

XpertHR Weekly Podcast

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Susan Dennehy:

Hello and welcome to XpertHR Weekly with me, Susan Dennehy. Having the right contractual documentation in place is essential to ensure that an overseas assignment runs smoothly, which should include what will happen if things don't work out and who will bear the cost of things such as accommodation and repatriation should the assignment be terminated. With me to explain the issues that employers need to consider when preparing for an overseas assignment and offer his invaluable, practical advice, I'm delighted to be joined this week by employment partner at Morgan Lewis and XpertHR author Matt Howse. Welcome to XpertHR Weekly, Matt.

Matt Howse:

Hello. Good to meet you.

Susan Dennehy:

It's a big investment moving staff globally and expanding into other countries. Lots of overseas assignments fail. In your experience, what is the main reason for that? [0:00:54.6]

Matt Howse:

I would say it's mainly down to lack of planning. I think what we often find is that the business gets very excited about sending someone overseas, sending someone to a new location maybe, or into an existing location, and the business have got it in their mind that it's going to happen and it's going to happen quickly, and HR sometimes get swept along as well and don't maybe put a break on it and say, 'Well we need to think about some of these things, such as, obviously, immigration, but equally important tax affairs for the person. When will they be taxed? Will there need to be tax equalisation benefits issues? Will they remain in their home country's benefit plans, pension plans, for example, or will they step into the host company or host country's plans?' And then obviously just the pure employment law relationship as well, in terms of documentation of the contractual arrangements when that person is located overseas.

So I'd say most of it fails because there isn't enough planning at the beginning of the whole process to think about what could happen in certain circumstances and to deal with important issues like, let's say, tax. Maybe other things as well. Family issues, accommodation, school fees. But it's lack of planning, number one.

- Susan Dennehy: And you quite often see the company sending their star performer, perhaps their star IT person or salesperson off to a country to take on a role overseas and it doesn't work out that well and they're not performing that well. Is there anything the employer should put in place for that sort of contingency? [0:02:21.0]
- Matt Howse: Yes, certainly. I think again you find that the excitement or the enthusiasm, if you like, for the assignment at the beginning, you find that employers and maybe the employee as well focus very much on starting out, what's going to happen, how much they're going to be paid, where they're going to live et cetera, and they don't spend enough time thinking about what could happen if it goes wrong.
- So again, in the documentation, in the contractual documentation, there should actually be some quite detailed provisions, I would recommend, that deal with what happens in the worst-case scenario, where it doesn't work out. Again, the more detail you put into the agreement, the less uncertainty there is and therefore the clearer roadmap that exists at the end for the employer and the employee about what will happen, i.e. Will there be a job to return to or if not, what will my severance payment likely look like? Will my family and/or my worldly possessions be flown home and if so, who pays the cost? So again, the more certainty you put in at the beginning, the less trouble and the less uncertainty there is going to be at the end if it does unfortunately go wrong.
- Susan Dennehy: As you say, it's quite an exciting time even for the employee and they might not want to raise what will happen if this doesn't work out. So really it's the emphasis on HR, isn't it, to... [0:03:35.8]
- Matt Howse: I would say so, yeah, absolutely. Again, just to be the...I wouldn't say the killjoy necessarily, but just to calm everyone down a bit and think about some of the more difficult issues, particularly what would happen at the end.
- Susan Dennehy: Because it can be quite drastic, can't it, if someone's gone to another country, they've moved their family, they've moved their pets? [0:03:51.6]
- Matt Howse: It can be quite drastic from both personal and professional basis, so yeah, absolutely. So again, it's all about just trying to get as much clarity as you can so everybody knows where they stand. I think the cases I've been involved in where it gets the most traumatic is where there is very little in the agreement and so the employee, as well as having to worry about returning home, getting their kids into school back at home and their house has been rented out and they need to deal with things like that, and the last thing they need then is to actually be

involved in some pretty tortuous and maybe distressing negotiations with their employer about the financial consequences. So if that is sorted and that's in the agreement, they can then concentrate on more of the soft, personal side of things.

