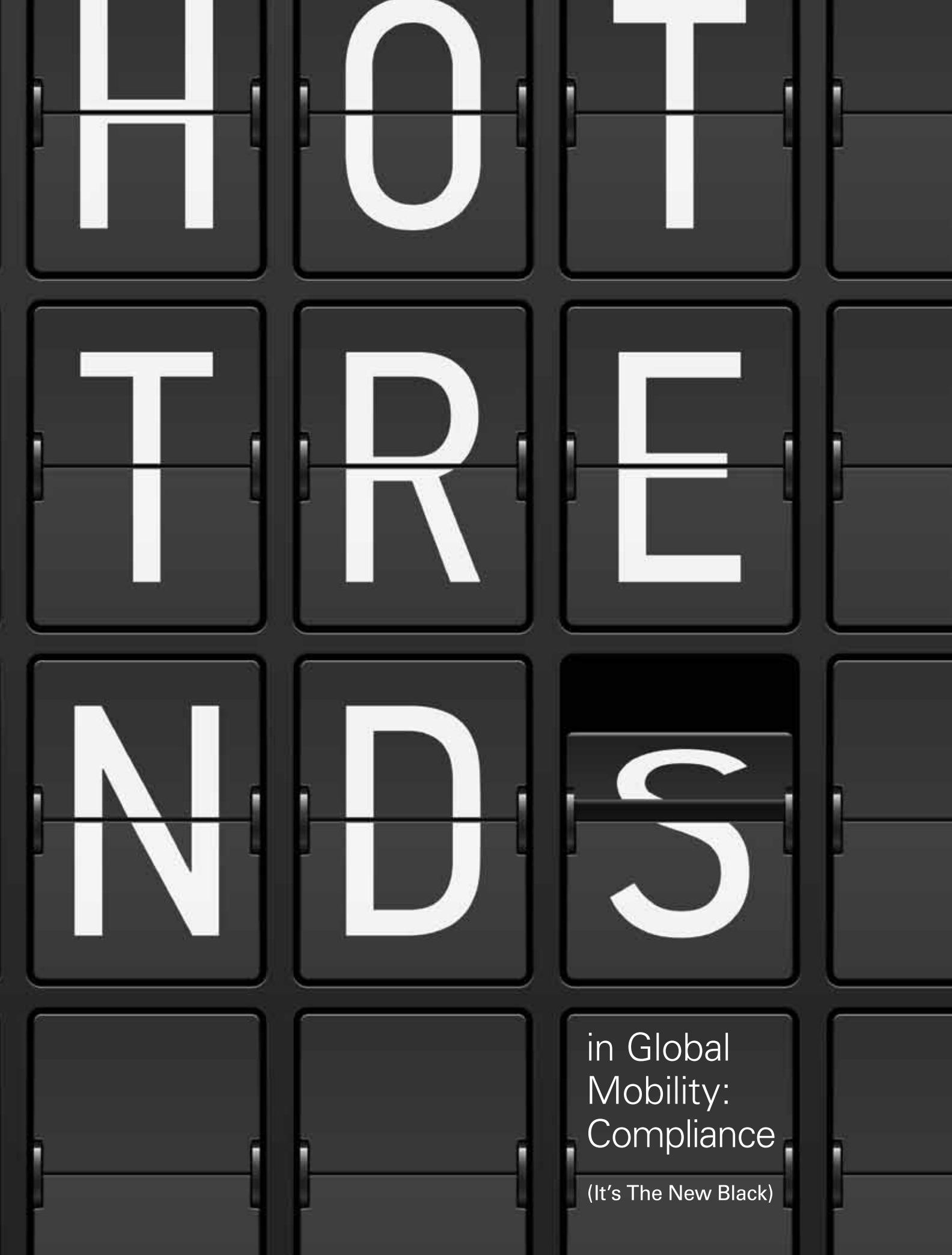

in Global Mobility: Compliance

(It's The New Black)

BY ELAINE MARTIN

Corporate compliance is becoming one of the trendiest mobility-related topics on the speaking and writing circuit lately. In the past few years, every relocation conference that I've attended has included multiple sessions on compliance, and it seems impossible to open a magazine or journal aimed at the relocation industry without reading articles on compliance. (Full disclosure: I have an article in the March 2012 issue of *Mobility* that deals with compliance.) This article will focus on immigration compliance in particular, with reference to other areas to watch.

But don't just take my word for it: In a 2011 Mobility survey conducted by Interdean,[1] 45 percent of respondents said that "getting a better grip on tax and compliance" was a high priority. The only higher priority — at 53 percent — was "cost management."

