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TalkingPoint

MANAGING BUSINESS IMMIGRATION RISK

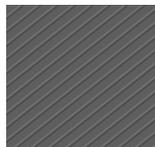
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TALKINGPOINT: MANAGING BUSINESS IMMIGRATION RISK



FW moderates a discussion on managing business immigration risk between Jonathan Goldsworthy, a senior associate at Bird & Bird LLP, Alex Paterson, a partner at Fragomen, and Marco Mazzeschi, the founder of Mazzeschi s.r.l.



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Jonathan Goldsworthy is a senior associate in the International HR Services Team at Bird & Bird, advising on a broad range of domestic and cross-border employment and global mobility issues. Mr Goldsworthy's experience includes advising business immigration issues as part of clients' international HR strategies; advising on the employment aspects of corporate and commercial transactions; advising on individual/collective redundancy exercises; and employment tribunal litigation for a variety of claims. Mr Goldsworthy can be contacted on +44 (0)20 7905 6389 or by email: jonathan.goldsworthy@twobirds.com.



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Alex Paterson is a partner of the Australian Practice of Fragomen. Previously, Ms Paterson was managing partner of Fragomen's London office for five years. Her role is to jointly lead Fragomen's Sydney practice and to lead its Western Australian practice based in Perth. Ms Paterson also manages a number of global and regional client relationships. She is a dual qualified solicitor of England and Wales/Australia and has practiced in the field of immigration law since 1995, providing legal advice to some of the world's largest global companies and many start-ups and small to medium sized enterprises. She can be contacted on +61 2 8224 8540 or by email: apaterson@fragomen.com.



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FW: What are the key benefits for businesses that tap into global talent? Would you say this is an essential strategy for multinationals that hope to maintain a competitive edge?

Goldsworthy: The underlying factor in all recruitment exercises is that they should be designed to source a candidate that has the required skills, competencies and experience for the role in question. As such, the principal benefit of adopting a global approach to recruitment is that the company should – subject to any immigration or contractual restrictions – be able to access a wider talent pool in order to resolve local skills shortages and upskill local talent. If a company is unable to identify or source a suitable candidate from the local labour market it will need to widen its search parameters internationally in order to meet its customer and business needs and grow as an organisation. It is also possible that placing arbitrary requirements on recruitment – for example, that only those applicants of a particular race or nationality should apply – would be discriminatory.

Paterson: Global business success means having the right people, in the right place, at the right time. Access to global talent in tandem with strong local training programmes for the medium to long term is critical to maintaining a competitive edge. In recent times, mobility streams have expanded from more traditional work assignments to include regional talent development rotations. Both streams play a vital role. The Business 20 (B20) Human Capital taskforce focused on easing intracompany transfers in its recommendations to the Group of Twenty (G20) for the removal of regulatory barriers, reduced processing times, cost and other restrictions, and the mutual recognition of professional qualifications. Businesses operating in locations with ‘brain drain’ or ageing population issues must also tap into global talent. In the Asia-Pacific region, it will be interesting to see the response to Hong Kong’s new scheme to incentivise

the return of second generation Chinese Hong Kong permanent residents, similar to Malaysia’s programme for overseas Malaysian professionals. Japan has also eased its rules to bring in more highly skilled foreign professionals to bolster its domestic labour supply.

Mazzeschi: The International Organisation for Migration (IOM) published a report in December 2014 which provides an overview of global migration trends. The report forecasts that by 2020 there will be a potential 38 to 40 million shortage of workers with a tertiary education. The gap between demand and supply of highly-skilled workers is estimated to be equivalent to 16 to 18 million workers in advanced economies. The Talent Shortage Survey 2014 carried out by the Manpower Group – obtained from a survey of 37,000 employers in 42 countries and territories – revealed that 36 percent of employers globally reported difficulty in filling jobs, the highest proportion since 2007. A regional breakdown of employers found that 48 percent of firms in the Americas reported difficulties in filling jobs, 45 percent in the Asia-Pacific region, and 27 percent in Europe. This data suggests that in the future there will be a strong degree of competition among countries and multinational companies to attract highly skilled workers. Those global companies which operate a well planned immigration strategy, and are able to offer job opportunities to foreign highly skilled workers, will have an advantage over their competitors.

FW: Could you provide a brief overview of some of the risks companies may face in connection with business immigration?