Susan Dennehy:

You sometimes see these employees put on standard employment contracts and there's nothing about repatriation or what's going to happen, or the notice period, or what's going to happen if the person's visa runs out. Is there anything the employer can do to prepare to clean up that mess just in case it doesn't work out? I know you've mentioned a few things there. [0:04:49.9]

Matt Howse:

Yeah. I mean, I think you're right, and I think that's the big danger, is where the documentation isn't properly adapted. So what you'll find – and what we help a lot of our clients with – are bespoke documents to deal with the transfer of people, the assignment of people overseas. So more sophisticated employers will have a suite of documents that deal with all of these things. And so what'll happen is that when the discussion is starting out about assignments somewhere overseas, a form will be given to the employee setting out, 'this is how it will work', very, very clearly. And that document is there. Obviously it has to be adapted from case to case because they'll often differ, but if you've got a suite of documents that you can use and don't have to draft things from scratch, that can certainly provide clarity for everyone right at the beginning.

Susan Dennehy:

So having a proper contract in place with all the contingencies covered? [0:05:43.0]

Matt Howse:

Yeah. So what you often find, in the case of the secondment, where a person is maybe going for two or three years, they will remain employed by their home company, if you like, what you will then have is that that document will stay in place, but it will be adapted, so you'll have a secondment letter which you will give to the employee, which will say, 'These are the terms of your employment arrangement which are differing...' or changing, rather, '...while you are overseas,' and that will deal with remuneration issues, benefits issues, relocation issues, termination issues, and it will be effectively a new contractual document which will exist during the time that they are overseas.

So I'd say it's dangerous just to rely on your normal type of employment contract. The only time I think you'd rely on a normal contract would be if you were doing not a secondment where the person remains employed by their home company, but where there is a clean break, so there's actually a full transfer. So their employment's ending, say with the UK

company, and they're perhaps starting a new employment relationship, say with a Singapore company if they're being transferred to Singapore. And then you would just give them, in those circumstances where it's a permanent transfer, then you would just give them the local Singapore contract.

But if you were doing a secondment where you are envisaging someone to return home, that's when you need to give them a bespoke agreement which deals with the relocation and deals with the terms and conditions while they're assigned overseas.

Susan Dennehy:

Going back to if it fails, in terms of a soft landing, often the employment's linked to visa requirements et cetera, so it can be quite sudden and drastic for the employees. Is there any way the employer can organise a kind of soft landing for the employee? [0:07:18.1]

Matt Howse:

Yes, I think you're right. So immigration is a big issue. So in many countries, including the United Kingdom, the visa or work permit that has been given to the employee is dependent on continued employment, with that particular employer normally as well. So if you know in HR that it's going badly wrong and that the business wants to terminate the employment of the person overseas, one of the things you need to be saying to the business is, 'That's fine, but one of the consequences of that is going to be probably the withdrawal of their permission to live and work in that particular country,' and so as part of the termination process, you need to make sure you put in enough time for the person to sort out their immigration issues and to return home.

So what you will often find is that although the person is maybe stripped of their responsibilities in this overseas country, effectively they'll be put on garden leave, still employed. Immigration status still exists, if you like, in that country, to give them time to sort out their return home and the return home maybe of their family as well.

Susan Dennehy:

There can be lots of costs involved, can't there, for the employee, because like you say, they may have rented out their own property and have rented a property in the country that they're in. And maybe even changed the SIM card on their mobile phone. Small, technical things that... [0:08:34.5]

Matt Howse:

Absolutely, and I think those costs are things that really should be again set out in your policy or your particular contract so that again there is no argument about who bears the cost. So often you'll find housing is a very expensive cost for the employer, effectively take out a lease, because often the employer will be able to take out a lease in a country and the employee won't, because the employee doesn't have a record in that country, if

you like. So the landlord will insist that it's the employer that takes out that lease.

You then terminate someone after eighteen months. Who bears the cost of those outstanding eighteen months worth of rent? More often than not it will be the employer, but what you tend to say, though, is that it will be the employer unless the employee has been terminated for cause. So if it's just because the employee has underperformed or there's been a falling-out maybe or it just culturally hasn't worked, well that wouldn't be for cause, so in those circumstances the employer would pick up the cost. But if the employee has been terminated for a misconduct-type issues – so bribery or harassment or some other form of bullying or something like that – well in those circumstances you may then try and turn it around and say, 'Well it's your fault that your employment's ended.' It's not the employer's fault and therefore the employee may have to pick up some of the outstanding costs.