The importance of being compliant

Why all the buzz about compliance now?

One reason may be that governments have been enforcing regulations, especially immigration regulations, with increased vigor over the past few years. Many people feel that governments see this as a way to raise money without alienating voters. In a recessionary economy, penalizing employers for immigration violations has a twofold benefit: increasing revenue without increasing taxes, and satisfying voters' desire to curb the number of undocumented workers in their country.

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Increased employer accountability and audits

Governments are now more likely to chase a company, rather than an individual expatriate assignee, for immigration violations. Not only does the company have deeper pockets, but governments see targeting employers as more effective. The theory is that employers who hire unauthorized workers create the demand that drives most illegal immigration.

In the United States, President Obama's administration has increased enforcement of immigration laws in the workplace. By December 2011, US Immigration and Customs Enforcement (ICE, the enforcement arm of the Department of Homeland Security) had conducted almost 6,000 audits in the previous three years, resulting in $70 million in fines and penalties.[2]

New Zealand's Immigration Act of 2009 set out various obligations on employers, and eliminated a "reasonable excuse" defense to employing an undocumented worker.[3]

In the United Kingdom, the Immigration, Asylum and Nationality Act of 2006 imposed the obligation on employers to check an employee's immigration status. The Act imposes severe fines and criminal liability for knowingly hiring an undocumented worker.

Business travel versus work visa

Are your employees sleeping around? Around the world, I mean? They almost certainly are.

Whether you call them "extended business travelers," "stealth expats" (with its sinister, underhand connotations), or "short-term assignee," chances are that you are using this process. You aren't alone — 92 percent of companies surveyed in 2010 said that they used short-term assignments.[4] The high use of this type of transfer probably relates to the cost concerns mentioned earlier.

Unfortunately, 33 percent of companies admitted to having experienced compliance problems with the short-term transfers.

Compliance problems are no surprise, given that over two-thirds of companies said that they didn't know the correct immigration status for an employee.[5] You might not expect a manager to know, but often these managers still ask an overseas worker to visit for a few weeks without going through any central mobility department.

In my experience, managers will often ask the overseas employee to take care of any immigration paperwork that is needed ("Just be here in two weeks, OK?"). The employee's first — and maybe last — idea is to ask a colleague. I call this the "Hey, dude" form of research, as in "Hey, dude, didn't you work in our San Francisco office last year for a while? What visa did you get?" The dude (with apologies to The Big Lebowski) says he didn't need a visa, and that you can go to the United States for 90 days without one. And so the chain of misinformation continues.

Maybe our transferee decides to double-check online himself. We all know how reliable that is.

Allowed business visa activities

Louis XIV may have been able to decree that "It is legal because I wish it," but that doesn't work for the rest of us (it didn't work too well for Louis XIV either, in the end).

The most important point to remember from this article is this:

