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# How to Launch an Employee Compensation, Bonus or Benefits Plan Internationally

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Multinationals inevitably vary their employee compensation packages—their pay rates, employee incentives, bonus plans, benefits offerings—by country of employment. It is pointless to inquire into some multinational's entry-level total compensation package for its managers, engineers, in-house lawyers, computer techs, punch-press operators, cashiers, secretaries, truck drivers or fry cooks without specifying their *place of employment*. Compensation packages for otherwise-similarly-situated staff inevitably run higher in (for example) Canada, Japan and Norway than in (say) Croatia, Jamaica and Nicaragua. Multinationals might even be said to “discriminate” in pay and benefits across borders, denying “equal pay for equal work” by linking an employee's “rewards” package to location—although of course geographical pay differentials are not *illegal* discrimination because pay equity laws do not treat overseas co-workers as comparators.

Geographical differentials in remuneration arise out of market forces and laws. Wage rates run highest in rich, developed economies with high standards of living. And employee benefits dovetail with local laws. Employer-provided medical insurance is so common in the United States because of the unique U.S. medical system. Worker profit-sharing payments and Christmas bonuses are ubiquitous in Mexico because Mexican law requires them.

Yet in recent decades business drivers have pushed multinationals to align or harmonize certain pay, bonus and benefits offerings internationally—particularly at the executive level but also as to “broad-based” or all-hands programs. In the old days, multinationals got away with locally segregating or “siloeing” their remuneration systems, but today's cross-border project teams and instantaneous internal communications motivate employers to extend certain compensation and benefits offerings across borders. (We are talking here about compensating local employees across international locations—*expatriate* pay and benefits is a different issue entirely.)

Globally integrating certain aspects of employee pay and benefits is on the front lines of international human resources integration, often the first aspect of HR that multinationals think about aligning across borders. This is because pay and benefits offerings, particularly for executives, are increasingly vital for motivating and integrating “talent” internationally. Multinationals regionalize or globalize all sorts of remuneration offerings that, back in the old days, were purely local. Examples include: cross-border equity/stock plans, global profit-sharing plans, regional sales commission plans, international sales incentive plans, cross-border variable compensation/pay-for-performance plans, multi-jurisdictional executive retention bonuses, international severance pay plans, global tuition reimbursement programs, certain insurance benefits—even company cars for executives, international employee assistance programs and global adoption expense reimbursement plans.

Sometimes it seems as if multinationals look at each element of compensation and benefits they give to headquarters staff and ask: *Why not expand this out to our people worldwide?* And indeed, this logic can make good sense. For example, the driver for a multinational's tuition-reimbursement plan may be to encourage staffers to learn more and advance their careers—a rationale that applies in Anchorage as well as in Athens and Algiers. The reason a publicly-traded company launches a broad-based equity plan is to get workers to think and act like owners—a strategy that applies equally in Boston and Brussels and Buenos Aires. An acquiring company might offer a post-merger retention bonus to retain recently acquired talent—talent retention is as important in Cincinnati as in Cairo and Caracas. Even where the business case for a certain staff payment or benefit is largely local, today's intranets, email systems and internal electronic communications can reveal to employees, almost instantaneously, what the boss gives overseas counterparts. Launch a new bonus pool, a new pay-for-performance program or a new severance pay plan for your team in Denver and expect your staff in Dubai and Dublin to ask: What about us?

But harmonizing pay, bonuses and benefits across different markets and legal systems requires a proactive, strategic and legally-compliant approach. According to a compensation consultant speaking back in 2009:

Today's multinational employer is evolving into the transnational of tomorrow ...[B]enefits professionals are implementing global benefits strategies (GBS). Yet, in recent surveys in which I have participated, nearly 78% of multinational firms have no formal international employee benefits strategy!<sup>1</sup>

Where a multinational has a business case for internationally expanding some element of compensation or some employee benefit, the mechanics of launching and funding the international “reward” inevitably get complex. Every country on Earth regulates many aspects of employee pay and benefits locally, and laws on remuneration can clash across national borders. Whenever a multinational launches, expands, improves or updates some border-crossing pay, bonus or benefits “scheme”—and certainly whenever the multinational amends, *reduces or discontinues* a crossborder plan—the organization needs to identify and overcome a list of legal obstacles in all affected jurisdictions.

