SHEPHERD+WEDDERBURN

Going Global

International employment guide

SHEPHERD+ WEDDERBURN

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SHEPHERD+ WEDDERBURN

About us

We are a leading full service UK law firm with offices in London, Edinburgh, Glasgow and Aberdeen, advising clients based in the UK and overseas.

Our clients are drawn from a range of industries and sectors including Energy & Natural Resources, Financial Institutions & Banking, Real Estate & Infrastructure, Hospitality & Leisure, Pharma & Life Sciences, Technology, Media & Telecoms and the Public Sector.

International reach

We advise clients in 92 countries and we are involved in significant cross-border deals and issues with both international and UK clients.

Our international activity is supported by global membership networks. We have developed a strong international network which can service all of our clients' cross border requirements.

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"Shepherd and Wedderburn is our 'go-to' law firm. The firm has an excellent reputation and the lawyers I deal with are both high quality and easy to get on with. Connectivity with people is a vital ingredient for us in choosing lawyers to work with and the firm very much delivers on that."

—Chambers and Partners

"The lawyers we instruct at Shepherd and Wedderburn provide an exemplary service and are quick to offer practical solutions when problems arise. They are a pleasure to work with."

—Chambers and Partners

Foreword

Neil Maclean
Partner and Head of Employment

Jane Wessel
Partner, International Arbitration

Our *Going Global: International employment guide* is essential reading for organisations with international reach. Whether you have offices abroad, employ people overseas, or recruit internationally, this six-part guide will lead you through the various international employment issues that you are likely to encounter.

We begin by explaining the backdrop of how UK employment law can apply to protect employees in various international situations, such as overseas employees of UK organisations, and the UK based employees of international employers. You may be surprised to see just how far UK employment protections can reach!

Next, we look at international employment contracts. We explain how to choose which country's laws should apply to the relationship and examine the complex rules surrounding which country's courts have jurisdiction to deal with any disputes. Protecting a global business is notoriously difficult, so we have also examined how to use restrictive covenants to safeguard your business when an employee who works internationally leaves and may then try to compete.

As your business grows internationally, it may need to recruit new people or resource services all over the world. To help you do so, we have included a quick employment checklist explaining the key things you should consider when hiring someone overseas. Alternatively, you may wish to second existing employees to different parts of your business, or to other organisations, around the world. As such, the guide also explains how to manage international secondment arrangements.

The guide concludes by explaining how to recruit an international employee to work in the UK and provides a quick overview of UK immigration rules.

We hope that our *Going Global: International employment guide* will be a helpful resource for you whether your business is expanding into new countries, or continuing to operate internationally. And of course, our experts in employment and international law are on hand to help with any further questions you may have.

Thank you and enjoy!

Chapter One
Territorial scope of UK employment law

In an increasingly global market with mobile work forces, the territorial scope of UK employment law can become an important issue for international employers. In this chapter of our *Going Global Guide*, we consider when UK statutory employment law might extend to international employees, employees working in the UK for non-UK based companies and UK employees working overseas.

Different rules govern whether contractual, rather than statutory, employment claims can be brought in the UK and the next chapter focuses on contractual issues.

Territorial scope of UK statutory employment rights

An employee can bring a statutory employment claim in the UK if:

- they are protected by the relevant piece of legislation; and
- a UK employment tribunal has jurisdiction to hear the claim.

Complex analysis may be required to ascertain whether an international employee working in the UK, a UK employee working overseas, or an international employee working overseas for a UK employer, has the right to bring a claim based on UK employment rights in a UK employment tribunal or not.

Step one: protection under UK legislation

The precise territorial scope of UK employment legislation differs depending on the relevant statute. We consider below the key UK employment law protections.

Unfair dismissal

The Employment Rights Act 1996 (ERA) sets out many key employment law rights, including

The precise territorial scope of UK employment legislation differs depending on the relevant statute.

the right not to be unfairly dismissed. ERA is silent as to its territorial scope, meaning this has been left to the courts to determine. Through case law, there are four categories of employee who can receive unfair dismissal protection:

1. **Employees ordinarily working in Great Britain** This category will cover employees ordinarily working in Great Britain (i.e. Scotland, England and Wales but not Northern Ireland) at the time of their dismissal, including those who work for overseas employers. Identifying such employees is generally quite straightforward.
2. **Peripatetic employees** Employees who travel frequently for their work will be protected by ERA if their base is in Great Britain. The employee's base is determined by looking at what happens in practice as opposed to what the contract says. Relevant considerations will include where the employer has its headquarters, where the employee's travels begin and end, the location of the employee's home, where and in which currency the employee is paid, and whether the employee is subject to tax and national insurance in the UK.
3. **Expatriate employees** Employees working and based abroad, who were recruited in Great Britain by a British company, are not necessarily protected by ERA. However, they may be protected in some circumstances. For example, where the employee is posted abroad for the purposes of business carried on in Great Britain, such as a foreign correspondent for a British newspaper or an employee working for a British employer operating within an expatriate enclave abroad.
4. **Employees with a sufficiently strong connection with Great Britain** This final category will catch anyone who doesn't fit into one of the above categories but nonetheless has a connection with Great Britain that is sufficiently strong that they should be protected by ERA. This test is very fact sensitive and it is important to consider where the employment relationship is forged, where the employee's home is, how much time he/she spends in and out of Great Britain, in what currency the employee's salary is paid, what the employment contract says, and whether the employment has a stronger connection with another country.