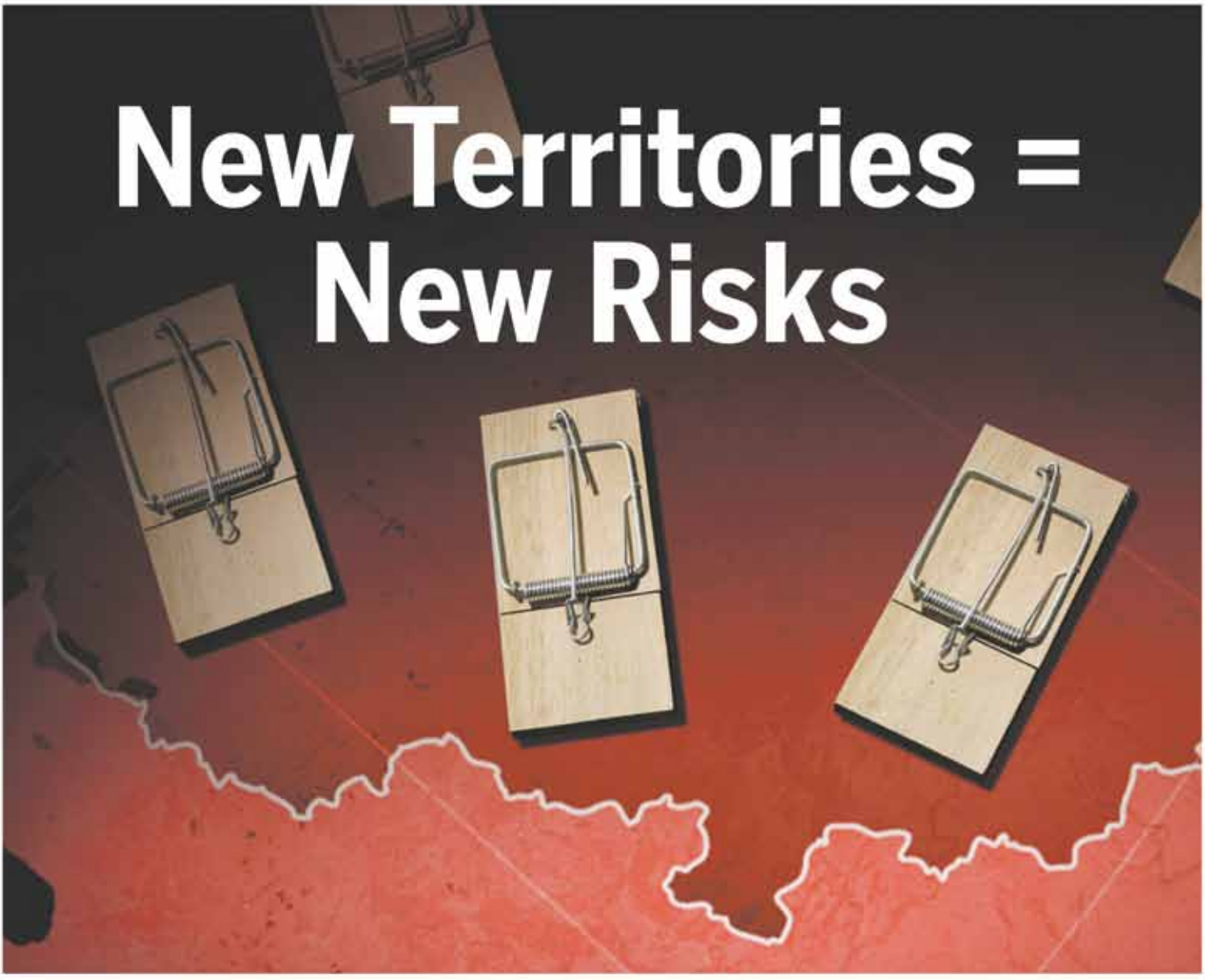
In most countries, working while in business visitor status is forbidden. It doesn't matter whether you are on the home, host, or even no, payroll. It doesn't matter how long you will be in the country — in most countries, working for any length of time, even two days, triggers the need for work authorization.

The general rule is that the assignee can do no productive work while in business visitor status. I've heard this described as the "hands in pockets" rule. If the assignee keeps her hands in her pockets, she can't be fixing machinery, directing projects, demonstrating products, conducting audits, etc. In most countries, the assignee cannot do anything that benefits the host company while she is in visitor status.

What can a business visitor legally do?

In most countries, business visitors can:

- attend conferences, seminars and business meetings;
- receive training;
- conduct sales/marketing activities for products or services originating outside the host country. For example, a French person could market Dom Perignon champagne in the United States as a business visitor;



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- go on a fact-finding mission; and
- install and/or service equipment bought and exported from the home country, if such service was provided for in the purchase contract.

Exceptions

Some countries allow for limited work as a visitor. For example:

- Brazil — short-term status available allowing work for up to 90 days
- China — working up to 90 days is allowed on an F visa.
- Mexico — work may be permitted for up to 180 days if the employee remains on the foreign payroll.

Employer penalties for noncompliance

The penalties for failing to comply with immigration requirements are potentially very serious.

Fines

Short of a slap on the wrist from the immigration authorities, fines are probably the least disruptive penalty … to the company, that is. However, managers and other company employees might also be subject to penalties that could be very disruptive indeed. In some countries (e.g., France), managers can be fined up to €15,000 and imprisoned for up to five years for each undocumented employee. The company can be fined up to €150,000.

Negative publicity

Many countries feel that publicizing a company's history of immigration violations is a deterrent. This works in cultures where saving face is important and embarrassment is shameful. It probably doesn't work so well in other countries, except when there is a significant anti-immigrant sentiment.

Countries that use the publicity penalty include France, Saudi Arabia, Israel and New Zealand.

Ban on immigration filings

A serious disregard for immigration rules can often lead to the company being banned from hiring overseas workers for a set period. In the United States, for example, the ban can last up to three years. There could also be a ban imposed on government contracts (France, United States), confiscation of assets (France) and even company dissolution (France).

