A DIFFERENT PERSPECTIVE

21st Century Employers

Exploring Cross-Border Record Keeping

Virtual Round Table Series, April 2016

Employment Law Working Group

21st Century Employers

Exploring Cross-Border Record Keeping

There is a growing trend for cross-border expansion, merger or acquisition among top-tier businesses as they react to an increasingly global marketplace. When these transactions happen, one of the most important, but often overlooked, factors is people.

Figures from Baker & McKenzie's 2014 'Going Global' study into cross-border M&A reveal that 1,083 cross-border deals worth $263 billion took place in the first three months of 2014 alone. It also said that human capital was the second most important consideration in 25% of all deals.

Even if a progressive business doesn't yet have an international presence; all modern employers need to attract the best talent, and should be keen to carry out that search on a broad stage, recruiting out of state, country or even continent.

Data collated by the Organisation for Economic Cooperation & Development (OECD) shows a significant increase in the inflow of people into and between OECD member countries during the last decade. In Australia, for instance, there were 251,000 new permanent residents in 2013, compared with just 123,000 in 2003.

In the United States, the number of new permanent residents confirmed in 2012 was 1.03 million, compared to 703,000 in 2003. Germany saw its population increase by 1.1 million in 2013, compared to 600,000 in 2003.

These are all trends which impact the makeup of any workforce, so 21st Century employers need to remain cognisant of the fact that increased labour mobility brings with it challenges, as well as the obvious advantages.

Employment Law

Hiring new employees in a foreign jurisdiction, filling international vacancies, or moving staff intra-company across borders can have far-reaching implications for employment law.

One of the most important aspects to be aware of is the way that laws relating to record keeping differ across jurisdictions. Employers must give careful consideration to the privacy of employee data, understand the implications of migrating employment records between countries or states and assess the relevance of existing employment contracts.

IR Global has teamed up with Australian employment law expert Jeremy Cousins, principal of Whitehall Workplace Law in Melbourne, to analyse some of the major issues that need to be considered by 21st Century employers and their advisers.

Jeremy has more than 13 years of experience as a dedicated employment and industrial relations lawyer with large internationally-focused commercial law firms. He recently chaired a virtual roundtable of members from the IR Global Employment Group to highlight some differentials in global law where employee record keeping is concerned.

The following discussion involves members from The Netherlands, USA, India and Australia. It serves to emphasise the importance of employment law due diligence to any company with an international mindset.

View from IR Global

This series of virtual round tables is designed to inspire and improve communication between our members. We are passionate about building closer integration and proactive working relationships within the IR community.

In this series we will focus on issues raised within our specific working groups and attempt to unpack them in a discussion forum. The aim is to address real problems that you, as experts, have identified and then provide the information, contacts and resources to resolve them.

We believe the power of a global network comes from sharing ideas and expertise, allowing members, in turn, to better serve their clients.

We currently have 11 active working groups: Accountancy, Commercial, Disputes, Employment, Insolvency, IP, Latin America, Mergers & Acquisitions, Private Client, Real Estate and Tax.

Each call is co-hosted by an IR Director and IR Global members.

Ross Nicholls
Business Development Director
IR Global

Host

Jeremy Cousins

PRACTICE AREA COMMITTEE MEMBER

Principal, Whitehall Workplace Law,
Australia

+61 (0)3 8605 4841
j.cousins@whitehallworkplacelaw.com.au

Jeremy Cousins deals with a wide range of workplace relations and employment matters including advising clients on industrial relations strategy, industrial disputes, restructuring, mergers and acquisitions, defending claims under the Fair Work Act 2009 (Cth) and under both state and federal discrimination legislation.

He assists clients with workplace investigations, performance and injury management issues, acts as an advocate in conciliation, tribunal, commission and court proceedings and has particular experience in the prosecution of claims arising out of breaches of confidentiality and restraint of trade matters.