Discrimination

Like ERA, the Equality Act 2010 is silent as to its territorial scope. Non-statutory guidance confirms that discrimination protection will apply 'when there is a sufficiently close link between the employment relationship and Great Britain'. However, European case law also suggests that where a domestic employment right derives from EU law, the territorial scope of the domestic law should, where possible, be interpreted widely enough to give effect to the EU-derived right. On that basis, it is possible that the territorial scope of the Equality Act, and other legislation based on European directives (the Working

Time Regulations 1998), is wider than that of unfair dismissal. This means an employee who doesn't have a sufficiently close connection with Great Britain to be protected from unfair dismissal could nevertheless be protected against discrimination, or be able to raise a holiday pay claim in a UK tribunal, for example.

The test as to whether a particular employee is protected by UK statutory employment law is very fact sensitive, and it is not possible to have a 'one-size-fits-all' approach to an entire workforce.

Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

TUPE applies to any business transfer or service provision change when the undertaking, or organised group of employees, is situated in the UK immediately before the transfer. TUPE provides basic protections to employees, including protection from dismissal. TUPE applies even if the transfer is governed by the law of another country.

TUPE does not apply to a transfer into the UK from another country. However, transfers from other EU member states may be covered by local legislation implementing the Acquired Rights Directive (the EU Directive which TUPE implements in the UK).

Step two: jurisdiction of the UK Employment Tribunals

As well as establishing the right to bring a claim under a relevant piece of legislation, an international employee must also establish that an Employment Tribunal has jurisdiction to hear the claim. The Employment Tribunals in England & Wales or Scotland have jurisdiction to hear claims if any of the following conditions are satisfied:

- The employer resides or carries on business in the relevant part of Great Britain;
- One or more of the relevant acts complained of took place in the relevant part of Great Britain;
- The claim relates to a contract under which the work is or has been performed partly in the relevant part of Great Britain; or
- There is a connection between the claim and Great Britain, and that connection is at least partly a connection with the relevant part of Great Britain.

Due to this final aspect of the jurisdiction test in particular, most cases which come within the reaches of UK statutory employment law are almost certain to come within the jurisdiction of an Employment Tribunal in England & Wales or Scotland.

Practical points

Once the employee has established a right to bring a claim in the UK tribunals, the question can arise as to whether to present a claim in Scotland or England

& Wales. This is normally determined by practicality. Claims raised online will normally be allocated to the tribunal located closest to the employee's workplace. However, the employee has the option to raise the claim in another tribunal. The slight differences in procedure north and south of the border may have some bearing on those decisions, for example, the employee may feel they would benefit from the more extensive disclosure rules used in England & Wales. We may also see an increase in jurisdiction shopping within the UK if the Scottish Government's proposal to abolish tribunal fees in Scotland is enacted so that a fee is required to litigate in England & Wales but not in the Scottish Tribunals.

Summary

The test as to whether a particular employee is protected by UK statutory employment law is very fact sensitive, and it is not possible to have a 'one-size-fits-all' approach to an entire workforce. Each case must be determined on its own facts. Employers should simply be aware that their international employees may be protected by certain aspects of UK employment law and advice should be sought on a case-by-case basis.

Chapter Two
Employment contracts

Employing someone to work overseas or who will be travelling extensively in their role brings with it a number of unique challenges. In this chapter we focus on preparing employment contracts for employees who will work internationally, and dealing with contractual disputes that may arise.

What should the contract include?

As with any employee, the key commercial terms should be included in the employment contract. This will include rates of pay, holiday entitlement and other benefits. When there is an international element it is also important to set out the position on currency, any travel expenses and work location. Under UK law, employers must specifically state in the contract if an employee is expected to work overseas for more than one month in the year. Data protection law varies across jurisdictions so the contract should be drafted to enable you to process personal data and other information as necessary and comply with any other obligations you have. Employers should also give careful consideration to protecting their business by including appropriate confidentiality provisions, intellectual property protections and restrictive covenants. The next chapter will focus specifically on restrictive covenants in international employment contracts.

Which country's law should you choose?

When drafting an international employment contract, certain clauses that may otherwise be thought of as 'boilerplate' suddenly become more complex. Perhaps the most significant are the choice of law provisions. While the parties have some freedom to choose the law that will apply to the contractual terms, certain statutory employment protections may continue

In contracts with an international element, selecting the governing law becomes more important.

to protect the employee by virtue of them working in, or their employment having a connection with, a particular country. The UK statutory protections were discussed in Chapter One.

Laws of the UK

Within the UK, employers may already take some time deciding whether to use the law of England & Wales, or Scotland. While this different choice of law can occasionally lead to different outcomes in respect of contractual disputes, employment law is generally very closely aligned across the UK and as such, the appropriate choice of law will often be that of the country where the employee usually works.