At a minimum, a company that is violating immigration laws faces a loss of credibility with government agencies. This leads to increased scrutiny of subsequent applications, which will be viewed with suspicion.

Criminal consequences

It is probably safe to assume that everyone reading this, myself included, wants to leave their job voluntarily, not involuntarily. However, if one of your managers or executives ends up being arrested because of the company's immigration violations, you probably won't be resigning by choice — even if you're not the one in handcuffs.

Prosecution of company officials is not limited to high-profile criminal cases like those involving Enron and Bernie Madoff. In May 2011, a Los Angeles furniture company executive was sentenced to 10 months in prison on charges related to hiring undocumented workers.[6] US law[7] provides that anyone engaged in a "pattern or practice of violations" can face criminal sanctions in addition to civil penalties. These sanctions can be fines of up to $3,000 for each unauthorized alien and up to six months imprisonment for the entire pattern or practice.

Employee penalties for noncompliance

I mentioned earlier that many governments were targeting employers rather than employees in cracking down on illegal immigration. Nevertheless, undocumented workers are liable for severe consequences if discovered.

Deportation/removal

An obvious (I hope) penalty is that the assignee who does not have the correct paperwork is barred from entering the country or is forcibly removed if he is already there. In some countries, being deported makes it extremely difficult to enter the country again legally.

In the worst-case scenario, if a US immigration official finds that a person committed fraud in trying to enter the United States, the assignee is barred from ever entering the country. This is a permanent bar, with no waiver available.

A worker deported from Israel is prohibited from entering the country again, for any reason, for years.

Fines

Many countries impose fines on overseas visitors who breach immigration laws by working without authorization, overstaying, etc. These fines can be very steep (e.g., up to $18,000 in Korea).

Criminal consequences

Employees may also endure criminal penalties if accused of immigration infractions. A few years ago, two accountants from KPMG were arrested in Indonesia and detained in jail. The Indonesian authorities claimed that the accountants were conducting audits on an Indonesian company without the correct work visa. Instead, the authorities alleged, the accountants just had tourist visas.

How will they know?

At this point, you may be wondering how the authorities will know that employees are working in visitor status. They wouldn't necessarily show on an audit, since it is hard to prove that someone is working when you say they aren't.

Inspection on entry

An employee does not have to enter the new country wearing overalls, a hard hat and carrying work tools for immigration inspectors to suspect that he is not just here for a business meeting. Immigration officers are very well trained in detecting suspicious answers to their questions, and they have wide authority to search luggage. In some countries (e.g., Israel), you can assume that luggage will always be inspected.

Items that could show that a person intends to work in the host country include:

- business cards showing a host country address,
- marketing lists,
- business papers,
- tools,
- uniforms, and
- instruction manuals/guides.

Authorities can generally search the traveler's laptop to find incriminating evidence. So far, courts in the United States and Canada, for example, have held that searches of laptops and other electronic devices are not unconstitutional.[8]

Whistleblowers

Protecting people who report a company's illegal activities to the relevant authority is enshrined in laws in many countries. This is commonly known as "whistleblower protection" and is often contained in a country's anti-corruption legislation (we'll come back to corruption later).

Examples of the countries with whistleblower protection are:

- United States — in various pieces of legislation including the Consumer Finance Protection Act, 2010 ("Dodd Frank" Act);
- South Africa — The Protected Disclosures Act, 2000; and
- United Kingdom — The Public Interest Disclosures Act, 1998.

Anyone within your company who suspects illegal immigration activity could report it to a government agency. The motivation behind the disclosure can vary and is irrelevant. However, the result will be the same — government investigation.

Contrary to popular belief, whistleblowers are usually not disgruntled employees seeking vengeance or financial rewards. A recent study of whistleblowers in the pharmaceutical industry revealed that almost 90 percent of them tried to report their concerns internally before going to the government.[9] The report found that most were motivated by ethics, not cash.[10] Nevertheless, financial rewards can be significant — up to $42 million as reported in the study.

An employee **does not have to enter** the new country **wearing overalls, a hard hat and carrying work tools** for immigration inspectors to suspect that **he is not just here for a business meeting**.

One significant immigration-related whistleblower case in the United States is still awaiting a decision: *Palmer v. Infosys Technologies Limited*. In this case, Jack Palmer, a project manager with Infosys, filed suit against the company alleging that it sought his help in circumventing immigration laws. Specifically, Infosys was accused of bringing Indian workers to the United States as business visitors when they were actually working for Infosys and its customers in the United States.