To launch or even just update any new pay, bonus or employee benefits offering internationally, consider developing a strategy on 15 legal-compliance sub-topics that come into play:

1. Business case
2. Tax treatment
3. Local foreign laws
4. Payor entity
5. Ripple effects on other pay
6. Definitions
7. Eligibility criteria
8. Labor consultations
9. Vested rights
10. Acknowledgements, consents and covenants
11. Old plan documents
12. Clawbacks
13. Choice-of-law and arbitration clauses
14. Translations
15. Data privacy compliance

If the strategic analysis reveals that expanding the offering internationally is viable, the employer can turn its strategies on these topics into a step-by-step project plan for launching or updating the envisioned compensation or employee benefits program across all affected jurisdictions in a way that clears the various multi-jurisdictional legal hurdles.

**1. *Business case: Is the business case for extending this pay/benefits offering internationally compelling enough to offset the compliance challenges?***

International compensation and benefits plans are inevitably expensive. Be sure the one under consideration is worth the money. Before expanding any element of compensation or employee benefits beyond its indigenous (home) market, consider whether internationalizing the program makes enough business sense to justify the expense—including the compliance costs. That is, before deciding to extend any element of staff remuneration across borders, identify a business and HR case compelling enough to support not only the direct costs of the offering but also the indirect costs of the various cross-border compliance steps we discuss here.

U.S.-headquartered companies might assume that the same reasons they offer certain benefits to American staff extend, as well, to staff abroad. Sometimes they do. But other times, American-style remuneration programs are not as relevant in overseas locales, skewing the cost/benefit analysis. Consider four examples: medical insurance; equity compensation; employee assistance programs; and severance pay plans.

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<sup>1</sup> D. Bryan, “Creating a Global Benefits Strategy,” Int'l HR Forum, Nov. 25, 2009.

- **Medical insurance (including vision plans, dental coverage, prescription drug coverage and disability insurance):** Supplementary medical insurance and other medical benefits can be unnecessary in countries with adequate government-provided health care. In Finland, for example, “all Finns are covered for all essential medical care automatically, regardless of employment or income”—“without anyone ever having to sign up for or buy health insurance unless he wants additional coverage.”<sup>2</sup>
- **Employee assistance programs:** Employee assistance programs tend to go underused in markets where this benefit is unknown and employees are suspicious of employer programs that intrude into sensitive aspects of their personal lives. And local medical systems may duplicate plan benefits.
- **Equity compensation:** Employees may undervalue equity compensation (stock options, restricted stock, phantom stock, stock purchase plans and the like) in certain underdeveloped markets where workers expect all compensation to be fixed and where local securities markets are underdeveloped and untrusted.
- **Severance pay plans:** Severance pay plans can make a lot more sense in the U.S., where law does not mandate any severance pay whatsoever, than in countries like Argentina, Brazil, France, Spain and so many others where statutory severance pay mandates run high. A severance plan may be pointless where local severance law requires more pay than the plan.

Multinationals based *outside* the U.S. face analogous issues and should also identify a compelling business and HR case for any employee benefit they might consider globalizing. For example, Continental European-based multinationals often give or lease company cars for their European executives—Europeans managers often expect company-provided vehicles, which can be tax-advantageous in Europe. But in markets like Canada and the United States, where this benefit is subject to income tax, benchmarking and tax analysis may militate against providing a benefit so expensive. Of course, few Canadians or Americans turn down a free car—which is why many North America-based executives working for European-headquartered companies drive employer-provided vehicles.

Think through the business and HR case for expanding any compensation or benefits program internationally. Are the reasons this particular offering makes sense at headquarters equally compelling abroad? If the case is strong in some but not all relevant jurisdictions, consider retaining flexibility to carve the less-compelling locales out of an otherwise-global plan.

## 2. **Tax treatment: How will foreign tax treatment affect this pay/benefits offering?**

We mentioned that whether a company car is a viable employee benefit depends in part on the applicable tax treatment of this particular benefit. Before deciding to extend any remuneration offering across borders, understand comparative tax treatment—how tax laws across relevant jurisdictions treat the offering. Consider tax treatment both for the employer grantor (deductibility) and employee beneficiaries (taxability). Factor tax treatment into the threshold decision of whether to launch the plan internationally in the first place. Consider two examples: retirement plans and equity plans.

- **Retirement plans:** Multinationals sometimes seek counsel as to whether a U.S. employer can let a non-U.S. employee participate in its 401(k) retirement plan. Usually the answer is: *Sure you can, if the plan terms allow.* But at that point the organization needs to ask the vital follow-up question: *Do non-U.S. differences in tax treatment defeat the purpose of offering a 401(k) to a foreign participant?* The *raison d’être* of a 401(k) drops out pretty much entirely as to a participant who is not a U.S. taxpayer. A 401(k) plan, by definition, is a creature of U.S. tax law under §401 of title 26 of the U.S. Code. The tax advantages that spawn these plans apply only to U.S. taxpayers. According to the U.S. IRS website “401(k) Plan Overview” webpage:

<sup>2</sup> Anu Partanen, “The Fake Freedom of American Health Care,” New York Times, Mar. 19, 2017.