So again, that's the sort of detail I would recommend you start putting in your agreements so again there's no argument about who picks up the cost in certain circumstances.

Susan Dennehy:

Quite a lot of details. It's going to take quite a lot of time but you're going to save a lot of time and money and... [0:10:02.1]

Matt Howse:

Oh absolutely. I mean, I think most assignment letters that I see now will run to several pages. If they don't run to several pages it may be because they then will just refer to a separate document which is the relocation policy. So you sort of incorporate the relocation policy. But it's going to be pages. Absolutely. There's a lot to cover.

Susan Dennehy:

Looking at recruiting for the overseas post, presumably there's a number of things you should look at, like having the right qualifications, but what other considerations should employers think about when you're sending somebody abroad, particularly if you're sending them to a problem country like Saudi Arabia because of the laws there that may not be ones that people are used to, or dangerous countries? What considerations should employers have? [0:10:39.8]

Matt Howse:

In my experience, you'll find that employers will look to send people who they consider to be the most adaptable, resourceful...and then sophisticated employers will actually do some form of psychometric testing to bring out those qualities from people, check that those qualities exist within their workforce, and then decide that they're the people to send.

Other employers are just reacting to circumstances. They need to send someone quickly and maybe don't think about those sort of things as much, but I think resourcefulness and

adaptability are the ones that I think you'll find are the skills that most successful people working overseas will have.

In terms of things like problem countries or more challenging companies, those skills are even more important. I think the thing I've found sometimes employers fall into the trap of doing, though, is sort of making assumptions about people, particularly stereotypical assumptions about whether certain people with certain maybe protected characteristics from an Equality Act perspective, whether they will be able to work successfully in certain countries.

So for example, maybe making an assumption that someone who is homosexual, for example, would not be able to flourish in countries where homosexuality may be illegal or culturally viewed very badly. And I think that's very dangerous for an employer to make those types of stereotypes or to make those assumptions, 'cause that would amount to direct discrimination.

So effectively, I think what you need to be doing in those circumstances is assume that all of your employees would be able to work in all of your locations and almost allow the employees to self-select and say, 'I wouldn't be comfortable working in this country because of the...' maybe racism or this country because of their views in relation to homosexuality. Or even this country because of their views in relation to females working, for example.

So you shouldn't make any assumption. You should maybe let the employee self-select in those circumstances.

Susan Dennehy:

And probably have an honest conversation with them. If you're sending a homosexual member of staff, you would have to sit them down, wouldn't you, and explain? [0:12:38.0]

Matt Howse:

Give them some form of cultural awareness, absolutely. But again, I've had cases where, as I say, employers make assumptions and have not allowed people with certain characteristics to go to certain places. And that is very dangerous, particularly when subsequently what happens is maybe you say to someone, 'There's a redundancy round. We're selecting you for redundancy because you're not as flexible,' or maybe, 'You don't have as much overseas experience as someone else,' and then the employee comes back and says, 'Well the reason I don't have as much overseas experience is because you didn't allow me to go to those countries,' and that then becomes a problem. That then becomes litigious. And as I say, I've had cases arising in exactly those circumstances.

Susan Dennehy:

And you said there that staff often select themselves for these overseas roles. Sometimes there's pressure on the employer,

isn't there, to send people off, 'cause it's seen as a passport to career in a lot of companies.

Matt Howse: Absolutely.

Susan Dennehy: They do say, 'We want you to go around two or three countries and that's how you'll get into senior management.' What are the benefits to the employer of sending somebody from their own company rather than taking a local hire? [0:13:35.1]

Matt Howse: Clients say to me the reasons for doing it is maybe two or three reasons. One is what they would say is they're supporting their business's culture. So particularly a lot of businesses in the technology sector, for example, are very proud of their culture and their way of doing things, and if you send people who are imbued with that culture, that's about spreading that culture overseas.

Similarly, spreading knowledge and expertise in particular products or particular areas of growth. Again, you're sending someone to be an evangelist almost, overseas, to spread that knowledge and expertise.

Obviously the downside of that is that maybe they will not have the local knowledge and the local contacts, so I think what you'll find is that the most successful businesses will have a mixture of people in those circumstances. They'll send one of their long-serving maybe employees overseas so they can export their culture, but at the same time they will employ people locally so they've got the local knowledge and the local cultural awareness too.