International contracts

In contracts with an international element, selecting the governing law becomes more important. We have a few tips on where to start when deciding which law to use:

- Firstly, it can simplify matters to align the law of the contract to the statutory regime most likely to apply. Any dispute is then likely to be less costly to manage. It can be difficult to determine in advance which statutory regime(s) will apply and advice should be taken. However, as a rule of thumb, the place the employee will primarily work is often a good starting point.
- Secondly, it is important to consider what statutory regime you would *like* to apply. By choosing the law of a particular country, you can increase the likelihood of the statutory regime of that country being deemed to apply by strengthening the overall connection of the employment relationship with that country. You have also actively agreed to the contract being interpreted in accordance with the laws of that country. It is important to be aware that this could result in certain provisions being incorporated into the contract. For example, the implied term of trust and confidence and the pay equality clause are likely to be read into the contract if parties opt for the contract to be governed by Scots law or the law of England & Wales. As such, it is important to think about these implications when selecting a choice of law.
- Finally, you should ensure that both parties are comfortable with the choice of law. This may involve considering factors such as knowledge of the law of that country and the pros and cons of applying it. Employers may wish to use standard contracts across their organisation, and as such, feel more comfortable opting for the same law as they do on the majority of their other contracts whenever appropriate.

While the contractual choice of law is important, it only forms part of the picture.

Employment law is designed to ensure that employees are protected and as such, any choice of law provision cannot normally be used to derogate from or dilute any *statutory* employment rights that the employee would otherwise have.

Special jurisdiction rules apply to employment contracts in order to protect employees.

Jurisdiction issues: where can a claim be brought?

The jurisdiction clause is separate to the choice of law clause. When choosing jurisdiction, you are deciding which country's courts and tribunals should deal with any disputes which arise in respect of the contract. While this will often match the choice of law clause, it does not need to. In most commercial contracts, parties are free to decide on the jurisdiction they would like to select, regardless of the substantive law of the contract. As with the choice of law issues discussed above, the question of which court has jurisdiction to hear disputes about the employment contract is separate from the issue of which court may have jurisdiction over statutory employment claims, as discussed in Chapter One.

European jurisdiction rules

Special jurisdiction rules apply to employment contracts in order to protect employees. In general, if the employee is domiciled in the EU, then the Recast Brussels Regulations can apply to determine which EU member state has jurisdiction to hear claims relating to the contract, in many cases even overriding any explicit jurisdiction clause in the employment contract. The employment relationship is widely defined and can, for example, include rights under share incentive schemes in addition to traditional employment relationships. As such, it is always very important to take legal advice when dealing with a dispute to determine what the correct jurisdiction is as it is not possible to assume that the jurisdiction clause in the contract can be relied upon.

The appropriate jurisdiction as governed by the Recast Brussels Regulations depends on the specific circumstances. In cases where there are only two parties to the dispute, the rules are as follows:

- If the **employer** is raising the claim, they must raise it in the EU member state where the employee is domiciled. The only exception to this rule is when the employee has already raised a claim and the employer wishes to raise a counter claim, in which case the employer can raise the counter claim in the same jurisdiction as the initial claim. It does not matter what the contract says in respect of jurisdiction when the employer is raising a claim or counterclaim.
- If the **employee** is raising the claim, they can choose the jurisdiction from the following:

- If the employer is domiciled in the EU, the member state where the employer is domiciled. The domicile of the employer can be its registered office, but can include other locations such as its central administration or principal place of business.
- The member state where (or from where, for example a base office or depot) the employee habitually works if any, or the last place in which he did so.
- If the employee does not (or did not) habitually carry out his work in one country, the member state in which the business which engaged the employee is situated.
- The courts specified in any jurisdiction clause contained within the contract (whether that is an exclusive or non-exclusive jurisdiction clause).

You can see that in cases where the Recast Brussels Regulations apply, the only party who can ever rely on a contractual jurisdiction clause is the employee. If the Recast Brussels Regulations do not apply, for example, where an employer wishes to sue an employee who is not domiciled in a member state, then they may have to do so in line with the contract of employment, or any other international rules on jurisdiction that could apply to the relationship.

It is understandable to wonder whether it is worthwhile including a jurisdiction clause at all in circumstances where the Recast Brussels Regulations apply. Certainly, its presence can be misleading. Parties may assume that the jurisdiction clause is valid and take action to raise proceedings in that location, only to find that they are not entitled to do so. However, there will be situations where legally it is unclear where a dispute should be raised. Including a jurisdiction clause can often provide a starting point and access to a potential forum. As an employer, you may wish to include a jurisdiction clause to encourage the employee to raise proceedings in a convenient forum for your business. If there is an international element, you should take legal advice on the correct jurisdiction for disputes and be aware that the contract may not contain the complete answer.

Enforcing judgments

Once you have a judgment from a court or tribunal, you may then face a further challenge of enforcing that judgment where it really matters, being where the losing party's funds are located. There are a number of international conventions which can assist parties trying to enforce judgments across borders. This can be challenging enough when you are trying to recover money from the other party, however, enforcing restrictive covenants to protect a global business can be even trickier. We will consider this issue in the next chapter.

Chapter Three
Restrictive covenants

As your business grows internationally, protecting it becomes more complicated. The approach taken to restrictive covenants can differ hugely depending on the country you are operating in. Some areas, like the UK and most of Europe will enforce reasonable restrictions, while other jurisdictions, including several states in the USA, are far more reluctant to do so. In this chapter we consider how to limit unlawful competition and protect your client relationships and information in an international context.

Do you need restrictive covenants to protect your business?

Before imposing restrictions on employees, consider whether they are necessary. For junior employees or those with limited access to business critical information/connections you may decide against them. Alternatively, the sector you operate in may not tend to use restrictions and insisting on these could discourage candidates from joining you. Restrictive covenants are normally considered at the outset of the employment relationship and should be kept under review and re-stated when necessary to ensure that they remain fit for purpose.

