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CROSS-BORDER EMPLOYMENT AND GLOBAL MOBILITY ISSUES IN EUROPE AND LATIN AMERICA: A CLOSER LOOK AT INTERNATIONAL ASSIGNMENTS

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This paper will outline some of the legal issues surrounding the secondment of foreign workers in Denmark by non-Danish employers. The paper is based on a practical hypothetical case: A Danish company (hereinafter the "Danish Company") seeks IT services from foreign nationals as it considers Denmark to lack qualified manpower in that specific field of expertise. It enters into communication with an Indian company (hereinafter the "Indian Company") who is willing to conclude a consulting service agreement with the Danish Company for an interim period (less than 6 months).

Based on this hypothetical case, the following issues will be discussed:

1. Choice of law - Danish employment law regulations
2. Work and residence permit
3. Social contributions - insurance
4. Tax
5. Summary

1. Choice of law - Danish employment law regulations

Pursuant to section 6 of the Rome Convention, any choice of law made in an individual employment contract shall not deprive the employee from the protection granted by the mandatory rules of the place where the employee usually carries out his work. In other words, if the Indian employee is deemed to "habitually" carry out his services in Denmark, Danish employment law will apply to him. These regulations provide a variety of minimum (mandatory) rules on issues such as termination, holiday, sickness, equal treatment, employment contracts and other types of employment terms.

It is not possible to estimate the period of time that will cause the Indian employee to obtain "habitual" Danish worker status. However, a temporary stay in Denmark (for less than six (6) months) will most likely fall outside the scope of the Convention. In other words, if the Indian employee stays in Denmark for less than six (6) months, it is highly probable that he will not be governed by Danish employment law regulations.

Instead, the Indian employee is likely to fall within the scope of the Danish Secondment Act. According to this Act, any employee seconded in Denmark to perform services for a limited period of time will be protected by certain parts of the mandatory provisions of Danish employment law regulations. Accordingly, as opposed to being governed by the Conventions (i.e. the full range of Danish employment law regulations), the Indian employee will be subject to specific provisions in the employment law regulations outlined in the Act.

For the Act to apply, it is a condition that the employer (the Indian Company) sends an employee to Denmark for the delivery of services at its own expense and according to its own instructions.

The specific provisions applicable to the Indian employee during his stay are as follows:

1. The Danish Working Environment Act (in Danish: arbejdsmiljøloven) with provisions on minimum resting hours, safety at work, industrial injury insurance and the like,
2. The Danish Equal Treatment of Men and Women Act (in Danish: ligestillingsloven), except for the provisions of Part III relating to right to leave for persons other than pregnant women or women who have just given birth,
3. The Danish Equal Pay to Men and Women Act (in Danish: ligelønsloven),
4. Section 7 of the Danish Salaried Employees Act (in Danish: funktionærloven) providing for women's rights and obligations in relation to pregnancy and birth,
5. The Danish Act on Discrimination on the Labour Market (in Danish: diskriminationsloven),
6. The Danish Act implementing the Working Time Directive (in Danish: lovgivningen om implementering af arbejdstidsdirektivet), and
7. The Danish Holiday Act (in Danish: ferieloven) with respect to supplementary holiday (up to 5 weeks of holiday during the period 1 May - 30 April), holiday allowance (12.5 per cent of the salary earned) and/or salary during holiday to the extent that the employees are not subject to rules in India providing for at least the same benefits.

It should be noted that these minimum provisions provide for the rights and obligations of the Indian employee *vis-à-vis* his Indian employer. It follows from the Act that the Indian employee is entitled to pursue any rights provided by the Act directly before the Danish courts.

The Danish Company is not legally responsible to the Indian employee if the Indian employer violates any of the regulations mentioned in 1-7 above. The Danish Company has nevertheless every reason to make sure that these regulations be applied properly, since any violation of these Acts, by the Indian employer, is likely to expose it to (i) claims where it will legally be regarded as the employer, and/or (ii) adverse publicity.