Susan Dennehy: With a lot of countries, cultural awareness is quite big, isn't it, in business? If you look at countries like Hong Kong and China. [0:14:37.3]

Matt Howse: Absolutely. That reminds me also of an advert by an international bank that talks about understanding local culture and local business needs and I think that's absolutely true.

Susan Dennehy: So you've spoken before about the types of arrangements that people are sent on on these assignments. Can you just remind us what the three main ones are? [0:14:52.0]

Matt Howse: Sure. So the most common by far I would say is the secondment, which lends itself to an assignment which is maybe six months to two or three years in length, and that's where from a legal perspective the person remains employed by their home company and are effectively loaned to the local company that they're going to work for in that region. So the whole idea then is that they will return to their home company, although what type of job they can return to varies from time to

time. But secondment is the most common and is quite popular with employees 'cause employees want to maintain a link with their home company.

The second one is one I touched on a bit earlier, which is where you have the clean break, again where you effectively send someone for an indefinite period, a long period where their employment relationship with their home company is completely broken and they start a brand new employment relationship with their new company in the new country.

And then the third, which you see increasingly, particularly for large multinationals, is what you see called the general employment company, where effectively a group of executives who are expected to work internationally will work three years in Singapore and then go to Rio de Janeiro and then go to Dubai and that's their career. They will then tend to be employed by a separate company within the group of companies, which will often be incorporated in a very tax-efficient country such as Bermuda or Singapore, for example. And then effectively what happens is they're employed by that company, that's their employment relationship, and then they have a series of secondments from that general employment company to the different countries that they go to. And again, that sort of deals with the whole issue of, you know, there's no termination of employment and then starting new employment. They're always employed by the general employment company.

That can work very well but is very expensive to set up, because it obviously involves you setting up a whole new infrastructure to deal with that. But once you've got it set up, it can be a very effective way of dealing with that group of employees.

Susan Dennehy:

And in terms of keeping an eye on the employee in your overseas operations, what do most companies do? Do they have an internal HR function or do they tend to outsource their operations? [0:167:00.0]

Matt Howse:

I think there's definitely a trend, I would say, to employers who have a lot of overseas assignments to either setting up a separate unit which they call 'global mobility' or something like that, within their HR department, or giving particular responsibility to one or two people within their HR department: 'You are responsible.' So they build up an expertise and I think that's quite important that they do, that it is someone who builds up an expertise and understands the tax issues, the immigration issues, the benefits issues, the employment law issues and maybe some of the softer, family-type issues as

well. So I think that's a trend I'm seeing in more of a specialisation in this area in many HR departments.

Susan Dennehy:

And are there are particular rules about dealing with performance or disciplinary matters for the overseas person? Do they tend to be the host country or the home country or a mixture? [0:17:49.2]

Matt Howse:

That really varies and you'll find that again that's something that should be dealt with in the documentation. So I've found that many employers will hand over the employee to the host country and say they're subject to those rules and those performance measures. But again, I've seen other arrangements where actually the home company still maintains the interest and the control on that.

But one thing to remember, though, is that in most cases, once you go beyond two or three months, an employee will start to gain local employment law rights, so statutory rights. So if you are, for example, going to discipline someone who's overseas, you should be, as well as taking advice in your home country (so if you're in the UK, take legal advice in the UK about that person), but you should probably also be taking some advice in relation to the employment laws that may apply to the employee in their host country as well.

Susan Dennehy:

It must be very difficult to organise if you've got an outsourced operation to know how the company would want to deal with certain issues like that. [0:18:52.2]

Matt Howse:

Absolutely. There needs to be a lot of communication. Absolutely. Everyone needs to be involved. Home, host, management, the management line needs to be involved as well to make those types of decisions.

Susan Dennehy:

Thank you, Matt, for that extremely useful guidance and helpful advice.

Matt Howse:

It's been a pleasure.

Susan Dennehy:

There are more resources on our website under the international manual section in the Guide for Global Employers. That brings us to the end of this week's XpertHR Weekly which you've been listening to with me, Susan Dennehy. We're back again next Friday. Until then, it's goodbye from us.