Contributors

David Seserman

Managing Member, Brosseau Bartlett Seserman LLC, Colorado

001 303.515.2482
dseserman@bbs-legal.com

David Seserman is a trial attorney. He concentrates his practice in the field of human resources with an emphasis on employment and employee benefits litigation.

During his career, he has tried numerous lawsuits in state and federal courts involving a myriad of employment related issues including wrongful discharge, misappropriation of intellectual property, disability, breach of employment contract, age discrimination, Title VII, FLSA and ERISA claims.

Marcel de Vries

Partner, Pallas Attorneys-at-Law, Netherlands

+31 (0)6 29 22 93 37
marcel.de.vries@pallaslaw.nl

Marcel de Vries is founder and joint owner of Pallas Attorneys-at-Law, and he specialises in individual and collective employment law.

He regularly advises on a range of matters such as non-competition clauses, flexible types of employment contracts, assignment contracts and contractual relationships with independent contractors. In addition, Marcel frequently provides advice on international employment law and the role of the managing director.

Aliff Fazelbhoy

Senior Partner, ALMT Legal, Advocates & Solicitors, India

+91 22 4001 0000
afazelbhoy@almtlegal.com

Aliff Fazelbhoy is recognised as one of the leading lawyers in his chosen fields of practice and has been consistently selected as one of India's leading lawyers by global legal publications like Chambers & Partners, Legal 500 and IFLR 1000 amongst others.

India Business Law Journal affirms ALMT as a leading Employment & Industrial relations Law Firm for 2014. The Tax Directores Handbook 2015 highly recommends Aliff for his tax practice.

Round Table Q&A

Q: Could you please provide an overview of the main legislation in your jurisdiction concerning employee record keeping?

Jeremy Cousins (JC): In Australia we have a central piece of legislation called the Fair Work Act which sets out a whole list of details any employer must keep covering things like overtime, leave entitlement, pensions and pay. Those records must be retained for seven years.

Aliff Fazelbhoy (AF): There are 30 different states in India and each has its own employment law act covering general working conditions. They include hours of work and employment record retention requirements. Most are fairly similar and workers can usually be employed without the need for a contract, although it is a requirement in some states.

We have a central Federal Industrial Disputes Act covering labour disputes, trade unions and settlement disputes. It splits the workforce into two camps; workmen and non-workmen. The main difference is that management level non-workmen are not protected against termination and can only take disputes to a civil court, not a labour court. Employee records are required to be kept for a period of two to three years.

David Seserman (DS): Federal and state laws are also both of relevance in the USA. The vast majority of employment law is at a state level and there isn't much. It is a federal requirement to complete an I-9 form to prove the immigration status of all employees, detailing their citizenship. In addition, it is strongly recommended, although not required, that payroll data and documents relating to deferred compensation such as pension plans and health insurance be maintained for a period of seven years.

Marcel de Vries (MV): Employers in The Netherlands are required to retain employee records for a period of seven years, but we always tell our clients to keep them for longer, in case of need. The seven-year period applies from the last calendar day of the year employment commenced.

There is a requirement to obtain identification for all employees, along with social security details, keeping these in the workplace of the employee. The legislation also applies to agency workers and subcontractors. Regular checks are carried out to ensure all employers have complied with tax, social security, immigration and employment laws. If any records are incomplete, fines will be imposed.

Break out session, IR Global Conference, London 2015

Round Table Q&A (continued)

Q: What rights do employees have to access data held about them by their employer? Can they be sure sensitive data is kept confidential?

(JC) Employees don't have the right to access their employment records in Australia. There is a piece of federal legislation concerning privacy of individual data, but actual employee records are exempt from that. If a company is considering transferring personal data and they are not sure if it covered by the privacy legislation (e.g. information from a job application) the best thing to do is seek consent.

(DS) Employees don't have the right to access their employment records in the USA either, although some states will provide limited access. Some employment data might be provided for litigation purposes, but that tends to be less sensitive payroll data. Private data on mental or physical health, for instance, would never be produced.