The allegations against Infosys have caught the eye of US authorities. In an SEC filing, Infosys confirmed that earlier this year, it received a grand jury subpoena from the US District Court in Eastern Texas, seeking "documents and records related to the company's sponsorships for, and uses of, [H-1B] business visas.[11]

Random inspections

I mentioned earlier that employees can be interrogated on entry to the country. They can also be questioned many weeks after they successfully enter the country, if they are in the wrong place at the wrong time. In the United States, individual states (e.g., Arizona, Alabama and Georgia) have introduced strict laws enabling local law enforcement personnel to check a person's immigration status. The constitutionality of these laws is being challenged, sometimes by the US federal government itself.[12]

Despite the legal challenges, the law is being enforced in Alabama and this led to the arrest and detention of two

ACC Extras on… Global Mobility

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car company executives. The executives, from Honda and Mercedes-Benz, were detained in separate incidents. Both were in the country legally; however, they were not carrying documents on them when stopped. Such high-profile incidents are raising fear in Alabama that it will be difficult to attract foreign investment.

But wait, there's more

Immigration is not the only area where companies might fall afoul — accidentally or otherwise — of compliance regulations.

The B (or F) Word

Bribery — or "facilitation fee" — payments are a major concern of corporations worldwide, with good reason. Countries are really trying to crack down on corruption, some more than others.

The United Kingdom enacted the 2010 Bribery Act in 2010,[13] which came into effect on July 1, 2011. The Act defines bribery generally as giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so. The Act also holds companies liable for bribery committed on the company's behalf (e.g., by an agent). Excellent guides to the United Kingdom Act are available on the UK Justice Ministry website: *www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm*

The United States enacted the Foreign Corrupt Practices Act (FCPA)[14] in 1977. The FCPA's anti-bribery provisions prohibit offering anything of value, directly or indirectly, to a foreign official to influence the foreign official in an official capacity. "Anything of value" is strictly interpreted, and could be meals, free travel, charitable donations, promises of future employment, etc. The perception of the recipient is often key to determining whether "anything of value" was offered.

Both the UK bribery Act and the FCPA allow the company to defend itself by showing that it believed that it had adequate procedures in place to prevent the bribery.

Does the FCPA apply to you?

Possibly, even if you are based outside the United States. The FCPA has very broad application, and can be enforced against companies and citizens that are not based in the United States. The FCPA now applies to actions committed outside the United States by companies that trade on the US Stock Exchange and by companies that do business with a US company, for example.

Nine of the top 10 FCPA cases involve non-US companies.[15] The largest settlement in FCPA history was by Siemens AG in 2008 — and it is hasn't ended yet.[16] Siemens

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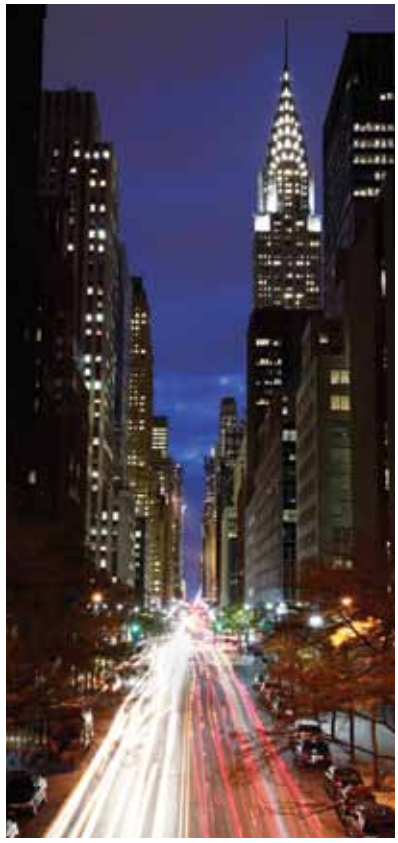

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originally paid a record $800 million to the US government in settlement. Now eight individual executives from Germany and Argentina are being charged with corruption in Argentina. The US government claims jurisdiction because Siemens shares are traded on the US Stock Exchange and because the money was funneled through US banks.

Facilitation fees

The US FCPA and the UK Bribery Act acknowledge the existence of "facilitation fees" in conducting business overseas. The FCPA exempts such payments from its anti-bribery provisions. The Act considers a facilitation fee to be one paid to expedite or ensure a routine government action (e.g., to speed up a routine approval). The distinction between what is and is not allowed is extremely vague, however, so please seek legal advice before trying to avail of this exception.