Garden leave provisions are often used alongside restrictive covenants, as another way of protecting your business while the employee is under notice. An employee on garden leave remains employed on full pay and is bound by their duties as an employee, but you can restrict their activities by excluding them from work premises and preventing them from dealing with customers, clients, suppliers or competitors. However, in some jurisdictions, including a number of states in the USA, garden leave provisions are prohibited, often because they are seen to breach the principle of 'employment at will'. Don't assume that you can rely on garden leave clauses in all countries.

If your business operates globally, you may wish to restrict employees' activities across the globe too.

What do you need to protect?

In the UK, and many other jurisdictions, the court's starting position is that restrictive covenants are unenforceable as a restraint on an employee's ability to trade, unless they are necessary to protect the business. Therefore, to maximise the enforceability of the restrictions, they must be tailored to the individual and kept as narrow as possible. Common restrictions include post-termination prohibitions on competing with the company, working with your suppliers, customers or clients, and poaching your employees. The extent to which each of these is relevant will depend on the nature of your business, the sector you operate in and the role of the employee.

How long do you need to be protected?

If a restriction lasts too long (in the eyes of the court) it will not be enforceable at all under UK law and similar rules apply in many other jurisdictions. You should consider not only how long you would like a particular restriction to last, but also what makes that time period necessary to protect your business interests. For example, if supplier contracts are negotiated twice a year, a nine-month restriction on dealing with suppliers may be appropriate. Just because a period is appropriate for one type of restriction, does not mean it should be used for all.

Where do you need the protection?

If your business operates globally, you may wish to restrict employees' activities across the globe too. However, some common problems can arise:

- Firstly, in many jurisdictions non-compete restrictions are unenforceable. For example, in California it is extremely difficult to enforce such a restriction. However, just because a restriction may not be enforceable, doesn't mean you shouldn't include it: even unenforceable restrictions can deter employees from acting in a certain way.
- Secondly, restrictions must be reasonable. While the business may operate globally, it is less likely that the individual employee will. Consider which territories are relevant to the particular employee and ensure that restrictions are not so onerous they are held to be unenforceable. In some (probably rare) cases, a worldwide restriction will be reasonable, for example where work relates to technology where the market is very much a global one.

How to draft the restrictions?

Taking legal advice is recommended when drafting restrictive covenants. This is particularly important when you have employees working internationally. Often the first consideration is whether to use one contract to document all

the restrictions across many jurisdictions, or whether to enter into a number of separate agreements. As a rule of thumb, using one agreement may initially be favoured by parties as it is simpler and more likely to tie in with the style of the contract normally used across the business. However, there is a risk that in trying to make one agreement work in a range of jurisdictions, you may end up with a compromise which does not offer sufficient protection in any jurisdiction.

Enforcing a restrictive covenant often involves acting quickly to prevent a breach or limit the damage.

Which law should you choose?

If you have opted for separate agreements for each country, then you will have the freedom to choose the most relevant law for each agreement after taking local advice.

If you are incorporating global restrictions into one agreement, then the appropriate choice of law may not be obvious. UK law permits restrictive covenants provided they restrict the employee no more than is necessary to protect the legitimate interests of the business. However, the law in some other countries is less flexible.

While employees may need to work in areas where restrictions cannot be enforced, you can ensure that you do not select these laws to govern your global contract.

How do you enforce the restrictions?

Enforcing a restrictive covenant often involves acting quickly to prevent a breach or limit the damage. If the dispute cannot be resolved by agreement, and/or by the employee signing an undertaking, court action may be necessary. Where there are international issues to consider, this can become far more complex.

Single jurisdiction

The simplest situation is where everything relates to one country: for example, a UK employee is restricted from competing with your business in the UK under a contract governed by UK law. In these circumstances, the employer would commonly seek an interim order from the relevant courts in the UK to prevent the employee from breaching the restrictions pending a full hearing on whether the restriction is enforceable, and whether it has been breached. If there has been a breach the court will issue a judgment on that basis. If the employee continues to ignore the restrictions and/or breaches a court order, the employer can take steps within the UK to enforce that order or claim damages for the breach. Penalties for breaching a court order can include fines and even imprisonment. While each country's court system will have different procedures, costs and timescales, many follow a similar format.

Cross-border litigation

The legal process becomes far more complex where there is a cross-border element. For example, a US company may employ a UK national to work in their London office under an employment contract governed by the laws of Massachusetts. The court will need to determine whether it has jurisdiction to hear the claim. Even if it does, it may need to hear evidence from an expert in the governing foreign law (Massachusetts in our example). This can significantly add to the time and expense of proceedings.

Enforcing the court's judgment

Enforcement is likely to be relatively straightforward in the jurisdiction where the judgment of the court was given. However, it is not uncommon for an employer who receives a court order in one jurisdiction, to want to enforce it in another. For example, a UK court may decide that an employee is restricted from working for a competitor business anywhere in the world for a set period. If the employee ignores this and takes a job with a foreign competitor, the employer is then faced with the problem of enforcing the UK judgment in a foreign jurisdiction.