Generally, deferred wages (elective deferrals) are not subject to [U.S.] federal income tax withholding at the time of deferral, and they are not reported as taxable income on the employee's individual income tax return. 401(k) plans are permitted to allow employees to designate some or all of their elective deferrals as 'Roth elective deferrals' that are generally subject to taxation under the rules applicable to Roth IRAs. Roth deferrals are included in the employee's taxable income in the year of the deferral.

If you let an Argentine, a Belgian, or a Chinese employee who is not a U.S. taxpayer participate in a 401(k), employer contributions are likely fully taxable at grant under Argentine, Belgian, and Chinese personal income tax laws. Even if Argentina, Belgium and China happen to offer 401(k)-like provisions in their own tax codes, your American 401(k) plan does not qualify under them (unless you already took affirmative steps to qualify your 401(k) outside the U.S.).

- **Equity plans:** Foreign tax treatment for both an employer grantor and employee grantee gets particularly complex as to employee equity or stock plans. Different jurisdictions tax equity grants in different ways and at different times (at grant, at exercise, at vesting). Tax treatment to the employer/grantor can also differ from country to country. One issue is that the grantor of an equity plan is often the headquarters-incorporated identity, which tends not to be a taxpayer filing its own corporate tax returns in foreign jurisdictions, because it operates abroad through locally-incorporated subsidiaries.

Understand how tax laws outside the United States would treat any would-be international compensation or benefits program. Look into tax treatment both to the employer-grantor and to employee-beneficiaries. Decide whether foreign tax treatment defeats the underlying purpose of the offering. Even if it does not, decide whether foreign tax treatment defeats the cost/benefit rationale. If tax treatment overcomplicates a given compensation or benefits program only in certain jurisdictions, consider retaining the flexibility to carve those countries out of an otherwise-global plan rollout.

### 3. *Local foreign laws: Beyond tax, how will other foreign laws affect this offering?*

Beyond business case and tax treatment, whether it makes sense to provide a particular element of pay or benefits to staff in a particular location also can depend on specific local foreign laws. We already mentioned that medical benefits might not make sense where local law provides medical coverage and that severance pay plans might not make sense where local law requires generous severance pay. Other examples of the interplay between employer remuneration offerings and local foreign laws include:

- **Discretionary bonus plans:** Legal doctrines in some countries (England, Germany and South Africa, for example) prohibit true discretionary bonus plans, because law effectively imposes an "objectively reasonable" standard and prohibits employers from exercising free discretion in setting bonuses.
- **Adoption reimbursement plans:** Child adoption laws affect the viability of global adoption reimbursement plans. In some countries, child adoptions are completely free and adoptive parents get paid time off by law.
- **Sales incentive plans:** Some countries strictly regulate sales compensation; for example, Argentina imposes complex laws on compensating "traveling salesmen." These rules can rein in cross-border sales incentive plans.
- **Sector-specific compensation and bonus plans:** Laws in some jurisdictions limit compensation and bonuses in specific contexts. The lead example is the controversial European Union cap on bankers' bonuses.<sup>3</sup> These laws restrict international compensation and bonus plans in the regulated contexts.

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<sup>3</sup> EU directive 2013/36/EU.

- **Equity plans:** Securities registration laws affect multi-country equity (stock) plans. A U.S. equity plan might comply with U.S. SEC rules and rules of various U.S. states, but may also have to comply with the securities registration laws of *each country where there are foreign participants*. Beyond securities registration law, other doctrines of law abroad that might affect the structuring of an international equity plan include insider trading law, foreign exchange law and social security law.

Understand how local foreign laws affect any proposed international compensation or benefits program. Consider whether the laws defeat the underlying purpose of the offering and consider whether the costs of complying with the laws outweigh the benefit of the offering. If laws only in certain countries render some element of staff remuneration inadvisable, consider retaining the flexibility to carve those particular jurisdictions out of an otherwise-global plan.