It is therefore recommended that to the extent possible the Danish Company should ensure that the Indian employer complies with these regulations. Also, the Danish Company should be aware that if it pays expenses related to the Indian employee and/or makes him subject to its instructions, there is a risk that it will be regarded as the employer, and thus, the regulations mentioned above will be directly applicable to it. Finally, the Danish Company should ensure that a specific choice of Indian law is made in the employment contract of the Indian employee.

2. Work and residence permit

According to section 9 a (1) of the Danish Aliens Act, foreign nationals residing outside EU (hereinafter "aliens") are only eligible for work and residence permits with respect to work in Denmark if essential employment or business considerations make it appropriate, e.g. if the alien has special education or training unavailable in Denmark, and/or if the alien performs services of a kind and nature that cannot be provided by Danish labour force ("specially qualified manpower").

In addition to this condition the salary and other employment terms of the alien must be common compared to local Danish standards. Finally, the application for work and residence permits must be based on a specific offer for employment or the like.

Before his entry in Denmark, the Indian employee should therefore apply for a visa at the Danish embassy in India. When submitting their applications for a visa, they must at the same time submit their applications for a residence and work permit in Denmark. In order for the Danish Immigration Service to determine whether the person in

question meets the requirements in Section 9a (1) of the Aliens Act, copies of their employment contracts must be enclosed in the application for residence and work permits. Any information regarding paid housing, insurance benefits, and the like, is to be submitted as well.

An uncomplicated application for work and residence permit may be processed within 30 days.

The Danish Immigration Service has drawn up a positive list of the selected professional fields, where Denmark is deemed to lack specially qualified manpower. With respect to the Indian national in question, it is noted that IT specialists are included in the positive list.

IT specialists are defined as data technology and information engineers, network consultants, programmers, application designers, database developers, software engineers, software developers, assistant technicians, assistant developers, multi-media animators, project leaders, test engineers, etc. Accordingly, in our view, and based on the information received, the Indian national is likely to be covered by the positive list.

As mentioned above, a prerequisite for a work and residence permit is that the proposed salary and employment terms correspond to Danish standards. The Danish Immigration Service operates with specific monthly levels for IT specialists that are not engineers and for IT specialists that are engineers. When evaluating the salary it is possible to take into account benefits such as paid housing, insurance coverage, etc. but the Danish Immigration Service assesses each case on its merits. Thus, it is not possible beforehand to make a definite legal assessment as to the ratio between the actual salary and benefits.

As mentioned, another prerequisite for the granting of an immediate residence and work permit is that the Indian national is in possession of specific employment offers. However, according to information from the Danish Immigration Service, it is not required that the Indian national enter into a work contract with a Danish employer. Consequently, the Indian national may still be employed by an Indian entity. The decisive element is to provide documentation showing that the alien will conduct work at the Danish Company's premises, and that this Company has entered into a contract with the relevant legal entity in India that covers the services provided by the Indian national in Denmark.

In summary, the leading element that will decide whether or not the Indian national meets the requirements in the Aliens Act is the degree of similarity between the proposed salary and employment terms and the "common" local Danish standards. In this connection, it is relevant to present the employment contract between the Indian and their Indian employer, information relating to the housing, insurance policies and other benefits provided to the Indian national during his stay in Denmark, and the capitalised value thereof. This is necessary to prove that the Indian national is effectively provided with salary and employment terms (including benefits) which, seen as a whole, correspond to local Danish standards.

The Danish Immigration Service assesses each case on its merits which means that it is impossible to make a definite legal assessment as to what extent an Indian national meets the above requirements. Taking into consideration the likely processing time of 30 days (provided the application is uncomplicated), expedient action should be taken to address this issue.

3. Social contributions - insurance

3.1 General

Another question relating to the secondment of a foreign national in Denmark is to determine, firstly, to what extent he or she will be covered by the Danish social security system, and secondly, to what extent he or she will be obliged to pay social security contributions (labour market contribution and the Danish labour market supplementary pension (ATP)) during stays in Denmark.

The assessment of the possible social benefits available to a foreign national is especially relevant when determining the need for supplementary insurance coverage during the stay in Denmark.