Employers should consider whether it is practical to take enforcement action via the relevant courts in the UK, and if not, how to enforce the judgment overseas. International agreements between various countries govern whether and how to enforce foreign judgments within certain territories. The first step is to determine if such an agreement exists between the country where the judgment was delivered, and the country in which you are seeking to enforce it. Even if such an agreement exists, if the right that you are trying to enforce is not one recognised by the country in which you are trying to enforce it (for example, a country which does not recognise the concept of restrictive covenants) you could be left without a remedy as the court may not be prepared or required to uphold the judgment of the foreign court to prevent a person engaging in what would otherwise be legal conduct within their territory.

Summary

To help protect your business, it is worth carefully considering restrictive covenants at the recruitment stage; having a rough plan of how you would react to a breach (and before which country's courts); and seeking international legal support so that you are aware of any potential pitfalls well in advance. Restrictions should also be reviewed on promotions/changes in role. Don't be discouraged from trying to protect your global business, just make sure you know how to do it effectively.

Chapter Four
Employment checklist

Expanding your business into a new part of the world is an exciting but often uncertain time. In this chapter, we explain the key questions you should consider and provide a quick checklist of things that an employer should think about when engaging individuals overseas. The next chapter focuses on seconding an existing employee abroad.

Who should the employer be?

Consider who the employer will be. In some jurisdictions, the employing entity may need to have its registered office in that country. There may be knock-on tax consequences: if you have an employee or agent in a country this can create a 'permanent establishment' for corporation tax purposes. You may need to register with local employment tax authorities and time should be factored in to do so. In each case, seek advice on the relevant local laws and any double taxation arrangements.

Are there any immigration issues?

If the employee will not be a national of the country that you are employing them in, think about visa and immigration requirements. Take advice on whether there are any local restrictions on hiring or recruitment activity. Third party permission may be required before you can advertise and recruit for the post or you may need to notify local agencies. Some countries offer grants or incentives to employers who hire people with disabilities or young apprentices, for example, and depending on who you are planning to employ in that country, you may wish to look into the availability of this type of support.

Another key issue is choosing which law will apply to the contract and which country's courts should have jurisdiction bearing in mind that local laws may take precedence over the terms of any employment contract if there is a conflict.

What might the employment contract look like?

In some countries, a written contract is mandatory and may need to include specified information or be drafted in the local language. Consider whether you want to use a standard contract in your business across all jurisdictions (with local variances) for greater consistency, or if it would be more appropriate for local lawyers to prepare a standard contract for each jurisdiction. Another key issue is choosing which law will apply to the contract and which country's courts should have jurisdiction, bearing in mind that local laws may take precedence over the terms of any employment contract if there is a conflict. Chapters Two and Three consider these points in detail.

Checklist of employment terms

When employing in different jurisdictions think about the following points as different issues will arise depending on the country you have chosen to operate in.

✔ Pay and benefits

Consider the currency in which you are paying the employee and whether there are any logistical problems for your payroll in using that currency or paying into a foreign account. Think about the rate of pay and whether a minimum wage applies countrywide, or is dependent on factors such as region, age or industry. If there are discrepancies in wage levels between your home state and overseas, consider whether to pay consistently with your home state or adopt local pay levels. In any case, research the local industry norms. You may also be expected or required to put in place benefits such as healthcare.

✔ Pensions

Investigate whether you need to contribute to a state run or other local mandatory pension scheme and if so, the minimum level of such contributions. Check your pension scheme rules to establish whether employees from overseas can participate in the scheme. Confirm whether such participation would have implications for the funding of the scheme and consider the tax implications of membership for both the employer and employee. Allow time to discuss international issues with your pension provider and to put in place any additional arrangements that may be required.

✔ Share incentives

If you operate a share incentive scheme that you would like the employee to participate in, check if the rules of that scheme need to be adjusted to take account of the particular requirements of the relevant jurisdiction. You should also assess whether any local registration or securities law issues arise.

✔ Tax and deductions

Take advice on the local tax position early on. Logistically, you may need to go through a process of registering as an employer for tax. You need to know how much tax the employer and employee is expected to pay and how this is deducted (for example, whether the employer needs to make deductions at source before paying salary). Check whether there are other contributions that you must make on behalf of employees, for example, social security payments. As explained above, even having one employee in a foreign country can create a tax presence and corporation tax liability for your business.

Take advice on the local tax position early on. Logistically, you may need to go through a process of registering as an employer for tax.

✔ Working pattern

Operating across multiple jurisdictions may involve navigating different time zones. Don't assume that 9 to 5 Monday to Friday will be the norm: for example, in the UAE the standard working week is Sunday to Thursday. There may be minimum rights to rest breaks and legal caps on weekly working hours, particularly across many European countries.

✔ Leave entitlements

Minimum annual leave entitlements can vary significantly. For example, in the USA employees often only take two weeks of holiday per year and may have no legal minimum entitlement. American employers may be surprised by the more generous annual leave entitlements across Europe where four weeks is the minimum, with many member states, including the UK, offering more. Annual leave may also vary by industry, type of work being carried out and length of service of the employee. Public holidays may be set nationally or vary by region. You should check whether it is common for employees to work on public holidays and if so, whether this attracts a higher rate of pay. In some countries, it is common for certain sectors to shut for seasonal holidays in the summer or winter.

Sick leave and pay entitlements may also apply and you should check whether sick pay can be recovered from the government of the country in question.