#### **4. Payor entity: Which corporate affiliate will fund and tender the compensation or benefit for this international program?**

We have been discussing threshold issues of whether, or where, to roll out a given pay or benefits program internationally. After deciding to go ahead and launch some new remuneration offering internationally, next identify the plan sponsor and payor. Ask: *Which corporate entity or entities within our multinational conglomerate group will fund this plan? And which of our corporate entities will tender plan payments or benefits directly to overseas employee plan participants?*

Headquarters funding of—and particularly headquarters tendering payments under—an international compensation/benefits plan can open a Pandora’s box of legal issues as to: payroll withholdings, contributions and reporting; corporate and employee-participant tax/social security; currency regulation; foreign exchange; and “permanent establishment” (unlicensed transacting of business abroad). Separately, whenever a headquarters’ entity directly tenders money, benefits or equity to employees of its overseas affiliates, the headquarters entity opens itself up to an argument that it is a co-/dual-/joint-employer, along with the local employer affiliate, jointly liable for local employment claims. (A fired in-country employee may sue both the local employer entity and overseas headquarters, arguing: *I was simultaneously paid by two bosses for my work, so obviously I worked for both of them.*)

One solution is for the overseas local employer affiliates—not the headquarters’ entity—to tender remuneration under the international plan to their own payrollled staffs, even if behind the scenes, headquarters funds the grant by reimbursing affiliates. On the other hand, as we will discuss, having headquarters rather than the local employer affiliates directly tender consideration might offer certain advantages as to ripple effects on other pay and enforceability of clawbacks and choice-of-headquarters-country-law clauses. Also, in administering equity plans, having headquarters tender equity grants directly may make more sense because the headquarters entity is often the issuer of the equity.

#### **5. Ripple effects on other pay: What are the ripple effects on other elements of compensation and benefits overseas?**

When granting any element of staff remuneration overseas, always account for potentially-significant ripple effects on other payment obligations. “Total compensation” includes base pay, bonuses and often the cash value of certain fringe benefits. Expect laws overseas to use “total compensation” including bonuses and non-cash employee benefits as the starting point for calculating statutorily-mandated payments an employer owes workers—like vacation pay, overtime pay, social security contributions, “thirteenth-month pay” (Christmas bonus), pension contributions and severance pay.

This means a global bonus or employee benefit might cost a lot more than expected. For example, in the two *Kabul Auto Tech* cases of December 18, 2013, the Korean Supreme Court required an employer to add bonuses into base pay for purposes of calculating overtime. Korean employers feared this decision would add “billions of dollars” to payroll costs.<sup>4</sup> For that matter, this same issue arises domestically in the United States as to lumping non-discretionary bonuses and other benefits

<sup>4</sup> c.f. Last Two Weeks in Korea blog, Dec. 30, 2013.

into base wage rate when calculating overtime pay under the federal Fair Labor Standards Act. Overseas employees are less likely to be exempt from overtime pay mandates, and other countries impose more mandatory payments (beyond overtime pay) calculated based on regular pay rate.

A multinational might try to resolve this problem by inserting into a global plan document a provision purporting to exclude plan pay-outs from other pay calculations. But law overseas may void this “savings clause,” reasoning an employer cannot cherry-pick which parts of total compensation it wants to account for when calculating legally-mandated payments. Still, there may be ways to structure a payment or benefit to insulate it from being aggregated into total compensation. For example, payments tendered by the overseas headquarters entity (as opposed to the local payroll employer entity) are less likely to roll into wages because they do not come from the employer.

#### **6. Definitions: Do international plan communications (and the plan document) define key terms to protect employer interests across borders?**

Appropriately define terms—even those with meanings that seem obvious back at headquarters—in any pay, bonus or benefits communication or plan document that reaches internationally. For example, an American multinational’s domestic U.S. plan might link eligibility to being an “exempt” or a “salaried” employee, or to “regular” or “full-time” status, and it may restrict eligibility as to those “retired” or dismissed for “good cause” during a plan year. These terms are mostly clear to Americans but can mean very different things abroad. For that matter, the common terms “exempt” and “salaried” are probably best edited out of cross-border plan documents entirely. Overseas, these words are more confusing than useful. In American HR usage, “exempt” is shorthand for “*exempt under the FLSA*”—a law that applies only in the U.S. and its territories.<sup>5</sup> And the hourly/salaried distinction that Americans so often draw does not work in regions like South America where employers denominate wages monthly. Also, in defining “good cause” for separation or in defining a “good leaver” (for example, in a global severance pay or equity plan), check whether the definition works under law in affected jurisdictions. Outside the U.S., laws tend to set out what is and is not good cause for dismissal.