The UK Bribery Act specifically prohibits facilitation fees:

> Facilitation payments, which are payments to induce officials to perform routine functions they are otherwise obligated to perform, are bribes. There was no exemption for such payments under the previous law nor is there under the Bribery Act.[17]

Anti-corruption measures worldwide

Many countries and groups of nations have signed treaties or enacted legislation against corruption, including bribery. The OECD Anti-Bribery Convention has been ratified by 38 countries. Russia was the most recent signatory, on Feb. 17, 2012.[18] Despite the apparent success of the convention, very few countries have actually enacted legislation to put the terms into effect. Half of the ratifying countries have no enforcement mechanisms, and a quarter have limited mechanisms.

For a fascinating — and sobering — analysis of corruption worldwide, see here: *www.business-anti-corruption.com*.

Tax compliance

Most of you know that you and your employees must comply with the tax laws of all applicable jurisdictions. The question as to what those applicable jurisdictions might be is the challenging one. The answer is best left to accountants, tax lawyers or others with expertise in this area.

I do want to shatter one myth: The idea that a person does not have to pay taxes if in a country for less than 183 days is often not true. This myth exists in the United States, because some countries have included this 183-day limit in their tax treaties with the United States. However, not every country uses 183 days as the timeframe. For example, the threshold is 89 days in Egypt and India. It may be even less in countries that have no tax treaty with your country.

"The single biggest problem in communication is the illusion that it has taken place."

—GEORGE BERNARD SHAW

Privacy laws

Transferring an employee from one country to another usually requires transferring information about that employee and her family from one country to another. The company's HR department, directly or indirectly, deals with many service providers in the new (host) country. These providers — immigration, tax, destination service providers, etc. — may need details about marital status, job description, salary, national ID numbers, passport and even medical or criminal history, in order to analyze the transfer correctly and complete any government forms.

Before any personal information is communicated from anyone other than the employee to anyone else, we recommend getting the employee's unambiguous, informed consent. Privacy laws vary widely around the world and are especially strict in the European Union. EU Directive 95/46/EC[19] prevents the transmission of personal data unless strict controls are in place. Under EU law, personal data can only be gathered legally under strict conditions, for a legitimate purpose. Furthermore, people or organizations that collect and manage personal information must protect it from misuse and must respect certain rights of the data owners, which are guaranteed by EU law.

In the United States, the Department of Commerce has consulted with the European Commission and developed a "Safe Harbor" framework to provide a way for US organizations to comply with EU — and Swiss — data protection law.[20]

Export controls

The United States, among other countries, controls the export of items to other countries, for security reasons. "Items" include commodities, software or technology, such as clothing, building materials, circuit boards, automotive parts, blue prints, design plans, retail software packages and technical information. Any restricted export needs a special license from the US Department of Commerce.

Technology transfer includes allowing a person from a restricted country to access that technology while they are in the United States. In such a case, the US company will need a license before such transfer, which may mean getting a license before an employee can work in the United States.[21]

Solutions

Short of embedding global positioning microchips in everyone, how do you track employees who are on short-term business trips? It is not an easy solution, and a common problem according to corporate mobility managers worldwide.

Communicate

A critical step to ensuring that your company personnel comply with any business travel policy is ensuring that they are aware of it. Sounds obvious, right? Yet, we saw earlier that a large percentage of company managers don't know the correct status for employees and don't ask an internal immigration coordinator. It is very important to let everyone in the company know that short-term assignments need to have the same legal analysis as any other assignments. Scare them, if necessary, by explaining the risks, including the risks to individual employees involved in the transfer, as mentioned earlier.

If your employees travel on business to a few countries more than any others, perhaps you can arrange training on the basic business-travel limits in those countries. However, this should not avoid the need to get a formal analysis each time.

Central control

We recommend that your company policy require all short-term assignments to be arranged through a centralized travel department. Perhaps all flights need to be booked by that travel department, or prior notice is a requirement for travel insurance to be effective.

This department/coordinator should be able to track all employee travel anywhere in the world, and can easily report on how long a person has spent in a particular location.

An effective method of ensuring that employees get prior approval for business travel is to require such approval before trip expenses get reimbursed. Sure, that is wildly unpopular, but you can bet that it works.

Include service partners

Companies can be held liable if their service providers or other agents ignore the compliance issues mentioned above. It is very important, therefore, to ensure that these partners agree to comply with any anti-bribery, privacy, etc., laws. Ideally, you will include it in your contract with these third-party providers.

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NOTES

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