(MV) The Netherlands is part of the European Union (EU) and has therefore implemented the EU Data Protection Directive into its legislation. Personal data may be accessed under limited circumstances where necessary; this might include complying with a legal obligation to which the employee is subject, such as a tax litigation, or to protect the vital interests of the employee.

There are also other exemptions in connection with specific identification procedures or affirmative action programs.

(AF) Regulations concerning employee privacy and the retention of sensitive data were introduced in 2011 in India as part of the Information Technology (IT) act. This ensures that sensitive data, such as an employee's medical history, financial affairs or sexual orientation is kept confidential.

Q: Are electronic employment contracts acceptable in your jurisdiction?

(DS) Most people are employees at will in the USA, there is no requirement to have a contract. If a contract does exist, there is no reason it can't have an electronic signature, but I have never seen one. What you tend to have is an exchange of documents back and forth with a requirement that both parties sign them.

There has been a lot of litigation in the US around whether terms and conditions of employment, or handbooks, can, in and of themselves, amount to an employment contract. If there are adequate disclaimers in the handbook saying 'this is not a contract of employment' then that precludes them from becoming contracts.

Break out session, IR Global Conference, London 2015

Round Table Q&A (continued)

As far as hard copies are concerned, there is no requirement for them to be maintained in original form, as almost everything is moving towards electronic soft copies. It is worth noting that document retention guidelines apply equally to both hard and soft copies.

(AF) Electronic maintenance of records is now possible in some Indian states, although you do need to make a filing with the relevant labour commissioner. E-contracts are not popular though, with hard copies the norm. The IT Act covers all e-commerce in India.

(JC) There is legislation at a federal and state level in Australia authorising employment contracts to be entered into electronically. Hard copies of employment records can also be converted into electronic format and then destroyed, providing there is no ongoing litigation or risk of litigation. Any soft copies must be easily recoverable and held in a secure location.

Q: Are there specific regulations concerning the transfer of employee records between your jurisdiction and another?

(MV) All EU member states comply with the same directives regarding transfer of employee records, therefore transfer within the union is covered. If the transfer relates to a non-EU country, then the level of data protection should be investigated using safe harbour rules.

(JC) If, for instance, an Australian business wanted to transfer employee records to an overseas parent company, they would have to take reasonable steps to make sure the overseas company complied with Australian legislation. If that was not the case, they would need to ensure that the legislation in the relevant jurisdiction was substantially similar. The other option is to obtain employee consent.

(DS) There are no restrictions in the US on the transfer of employee data, except to maintain confidentiality.

(AF) Employee consent should be obtained before transferring records to third parties. Information can be provided to Indian government authorities under certain standard exemptions.

Q: What rights do employees have at work with regard to privacy?

(JC) Very few, particularly when it comes to issues such as email surveillance. There are some protections in Sydney, New South Wales and also some here in Victoria, but very few in reality. There has been some movement recently to codify and legislate, but it remains underdeveloped.

(DS) Employees in the US have no expectation of privacy, but most companies take that a step further by providing explicit instructions when, for instance, issuing a computer. They will specifically say that the computer is the property of the company and that the employer has the right to monitor any communications made using it.

Break out session, Shanghai 2015

Contacts

UK HEAD OFFICE

IR Global
The Piggery
Woodhouse Farm
Catherine de Barnes Lane
Catherine de Barnes B92 0DJ

Telephone: +44 (0)1675 443396

www.irglobal.com
info@irglobal.com

KEY CONTACTS

Thomas Wheeler
Managing Director
thomas@irglobal.com

Ross Nicholls
Business Development Director
ross@irglobal.com

Nick Yates
Contributing Editor
nick.yates@scribereconsultancy.com
www.scribereconsultancy.com

Contributors

Jeremy Cousins
irglobal.com/advisor/jeremy-cousins

David Seserman
irglobal.com/advisor/david-seserman

Marcel de Vries
irglobal.com/advisor/marcel-de-vries

Aliff Fazelbhoy
irglobal.com/advisor/aliff-fazelbhoy