Be precise in defining plan payments—label what specific obligations plan payments extinguish in a way that works as intended across relevant jurisdictions. For example, in Brazil (where employee severance releases are void), dismissed employees often sue for payments the employer thought it had already satisfied. A Brazilian court may side with a dismissed employee who characterizes an employer payment under a company plan as separate from (and therefore owed in addition to) a statutory obligation for more or less the same thing. A severance payment under a severance pay plan will not likely count toward Brazilian severance pay due into the Brazilian FGTS system. Wherever an employer wants payouts under a company plan to count toward statutory severance or notice pay under local dismissal law, have the plan document make that crystal clear. In December 2013, the Supreme Court of Canada refused to let an employer characterize pension payments to a laid-off employee as severance/notice, because neither the employment contract nor the pension plan document defined the payments that way:

[I]n this case,...the pension benefits are not an indemnity for loss of earnings, they are not reduced by other benefits or income received and the employee over time receives a legal entitlement to the commuted value of the benefits. . . . [T]here is no general bar against an employee receiving both pension income and employment income, and receipt of the benefits and income is not based on opposite or incompatible assumptions. Pension benefits are not reduced by other income. Not deducting the pension benefits serves the goal of equal treatment of employees and provides better incentives for just treatment of all employees .... I conclude, therefore, that... the pension benefits [under this plan] should not be deducted from the wrongful dismissal damages.<sup>6</sup>

<sup>5</sup> 29 USC §213(f).

<sup>6</sup> *IBM v Waterman*, 2013 SCC 70, at97-98.

## 7. **Eligibility criteria: Do the eligibility criteria for this international pay/benefits offering comply with overseas restrictions?**

Few multinationals open all their pay and benefits programs to everyone around the world who delivers services to the organization. Employers tend to limit international pay and benefits offerings to specified subsets of staff. For example, a payment or benefit might only be for managers, or only full-timers, or only those above a certain pay grade or only those employed for over a year—or, at least, only for payrolled employees as opposed to contractors and consultants. But these eligibility criteria must comply with applicable law.

Stateside, eligibility criteria tend not to pose much of a problem. American employment-at-will leaves employers largely free to offer a bonus or benefit to whomever they want, as long as eligibility criteria do not discriminate based on a handful of protected classes, chiefly gender, religion, race, disability, national origin and age above 40, and as long as employers do not run afoul of ERISA discrimination testing rules for “high compensated individuals” and “health factors” under 29 CFR 2590.702. Other countries impose employment discrimination laws like those of the United States (without imposing rules analogous to ERISA discrimination). But in addition, foreign laws often intrusively regulate eligibility for employer-provided payments and benefits. For example:

- **Laws against favoring job categories:** In Finland, France, Poland and beyond, so-called “wage discrimination” or “equal work for equal pay” laws prohibit giving a benefit to some workers without offering it to identically-situated coworkers, and these laws can force employers offering a benefit to one class of workers to offer that same benefit to all equivalent-or-higher employee groups.<sup>7</sup>
- **Laws against favoring full-time staff and payrolled employees:** Some jurisdictions actually outlaw the almost-universal American practice of offering a bonus or benefit only to full-time payrolled employees. For example, every European Union member state expressly prohibits linking ineligibility for a payment or benefit to part-time status and even to outsourced-labor status.<sup>8</sup>
- **Laws against favoring or disfavoring expatriates:** Laws in Brazil, the Middle East and elsewhere prohibit compensating foreigners, including “inpatriates,” more than locals. The EU’s complex “temporary agency work directive”<sup>9</sup> prohibits discriminating in compensation against staff who work temporarily in a state other than their home base.

## 8. **Labor consultations: Does this remuneration initiative trigger collective worker obligations in any countries?**

In many jurisdictions, when management wants to change, cut back or eliminate some existing element of pay or benefits, labor law requires the employer first discuss, bargain, negotiate or “consult” over the proposal with some standing body of local staff representatives—trade union committee, works council, staff representative, health and safety committee and the like. That is, labor law can prohibit management from unilaterally modifying or terminating a new pay or benefits initiative without first having solicited and considered staff representatives’ views; in American terms, the initiative could be a “mandatory subject of collective bargaining.”

These labor consultation mandates can even reach a proposed *new* offering that would grant workers *additional* pay or benefits: Employees do not turn down extra money or benefits, but labor representatives sometimes insist on a say in plan terms and plan structure, or try to “horse trade” for a different benefit. Outside the U.S., laws requiring labor consultations can even reach a proposal that would affect only executives—in many countries, managers are actually constituents of collective worker bodies; in American terms, the “bargaining unit” may include almost every employee on the payroll.

7 *E.g.*, Finland Sup. Ct. case # KKO:2009:52; French Supreme Court Social Chamber dec. no. 13-25.821 (May 6, 2015); Polish Supreme Court dec. no. iii PK 136113 (Sept. 2014).

8 EU directives 97/81/EC; 2008/1 04/EC.

9 2008/1 04/EC.