Family-friendly leave and pay (such as maternity, paternity and parental leave) will also vary from country to country with some offering no leave, and others guaranteeing up-to a year. You may wish to compare local statutory provisions with any existing organisational policy and decide whether to extend your organisational policy to this employment contract, or to apply the local legislative requirements.

✔ Collective agreements

In some countries, sector-specific collective agreements are in place containing minimum employment terms. It is important to identify these from the outset to ensure that you meet any such requirements.

✔ **Data protection and intellectual property**

Data protection law varies across jurisdictions so the employment contract should be drafted to enable you to process personal data and other information as necessary and comply with any other obligations you have. Employers should also give careful consideration to protecting their business by including appropriate confidentiality provisions, intellectual property protections and restrictive covenants.

How do you end the employment relationship?

You should find out whether there are any country-specific requirements around ending the employment relationship, and what grounds you might be able to rely on to dismiss.

Are there any statutory requirements?

You should check whether there are statutory minimum notice periods. Legislation governing employee protection from dismissal may also exist: in Italy, for example, certain types of employees are automatically protected from dismissal (apart from in exceptional circumstances) and you should check whether any such protections apply to the employment you are seeking to end. It is also important to check what procedural requirements may apply. For example, there may be rules governing how to communicate with the employee and any relevant third parties who may need to approve, or be given notice of, a dismissal decision. In some jurisdictions you will need to consider alternatives to dismissal.

Are any payments required to end the employment relationship?

In some cases, you may need to make a termination or severance payment, particularly if the employment is being terminated by reason of redundancy or without cause. There may be a mandatory procedure to follow to comply with local laws. Additionally, there may be other obligations on an employer once an employee has been dismissed: for example, French legislation requires an employer to notify the state to allow the employee to claim benefits.

You may not wish, or need, to hire someone directly in a foreign jurisdiction in order to do business there. In the next chapter we consider foreign secondments.

Chapter Five
Secondments

As commerce and global markets expand, employers are increasingly deploying members of their existing workforce overseas. This chapter outlines some issues to think about when considering seconding an employee to a foreign jurisdiction on a temporary basis.

Who is the host?

The host is the organisation that the employee is being sent to. This could be another member of the employer's group (internal) or a separate organisation (external). It would be prudent to use a formal secondment agreement for internal secondments, and it is essential to do so for an external secondment. Your agreement with the host should set out what your obligations will be towards each other and toward the employee during the secondment. You should take advice on what local employment laws may apply whilst the employee is working overseas.

In addition to entering into a secondment agreement with the host, an agreement with the employee is normally required. This should set out any new terms which will apply during the secondment. Often this will be done by way of a letter or agreement between the employer and employee. However, in some cases the employee may instead be asked to sign up to the secondment agreement between the employer and host meaning that all of the relevant provisions are contained within a single document. This may not be appropriate if the employee is not or should not be privy to the underlying commercial arrangement between you and the host.

Practical arrangements governing the secondment

Whether you are dealing with an international secondment or a local one, some key practical and

For a secondment overseas you should consider whether to continue paying in the home currency, or whether to change to the local currency for the duration of the secondment.

commercial arrangements would commonly be documented, including the role of the employee while on secondment and the commercial agreement regarding whether the host will be paying a fee to the employer, for example, to cover the cost of the employee's salary. Specific issues also arise when sending an employee on an international secondment as set out below.

Location

You should be clear about where the employee will be working from. While with a local secondment, it may be that an employee continues to work from your site or from home, it is far more likely that the employee will work from the host's site in an international secondment. You should consider whether the employee will need to be mobile from that base.

Duration

As with a local secondment, you should specify the intended duration of the secondment, any notice provisions to terminate the arrangement and importantly, what will happen when it comes to an end. The intended duration (and intention that when the secondment ends the employee will ultimately return to you) can have a bearing on the tax treatment of salary and other payments, and as such, you should take advice on this at an early stage. In an international secondment, the duration can take on a greater significance as the period of time that the employee will be working abroad can have visa implications as discussed below.

Working pattern

You may need to consider practical factors, such as time zones or different weekly working patterns. The impact this has on day-to-day business will vary depending on how you wish to maintain contact with the employee during the secondment.

Pay

For a secondment overseas you should consider whether to continue paying in the home currency, or whether to change to the local currency for the duration of the secondment. Advice should be taken on any logistical, or tax issues that may arise as a result of doing so. For example, you should check that the payroll is able to process payments in foreign currencies and/or to foreign bank accounts. You may also wish to consider whether a change in salary or provision of additional allowances might be appropriate during the secondment, on the basis of increased living costs or out-of-pocket expenses and the employee may require protection against currency fluctuations. The question of who covers the costs of any such uplift is normally a commercial decision to be taken between the employer and host.

Benefits and insurance

You should consider whether the employee is still eligible to participate in any bonus, pension, share incentive and other benefit schemes operated by the employer while posted overseas and whether the secondment will have any impact on existing benefits already accrued. If they do remain eligible to participate, think about steps you may need to take to ensure that benefits remain in place as intended. You should also consider whether any additional benefits may be necessary (or desirable) dependent on the host country. For example, while medical insurance may not be required in the UK, it may be far more important in some other countries. You may even want to consider paying for language lessons.

It is important to start thinking early on about what needs to be done to ensure the employee has the right to legally work in the chosen country.