3.2 Social security contributions

Employees working for foreign companies that are domiciled or have permanent establishments in Denmark are liable to pay social security contributions (so-called labour market contribution (in Danish: arbejdsmarkedsbidrag) and special pension contribution (in Danish: SP-bidrag)) at a rate of 9 per cent (2002)). However, employees working for foreign companies that are not domiciled or have permanent establishments in Denmark are not liable to pay these contributions.

The term “permanent establishment” is interpreted in line with the similar term in article 5 of the OECD model treaty concerning double taxation and is generally used if a company has premises in the country from where it conducts business, and does so for a period of time and/or if a company has activities in Denmark that are not merely of a preparatory or auxiliary nature.

In our case, the Indian Company is not domiciled or has a permanent establishment in Denmark. Based on this, it is safe to say that the Indian employee has no obligation to pay social contributions (arbejdsmarkedsbidrag or SP-bidrag).

In addition, since the Indian employee will be staying in Denmark for less than six (6) months, there is a legal basis for exempting him from paying contributions under the other statutory social contributions such as the Labour Market Supplementary Pension Scheme (ATP).

3.3 Social benefits

The possible social benefits provided by the Danish authorities comprise the following:

1. Industrial injury insurance (arbejdsskadeforsikring)
2. Unemployment insurance (arbejdsløshedsforsikring)
3. Sickness and maternity benefits (syge- og barselsdagpenge)
4. Social security pensions (social pension)
5. Labour Market Supplementary Pension Scheme (ATP)
6. Health and hospital insurance (sygesikring og sygehusbehandling) and
7. Child benefit (børnetilskud/børnefamilieydelse)

As Denmark has not entered into any agreements with India regarding social contributions and social benefits to foreign employees temporarily staying in Denmark, Danish legislation within each of the social benefits referred to above will

determine if (and to what extent) these benefits and contributions will apply to an Indian national. The rules governing each of the social benefits are detailed and subject to administrative practices not relevant at this point. Our remarks below are therefore strictly cited for the purpose of highlighting the areas where supplementary insurance coverage is or is not likely to be necessary.

3.3.1 Industrial injury insurance (arbejdsskadeforsikring)

It follows from the Danish Industrial Injury Insurance Act that any employee in the service of an employer in Denmark (whether permanently, temporarily or for short periods of time) must be insured against industrial injuries pursuant to the Act. Accordingly, this Act applies without regard to the nationality of the employees in question.

In our case, there is most likely a legal obligation to provide mandatory industrial injury insurance to the Indian employee.

The Indian Company is the one (and only) party that should provide the foreign national with this insurance (along with any other insurance benefits), in order to avoid the assumption that the Danish Company is the employer - that could have adverse effects on tax issues, social contributions and Danish employment regulations.

The Danish Company should therefore ensure that any such insurance is in fact paid and provided to the seconded worker in order to (i) avoid any adverse legal effects created by the lack of insurance (including the risk of being imposed obligations as an employer), and (ii) to avoid possible adverse publicity on the issue.

3.3.2 Unemployment insurance (arbejdsløshedsforsikring)

The Danish rules on unemployment insurance lay down a minimum requirement for employees that plan on staying permanently in Denmark (for more than one (1) year). In our case, protection against unemployment does not appear to be relevant to the Indian employee as he will only stay in Denmark for a period that will not exceed six (6) months.

Protection of the Indian employee should instead appear in the provisions of the contract his employer who should provide him with a ticket home when his work in Denmark is over (or for any other reason that would no longer require him to perform duties in Denmark).

The Danish Company should make sure that the employee has in fact the right to return in order to avoid the risk of imposed employer-related obligations and/or adverse publicity.

3.3.3 Sickness and maternity benefits (syge- og barselsdagpenge)

It is a general requirement that employees in Denmark receive sickness and maternity benefits if that employee is staying for an indefinite period.

Again, in our case, it is unlikely that the Indian employee will be entitled to Danish statutory sickness and maternity benefits as his stay in Denmark is temporary.