To the extent required in any affected country, offer local worker representatives a voice in deciding whether to launch or expand—and particularly whether to *reduce or discontinue*—any element of staff remuneration. This is easy advice to give, but actually doing it can be cumbersome. By definition, any cross-border remuneration initiative emerges above the local level, at global or regional headquarters, and headquarters may not have the time and patience to submit to the inevitable vagaries and delays of multijurisdictional collective bargaining. And headquarters usually wants to avoid having to make location-specific tweaks to the plan. When the labor consultation issue emerges during the gestation of some proposed cross-border remuneration initiative, headquarters usually seeks to stake out a position that affected jurisdictions do *not* flatly require collective bargaining over this particular proposal—that is, labor consultations may be recommended, but are not flatly mandatory. Headquarters asks: *Does labor law in any of our countries actually force us to consult with labor representatives over this particular remuneration proposal?*

In some jurisdictions, it may well be possible to rule out a consultation obligation over a proposed remuneration initiative. In countries like Argentina, Brazil and Italy, local trade unions may see certain elements of employee benefits as outside their labor responsibilities. Austria empowers works councils with broad consultation rights—but specifically excludes “competence” (jurisdiction) over most aspects of pay and benefits. Otherwise, black-letter labor law in a country may not spell out whether an employer must consult with labor representatives over a particular remuneration proposal. Often this is a grey area that differs depending on circumstances. Answering this question can require lifting the lid and looking into the employer’s own collective labor position in each country:

- **Labor representatives:** What standing bodies of staff representatives does the organization currently have established in its local workplaces?
- **Labor agreements:** Do existing labor agreements, including any applicable industry-wide “sectoral” agreements, address this particular element of remuneration? Do labor agreements address which elements of remuneration are mandatory consultation topics?
- **Bargaining history:** What is the demeanor and bargaining agenda of the worker representative bodies in this particular workplace? What positions have they taken in the past as to changes in remuneration and mandatory topics of consultation?

Often the person best positioned to answer these questions in a country will be the employer’s own management-side labor liaison who speaks for management in day-to-day consultations with local worker representatives.

**9. Vested rights: Will the multinational be able to discontinue the pay/benefits initiative consistent with applicable doctrines of vested or acquired rights?**

Multinationals launching international compensation and benefits plans almost always try to reserve a right to discontinue the program at any time. U.S. employers are used to making this reservation stateside because it is inherently compatible with the concept of employment-at-will. But discontinuing some element of pay or benefits granted more than once in the past can be tricky outside the United States because of the overseas legal doctrine of *vested or acquired rights*. Law outside employment-at-will (and, for that matter, law in the U.S. union context) supports the argument that employees can acquire a “vested right” to some element of remuneration the employer had been paying out regularly. This vested rights doctrine can prevent an employer from discontinuing an offering even if a savings clause in the original plan document purports to let the employer modify or terminate unilaterally.

When launching any cross-border pay or benefits offering—whether an ongoing program of indefinite length or a one-time-only or fixed-term grant—factor in the vested rights doctrines of the relevant countries. This is vital when launching a special payment or benefit expressly designed to be temporary, like a success bonus, a Christmas gift, or a one-off broad-based stock grant that the employer might perhaps re-grant again next year and maybe even again the following year, but one day will end. When drafting a multijurisdictional provision purporting to reserve the employer’s

right to discontinue a global plan at any time, check whether that purported employer “right” actually exists under applicable law. At minimum, in employee communications and plan documents, unambiguously declare the temporary character of this particular offering. Name the payment using a label that includes the word “temporary” or “one-time-only.” Try to get employees or their labor representatives to acknowledge the temporary character or end date in writing. But at the same time, recognize that as time goes by, even signed acknowledgements on this point may prove unenforceable in the face of a vested rights challenge.

#### **10. Acknowledgements, consents and covenants: Will the multinational be able to enforce commitments that employees make when enrolling in the program?**

A new remuneration offering usually gives workers something they did not have before. It is said that nothing in life is free, and employers often condition eligibility for a new payment or benefit on recipients committing to promises back to the employer. Sometimes these promises merely involve enrollees agreeing to the new program’s own terms. (We just discussed employee-signed acknowledgements that the plan is subject to being discontinued in the future.) But other times an employer links eligibility to a substantive *quid pro quo*, insisting that enrolling staff execute an acknowledgement, consent or covenant on some topic beyond the scope of the plan itself, like an acknowledgement of a global code of conduct, a consent to repeal some different element of remuneration, or a restrictive covenant—non-compete, nonsolicit or assignment of intellectual property. For example, two landmark English cases on choice-of-law in non-competes happen to involve American employers that had conditioned participation in their stock option programs on signing non-competes.<sup>10</sup>

When an existing employee (as opposed to an onboarding new hire) executes an employer-solicited acknowledgement, consent or covenant, confront the problem of *enforceability*. Common-law jurisdictions impose the consideration requirement for forming a binding contract. Separately, in Northern Europe, parts of Latin America and beyond, employee-signed promises can be held void as inherently coerced—the theory is that workers’ bargaining power is so weak that a purported assent to an employer-solicited commitment can be as void as an agreement executed by, say, a child, a psychotic or someone with a gun to his head.