Tax implications

As already explained, you should take advice on the tax implications of seconding an employee overseas. The secondment may give rise to a presumption of tax residency for the employee in the host country. Additionally, as an employer you may be liable for corporation tax due to the presence of your employee in that country. You should also consider whether national insurance/social security contributions will continue to be due in the home country for the duration of the secondment.

Personnel management arrangements

As with any secondment, it will be important to clarify management arrangements, including day-to-day line management. This will include things like annual leave requests, sickness reporting and ongoing performance management. It may be more practical for day-to-day line management to be carried out by the host employer.

Data protection and intellectual property

Data protection law varies across jurisdictions so you should consider steps you may need to take to enable the host to process personal data and other information in compliance with the law. You should also give careful consideration to whether you need to take any additional steps to protect your business's confidential information during the secondment.

Making it happen

There will also be a number of logistical considerations including:

Immigration, visa and work permit requirements

It is important to start thinking early on about what needs to be done to ensure the employee has the right to legally work in the chosen country. You should be clear about where responsibility lies for making the necessary arrangements

and gaining the necessary permissions for entry into and right to reside and work in the host country. In some cases, even short-term secondments or business trips can potentially give rise to visa requirements. You should decide who is liable for payment of any fees associated with this. It is also important to build in time for acquiring the relevant permissions or permits. Finally, you should think about how you will manage any breaches by the employee (or host) of any immigration or visa requirements.

Relocation expenses

Take time to think about the full cost of relocating the employee and decide commercially who is covering that cost. In some cases, costs may include relocating whole families and paying for accommodation, school fees and family benefits. Alternatively, you may decide to cover the costs of regular trips home or trips for family members to visit the employee.

The end of the secondment

As with all secondment arrangements, you should be clear about what will happen when the secondment ends. This is likely to include the costs associated with the employee (and family) physically moving home again. It will also be important to consider how the employee will re-integrate into your business and how you can make the most of the stronger connections that the employee may have with the host organisation and any new knowledge they may have gained while on secondment. If you have particular concerns about the host potentially poaching the secondee, then it can help to set out in the secondment agreement with the host any restrictions on them offering a role to the employee during the secondment or on the employee accepting a role with the host within a certain period after the secondment ends.

You will find that many of the considerations associated with managing an overseas secondment are consistent with those for a secondment that is within the UK. However, taking local advice on what may happen in the country that the employee will be seconded to will help to ensure that any overseas secondment is managed effectively. By using our international network we can provide appropriate local advice around the world.

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Chapter Six

International employees working in the UK

In the final chapter of our *Going Global Guide*, we look at the key points employers should bear in mind when seeking to recruit overseas employees to work for them in the UK. Given the free movement of workers within the European Economic Area (EEA), candidates from within the EEA can take up employment in the UK in the same way as a UK national. However, where you are seeking to harness skills from the wider global market, it is essential to be aware of UK immigration rules.

The basics of UK immigration rules

The UK immigration system relies on UK employers to police immigration by making them responsible for ensuring that their workers have the right to work in the UK. Whilst this chapter focuses on hiring individuals from outside the EEA, it is worth remembering that the obligation to carry out pre-employment immigration checks applies to all new recruits. Failure to check a worker's 'right to work' status before they start could result in a civil penalty of up to £20,000 per illegal worker, and potential criminal sanctions (unlimited fine and/or up to 6 months' imprisonment) for a breach committed knowingly.

When to start thinking about immigration

Immigration can be triggered as a concern at various points of the recruitment process: for example, when you advertise a post and an overseas candidate applies, or when you already have a specific overseas candidate in mind for a particular role. It is not uncommon for employers to make an offer to (or even employ) an ideal international candidate, only to find that there are a number of immigration hurdles to jump first, potentially meaning they can't recruit that person at all. As such, we recommend that potential immigration implications are considered as early as possible in the recruitment process.

The UK immigration system relies on UK employers to police immigration by making them responsible for ensuring that their workers have the right to work in the UK.

What do you need to think about first?

Does the candidate have permission to work in the UK already?
They may have a right to work in the UK if they are a British citizen, EEA national or potentially through Commonwealth ancestry or other family connections. Alternatively, they may already be resident in the UK under one type of visa which they are able to 'switch' to another category allowing them to work in the UK.

How long do you want them to come to the UK for and what will they do?
If the individual is coming to the UK on a temporary basis for a business reason, but not to work, a visitor visa (which recently replaced the 'business visa') may be the most appropriate route. A visitor visa now permits a number of business activities, including: delivering training, attending meetings and holding negotiations.

Which immigration route is most suitable?
High net worth individuals may be able to obtain a visa to work in the UK under Tier 1. However, the main employment categories are Tier 2 and Tier 5, which are split into further sub-categories. Tier 2 (general) applies to skilled workers and is likely the most common. If you are part of a multi-national organisation, take care not to assume that employees are free to come to the UK and work in the UK office or branch by virtue of the group-company link. There is a separate visa category for intra-company transfers (see below).

What does immigration law require employers to do?

We have outlined below the main obligations which apply to an employer looking to recruit from outside the UK, including: becoming a sponsor, issuing certificates of sponsorship and satisfying the resident labour market test.