Hence, protection of the Indian employee on this matter should be assumed by his employer (the Indian Company) who

would guarantee a continued remittance of salary and benefits, regardless of the fact that he may become ill or otherwise disabled during his stay in Denmark.

Again, the Danish Company should make sure that continued support is in fact a right of the foreign employee in order to avoid the risk of imposed employer-related obligations and/or adverse publicity.

3.3.4 Social security pensions (social pension)

It is a condition for receiving social pension in Denmark that the individuals have Danish citizenship.

For that reason, in our case, protection of the Indian employee should appear in the provisions of the agreement he has with his employer who should provide him with a ticket home when his work in Denmark is over (or when he is otherwise no longer required to perform duties in Denmark).

3.3.5 Labour Market Supplementary Pension Scheme (ATP)

As noted under section 3.2, there is a legal basis for exempting the Indian employee from paying contributions under the Labour Market Supplementary Pension Scheme (in Danish: Arbejdsmarkedets Tillægspension - ATP). The benefits relating to this scheme are relatively small, and there does not appear to be any alternative protection for foreign employees in this area, apart from the right and duty to be paid a return ticket home.

3.3.6 Health and hospital insurance (sygesikring og sygehusbehandling)

The Danish Sickness Security Act or the Danish Hospital Act provides access to doctors, medical aid, and hospitalisation. These benefits are not contingent upon Danish citizenship, but generally require a permanent stay to be documented by registration with the national register in Denmark (in Danish: Folkeregistret). Even if the conditions for eligibility for full health and hospital benefits are not met, there is a general right, regardless of the individuals status, to receive emergency health and hospital aid during a stay in Denmark.

In our case, it would not be recommended to register the Indian employee with the national register, due to the possible adverse effects on his tax status in Denmark and the like. Accordingly, it is relevant to provide the Indian employee with supplementary health and hospital insurance during his stay. Also in this respect, the Danish Company should ensure that the Indian employer provides the insurance and safeguards the interests of the Indian employee.

3.3.7 Child benefit (børnetilskud/børnefamilieydelse)

It is a requirement for receiving child benefits in Denmark that the individuals, or their children, have Danish citizenship. The benefits related to child payment are relatively small, and there does not appear to be any alternative protection to the foreign employees in this area apart from a right and duty to a paid return to home.

4. Tax

4.1 General

The first issue the Indian employer (and employee for that matter) should be aware of is Danish taxes: employees from abroad who are seconded in Denmark are liable to pay taxes if the following conditions are met:

a) permanent residence, or
b) a stay in Denmark for over six (6) consecutive months, or
c) income from sources in Denmark

In Denmark, a distinction is made between employees that are liable to full taxation (conditions a and b), and those that are liable to limited taxation (condition c). Accordingly, an foreign employee is liable to full taxation if he has a permanent residence in Denmark or has lived there for a period of at least six (6) consecutive months (and will, as a result, be taxed on his world-wide income, as opposed to his local income from Denmark (limited taxation)).

Consequently, it's important to start off by identifying in what cases a foreign employee is considered to have a permanent residence in Denmark. Under Danish law, it is the type of household that is used as the distinguishing criterion: i.e. is he renting a residence, or has he taken other steps indicating that he intends to have permanent residence in Denmark, such as, the placement of his family, etc.

Hence, it is important that the Indian employer take certain measures, such as providing the employee with a (temporary) residence (effectively controlled by him (the employer)), as it would then be assumed that the Indian employee has not taken permanent residence in Denmark. Furthermore, if the Indian employee keeps his permanent residence in India (and then e.g. sub-lets the residence), this would also indicate that he has no intention of staying in Denmark for an indefinite period.

4.2 Double taxation

Regarding double taxation, the Indian employer should know that article 16(1) of the Double Taxation Treaty between India and Denmark provides that any state where an individual carries out work for an employer (in this case Denmark), is the state that shall have the right of taxation on that individual employee. In other words, an Indian individual carrying out work in Denmark may be subject to Danish taxation.