This said, under both legal doctrines—contractual consideration and unequal employee bargaining power—jurisdictions more readily enforce employee commitments made in exchange for new payments or new benefits that an assenting worker otherwise had no right to get. An employee-signed acknowledgement, consent or covenant that might be void if gratuitously executed out of nowhere can be fully enforceable if signed in exchange for extra pay or an extra benefit. Consider two strategic issues:

- **Enhance enforceability:** If part of a new pay or benefits program involves staff committing to some acknowledgement, consent or covenant, structure that commitment in a way that enhances enforceability under applicable employment law. As just mentioned, the obvious approach is expressly to link the employee’s promise to eligibility for the new remuneration. Implement this approach in practice: Make the new payment or benefit truly conditional—withhold it from anyone who fails to sign the consent or covenant. A separate strategy is the *collective labor* approach: Labor law in some jurisdictions actually makes a union or works council’s commitment on behalf of constituent workers more readily enforceable than individual employee-signed agreements. For this reason, consider seeking labor representatives’ buy-in to the commitment.
- **Collect unrelated commitments:** The launch of a new remuneration program opens a window of opportunity to collect enforceable staff acknowledgments, consents and covenants that go beyond the scope of the new program. Consider whether an envisioned pay or benefits roll-out offers the organization its chance to collect enforceable commitments on unrelated topics that the employer may happen to need (like code of conduct acknowledgements, consents to discontinue obsolete programs or restrictive covenants).

<sup>10</sup> *Duarte v Black & Decker* (2007 EWCH 2720 (UK QB 1/07)); *Samengo-Turner v Marsh* (2007 EWCA Cir. 723 (UK 7/07)).

### **11. *Old plan documents: Does the new offering rescind, in each affected country, earlier obsolete communications and plan documents?***

Some multinationals roll out regional or global sales commission and variable-pay plans annually, each time intending to replace last year's version. Other times a multinational just needs to update some existing cross-border remuneration program. By definition, any updated documents about a cross-border remuneration offering are supposed to replace obsolete earlier versions. But too often old versions of a plan or old communications about a program linger somewhere on the company intranet or otherwise remain (arguably) still in force. Staff may claim that both the old and new programs are simultaneously active, or may argue a right to compute benefits (or apply conditions) under an old version more favorable to them. Employees making these arguments are not always being disingenuous—workers can get genuinely confused by extant statements addressing a remuneration program that the employer's HR group considers obsolete.

We already discussed a different issue that comes up when trading in an old international remuneration plan for "this year's model": Employees might claim vested rights in the old version. A separate matter is keeping the paper trail clear. For this reason, formally rescind any earlier plan document and obsolete program communications in a way that sticks under applicable law. Take whatever steps necessary to repeal old plans and revoke outdated communications. Steps might include: issuing repeal notices; passing board resolutions; collecting employee consents; engaging in labor consultations—and, of course, purging obsolete pages on the company intranet.

### **12. *Clawbacks: Is the plan's clawback provision enforceable internationally?***

Clawback provisions requiring plan participants to reimburse payments under specified conditions are common in international pay and benefits plans because they disincentivize undesired employee behaviors. To an employer, a clawback can be a powerful tool. Clawbacks are common, for example, in:

- *Retention bonuses* that require employees who quit early (or get fired for cause) to pay back part of the bonus.
- *Sales commission plans* that let the employer recover commissions paid but unearned (for example, on uncollectible accounts).
- *Tuition reimbursement programs* that let the employer recover tuition paid to a plan participant who flunks or drops out of the course early or quits too soon after graduation.
- *Equity plans* tied to restrictive covenants, in the scenario of a beneficiary breaching the covenant.

Employers like clawback provisions, but actually enforcing one across borders is tricky because worker-protective wage laws chafe against the concept of employees tendering money back to their employers. Some of the many jurisdictions particularly tough on this point include Denmark, France, Japan, Korea, Sweden and much of Latin America. An even bigger challenge is enforcing a *deduction* clause—a clawback that purports to let the employer deduct reimbursed funds directly from paychecks and severance payouts.

Before drafting and relying on a clawback or pay-deduction provision in an international compensation plan, understand its enforceability in each applicable jurisdiction. This requires a country-by-country analysis. Be prepared to restructure the provision to enhance enforceability, accepting that different legal doctrines in different countries may require spinning off different provisions for different jurisdictions.