Sponsorship
In order to obtain a Tier 2 (general) visa, a prospective employee coming to the UK to work will need to be sponsored by their new employer. Therefore, if you are recruiting from outside the EEA for the first time, you must register to become a sponsor. The registration process can be completed online and requires you to satisfy the enforcing body, UK Visas and Immigration (UKVI) that, amongst other things, you are:

1. a genuine employer based in the UK and operating lawfully;
2. able to comply with employment and immigration law and good practice; and
3. willing to take on the responsibilities of a sponsor.

One of the main responsibilities a sponsor holds is a reporting obligation: essentially a duty to notify the UKVI of any changes to the sponsored employee's circumstances. The UKVI are keen to make it clear that holding a sponsorship licence is a privilege, and one that they can swiftly take away. For example, they have revoked sponsorship licences from employers who failed to report that an employee's contract had terminated or who incorrectly record their sponsored employees' work addresses. Sponsoring employers should have sufficient systems, checks and balances in place to ensure that all relevant information is reported accurately and within the given timescales.

In most cases, if a suitable local candidate is found, they must be given the post even if the employer thinks that the international candidate would have been better.

Certificates of Sponsorship

As a sponsoring employer, you will be given an allocation of unrestricted Certificates of Sponsorship (CoS) which can be used at your own discretion but only in specific circumstances (for example, in respect of migrants you already employ; high earners with salaries of approximately £155k or more; and in some 'switching' scenarios).

However, the majority of prospective hires require a restricted CoS. A restricted CoS is specific to the individual applicant, so must be applied for on a case-by-case basis. Before a restricted CoS will be granted, certain criteria must be met, including the minimum skill threshold, minimum salary level, and confirmation that a resident labour market test has been completed (see further below). The UK system is points-based, and points are gained by meeting the criteria mentioned above. However, simply satisfying the minimum requirement is not always enough.

Since 2011, there has been a UK-wide limit on the number of restricted CoS that can be issued each year, broken down into monthly allocations. The threshold was reached for the very first time in June 2015 and has been reached again in subsequent months, so this trend looks set to continue. The result is that only those applicants scoring the highest number of points are making it through, meaning many businesses have been prevented from finalising appointments as planned. As posts with higher salaries attract a higher number of points, it is likely to be those at the lower end of the salary scale that may lose out if this trend continues. The key message to employers in the short term is to plan ahead, consider timing issues and salary levels in advance, and be prepared for potential delays.

Resident labour market test

The resident labour market test (RLMT) requires that employers who are seeking to fill a post, and who are considering recruiting from outside the EEA, must first advertise the post for at least 28 days, including certain details about the role and requirements, and using at least two specified advertising methods.

The aim of the RLMT is to protect the settled workforce by requiring businesses to advertise vacancies 'at home' first to give the settled workforce a chance to apply before casting their net into the wider, global market. The RLMT does not apply in all circumstances, for instance it doesn't apply to intra-company transfers, so it is worth checking or taking advice on whether one of the statutory exceptions applies.

In most cases, if a suitable local candidate is found, they must be given the post even if the employer thinks that the international candidate would have been better. A suitable candidate is any worker who has the skills and experience the employer is seeking. Therefore, employers should think carefully about the job advert, in particular the skills and qualifications required. Whilst the advert or job description cannot be structured dishonestly in order to exclude local candidates, as the vacancy and description of the role must be genuine, businesses should ensure it is not so wide such that a local candidate could meet the requirements on paper but not in practice.

Intra-company transfers

Separate rules apply to employees who are being transferred by an overseas employer to a related UK business. This route is separated into four categories: short-term staff, long-term staff, graduate trainee, and skills transfer. As noted above, the RLMT does not apply to intra-company transfers. However, minimum salary and skill levels must be met, alongside additional criteria applicable to each category. Established staff transferring on a short or long-term basis must have worked for the multinational organisation for at least 12 months before they will be permitted to work in the UK via this route.

Ongoing obligations

Once you have successfully recruited an employee from overseas, you continue to be responsible for reporting relevant changes in circumstances to UKVI and ensuring that the employee continues to hold the right to work in the UK for the duration of their employment with you.

We hope that you have found our Going Global Guide useful. If you require additional information or advice, please contact Shepherd and Wedderburn to speak to one of our experts on employment and international law.

This briefing contains a summary of general principles of law. It is not a substitute for specific legal advice.

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Key contacts

Neil Maclean
Partner and Head of Employment
T +44(0)131 473 5181
E neil.maclean@shepwedd.co.uk

Katie Russell
Partner, Employment
T +44(0)20 7429 4661
E katie.russell@shepwedd.co.uk

Elouisa Crichton
Senior Solicitor, Employment
T +44(0)141 566 7249
E elouisa.crichton@shepwedd.co.uk

Jane Wessel
Partner, International Arbitration
T +44(0)207 429 4946
E jane.wessel@shepwedd.co.uk

Claire Stockford
Partner, International Arbitration
T +44(0)207 429 4955
E claire.stockford@shepwedd.co.uk

Stephen Miller
Partner,Taxation
T +44(0)131 473 5227
E stephen.miller@shepwedd.co.uk

Rodger Cairns
Partner, Employee Share Schemes
T +44(0)131 473 5449
E rodger.cairns@shepwedd.co.uk

Joanna Boag-Thomson
Partner, Intellectual Property
T +44(0)141 566 8570
E joanna.bt@shepwedd.co.uk

Louisa Knox
Partner, Pensions
T +44(0)131 473 5216
E louisa.knox@shepwedd.co.uk

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