However, there are exceptions: it follows from article 16(2) of the Treaty that the individual employee will only be subject to the taxation of the state where he resides (in this case India) if the following conditions are met:

a) the individual stays in the other state (Denmark) for a period, or for periods, not exceeding 183 days of the taxation year in the relevant state
b) the remuneration is paid by or on behalf of an employer not residing in the other state (Denmark)
c) the remuneration is not paid from a permanent establishment or other permanent place that the employer controls in this other state (Denmark).

Accordingly, provided (i) an Indian employee stays in Denmark for a period that does not exceed 183 days, (ii) that all salaries and benefits are paid or provided strictly by the Indian Company, and finally, that (iii) such salaries and benefits are paid or provided directly by the Indian Company, the Treaty would then allow the foreign employee to remain solely under Indian taxation.

For that reason, it is of major importance to ensure that the Danish Company does not *de facto* assume the rights and obligations of the Indian employer. If, and to the extent that the tax authorities find out that the employees ARE, *de facto*, subject to the instructions of the Danish Company (and/or it bears the risk relating to the work performed), there is a risk that the Danish Company and the Indian employee will be subjected to stricter rules of taxation. Thus, in order to avoid this risk, it is recommended to approach the local tax authorities for a decision on the tax position of the foreign employees.

Also, the benefits provided to the seconded employee (i.e. paid housing, insurance, etc.) should in no way be paid by the Danish Company, whether directly or indirectly (such are the conditions of the Treaty).

Finally, It may prove necessary to obtain a special "exemption certificate" (in Danish: trækfritagelsesattest) from the local tax authorities in order to prove the tax status of the Indian nationals.

4.1 Preferential tax scheme

There exists in Denmark a preferential tax scheme applicable to scientists and similar employees (25 per cent taxation plus social contributions of 9 per cent). Under this special tax scheme, it is essential that the individual in question be subjected to full taxation in Denmark (this requirement is not met in our case).

Even if this condition is met, it is also necessary that the stay of the seconded worker exceeds six (6) months. Moreover, special conditions relating to the level of salaries will have to be met.

Accordingly, only if the Danish Company chooses to employ the Indian employee for a period exceeding six (6) months, and provides him with a level of remuneration exceeding the levels referred to above will this option become possible.

5. Summary

The Danish Company should organize the secondment of the Indian employees by way of a consulting service agreement with the Indian Company, thus preserving its status as the employer.

Under the double taxation treaty between India and Denmark, it is possible to keep the Indian employee strictly under Indian taxation, although this requires the Danish Company not to *de facto* assume rights and obligations as an employer towards an employee (i.e. that the Indian employee will be subject to the exclusive instructions of the Indian Company, and all expenses should be paid strictly by that same Company). It is also advisable to consult the tax authorities for an up-front confirmation of the tax status of the relevant employee.

It will be possible for the Indian employee to obtain visas as well as work and residence permits. The leading element being to what extent the employee fulfils the requirements in the Danish Aliens Act: requiring, for example, his salary and benefits to meet a certain level that is considered "common" in Denmark for other IT specialists. Benefits such as paid housing, insurance coverage, and other salary-related benefits will be taken into account. The Danish Company should ensure, through the consulting agreement, that the risk of tax status is placed with the Indian Company.

There is a basis for exempting the Indian employee from having to pay social contributions (Arbejdsmarkedsbidrag, SP-bidrag and ATP), assuming that the Indian Company does not have a domicile or a permanent establishment in Denmark. It is advisable to include a request for confirmation of this with the request for a confirmation of the tax status.

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The Indian employee will only, to a limited degree, be eligible for Danish social contributions during his stay in Denmark. It will thus be necessary to provide the Indian employee with supplementary insurance, especially with respect to sickness, health, and hospitalisation. In addition, the Danish Company should ensure that, through the consulting agreement, the relevant insurance benefits are provided by the Indian Company (to the employee), and that the relevant employee is provided with paid returns to India.

The Indian employee will have certain rights *vis-à-vis* his Indian employer under specific Danish employment law regulations, outlined in the Danish Secondment Act. The Danish Company should make sure that the Indian employer complies with these regulations in the consulting agreement.