### **13. *Choice-of-law and arbitration clauses: Is the plan's choice-of-law or choice-of-forum clause enforceable internationally?***

Employers often insert choice-of-headquarters-law clauses, arbitration clauses or headquarters-court-venue clauses into international pay and benefits plans. But these may not be enforceable. Understand how enforceability works as to any choice-of-law, arbitration or court-forum clause in an international pay or benefits plan.

Speaking broadly, host-country courts can be quick to hold a choice-of-foreign-law, arbitration or choice-of-foreign-courts clause void in an employee-versus-employer dispute that the local court perceives as arising under employment law. A court might enforce this clause only if it sees the dispute as contractual, arising only under the plan terms, rather than an employment law claim. This is because employment laws tend to apply by force of public policy, voiding any choice-of-foreign-law provision (and, often, any arbitration or foreign-court-venue clause).

In the United States, no one would expect a Mexico law clause signed by a Mexican citizen employee who happens to work at a Mexico-based employer's El Paso, Texas office to be enforceable if the employee sues under the FLSA alleging underpayment of U.S. minimum wage, and other U.S. employment law protections for people working in the United States, even if this employee had signed a Mexico law clause. This is also how it works abroad.

If a choice-of-foreign law, arbitration or foreign-court-forum clause in an employee remuneration plan is to be enforceable, that provision should emphasize the contractual and non-employment-related nature of the remuneration arrangement and any dispute that later arises under it. Certainly the clause will more likely be enforceable in a plan where the grantor is the headquarters entity as opposed to the host-country payrolling employer subsidiary. Still, countries like Argentina and Chile may hold a choice-of-foreign-law clause void even in this scenario, if a dispute over the plan arises locally and lands in a local labor court.

#### **14. *Translations: Are plan communications and documents written in a legal language?***

Multinationals may consider English their “official company language,” preferring to issue at least some international remuneration plan communications and plan documents in English. But even putting aside the employee-communications challenges of issuing English-language documents in non-English-speaking countries, English-only communications can be flatly illegal. A French appeals court decision once fined a U.S. multinational \$800,000—halved on appeal from an initial fine of \$1.6 million—because headquarters had illegally distributed English-language employee benefits documents to French staff in violation of a statutory French-language mandate.<sup>11</sup> Beyond France, laws in Belgium, Mongolia, Quebec, Poland, Turkey and elsewhere can require that most all employee communications—including written compensation and benefits plans—be communicated locally in the local language regardless of whether the organization purports to have designated English its “official company language.” Be sure to translate cross-border plan documents and communications at least in jurisdictions requiring translations.

#### **15. *Data privacy compliance: Do data flows (for administering the international plan) to headquarters and to outside benefits providers comply with data protection laws?***

Making pay-outs or grants under a global remuneration program—think of a global equity or a severance pay plan—often requires transmitting internationally (to headquarters and to any overseas plan administrator) information about each plan participant like name, pay rate, date of hire, vesting information and current employment status. Be sure any flows of employee information to headquarters (and onward to outside plan administrators) necessary to administer a cross-border pay or benefits program comply with applicable data protection laws.

Under domestic U.S. law, a simple transmission of basic employee information within a multinational group or to an outside benefits provider does not trigger significant legal issues. Not so under the comprehensive data protection laws in jurisdictions including Argentina, Canada, Europe, Israel, Hong Kong, Mexico, the Philippines, South Africa, South Korea, Uruguay and beyond. These countries proactively regulate the “processing” and “exporting” of personal data, including even routine employee/plan-participant data. And so data exports to administer an international remuneration program may have to flow through cumbersome pre-approved channels—Europe has the formalistic data export channels of “model contractual clauses,” “Privacy Shield” and “binding corporate rules.”

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<sup>11</sup> Versailles Ct. App., Mar. 2, 2006.

This said, in the benefits administration context, an unambiguous participant-signed consent to plan-related data processing and exporting may suffice, at least where participating in the plan is demonstrably voluntary. Collecting artfully-worded data consents may be a vital step in launching a cross-border pay or benefits offering.

### **Conclusion**

Harmonizing employee pay, bonuses and benefits across national markets is increasingly important in today's global economy. While a multinational may have pressing business and HR reasons to expand a particular element of staff remuneration internationally, the mechanics of rolling out and funding a legally-compliant international "rewards" offering inevitably get complex. Launching (or even just updating) a cross-border pay or employee benefits program requires a proactive, strategic approach for complying with legal constraints across the relevant countries.

To introduce or update any pay, bonus or employee benefits offering across borders, answer the key compliance questions. Then, answers in hand, craft a step-by-step project plan for launching the program across the relevant jurisdictions.