Paterson: As business contends with increased enforcement and ever-changing regulatory requirements for hiring foreign nationals in the Asia-Pacific region, it is crucial to devote resources to ensure immigration compliance. Incidents of noncompliance are common for short-term business travellers, who can easily fall

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under the radar of employer mobility programmes. In most countries, it is the nature of the activities to be undertaken and not solely the length of stay or payroll location that determines whether the traveller should first be work-authorized. Immigration rules differ significantly by country, so it is important to identify challenges for particular countries – for instance, there can be multiple levels of approval, foreign worker quotas, extensive documentation or immigration restrictions for certain nationalities – and plan accordingly to meet business targets.

Mazzeschi: Despite the highly skilled workers shortage, immigration policies of many countries are still very protectionist and extremely selective, and do not always meet the demands or need of local employers. In some countries there is not a clear distinction between activities allowed under 'business status' and activities for which a work permit is required. Some companies tend, in order to minimise costs, to send their employees on rotation for short assignments instead of localising employees, but this can be a risky policy. If investigated, companies can be subject to heavy fines and sanctions and possible restrictions for obtaining future visas.

Goldsworthy: Under the Points-Based System, sponsoring employers play a much more active role in the immigration process than under the previous immigration regime – for example, with companies being able to assign unrestricted certificates of sponsorship with little initial supervision or approval from the Home Office. The quid pro quo is that employers take on a much greater degree of responsibility for immigration compliance and are expected to understand and adhere to immigration law and current Home Office policy. This is often difficult to do – the Immigration Rules alone have undergone approximately 50 revisions since the introduction of the Points-Based System – and sponsors face serious consequences for failing to comply, including

the downgrading or removal of the sponsor licence and, in the case of failing to comply with prevention of illegal working legislation, potentially unlimited fines and imprisonment. The key risk for companies is that they fail to keep up-to-date with their obligations in relation to business immigration.

FW: Bribery and corruption risk is a sure way to obtain board level attention within global businesses. In your experience, are there any such issues that surface in relation to business immigration?

Mazzeschi: The enactment of the Foreign Corrupt Practices Act in the US and the 2010 Bribery Act in UK had a major impact on global corporations, due to the extraterritorial reach of the provisions. A company can be liable even for offences committed abroad and by officers and employees of a subsidiary, agents or service providers. Accordingly, there is an increasing pressure and attention by global corporations in ensuring that anti-corruption policies and practices are put in place, and periodical due diligence is carried out on service providers. Extreme attention is focused on the recording and documentation of any costs and expenses accrued, to ensure they are duly allocated and any funds paid by the company are used for compliant purposes.

Goldsworthy: Ensuring compliance with anti-bribery and corruption legislation is an essential issue for all global businesses. Whilst it may be tempting to circumvent internal procedures or UK immigration law requirements in order to recruit a key hire, there are serious consequences for a company that fails to comply with its obligations. Offering to bribe someone, whether an internal employee or Home Office official, in order to ensure that a particular candidate is recruited or is granted an immigration permission that he is not eligible for, is a serious issue and companies should ensure that all staff are aware that such practices are unlawful. That said, in our experience,

bribery is not commonplace in UK immigration.

Paterson: In certain countries in particular regions, there are justifiable concerns at pressure to pay bribes or make facilitation payments that are not being reported. There may also be cultural 'dilemmas', as with some Southeast Asian countries, where small gifts to government officials during festive seasons are expected. Businesses are concerned that not abiding by this custom could jeopardise pending or future applications. Respect for the immigration laws and culture of each country must go hand-in-hand with full compliance with international and local anti-corruption standards. This extends to local partners performing services on their behalf, and any agents acting for them. Ultimately, it is about knowing every link in the process, down to the individual who does the filing or follow-up at the immigration counter. It is vital to engage a provider with a discerning and robust process to qualify all local agents and ensure that required legal standards are met.

FW: How much of an impact have regulatory and policy developments had on business immigration practices and foreign workers? Are you seeing greater monitoring and enforcement activity by regulators in this area?

Goldsworthy: It is a key feature of the UK's Points-Based Immigration System that it is able to develop and respond to changing trends in the UK labour market and government policy generally. Changes aimed at reducing net migration have included introducing a 'cooling off' period to prevent migrants from returning to the UK under a Tier 2 working visa until they have spent a period of time outside the UK and the recent removal of Tier 1 (General) migrants' ability to extend their stay in the UK, the scheme having initially closed in 2010. Under the Points-Based System, sponsoring employers play a much more active role in the immigration process than

under the previous immigration regime and employers are, therefore, required to take on a much greater degree of responsibility for immigration compliance. The Home Office regularly audits and inspects companies by making both pre-arranged and unannounced visits to ensure that companies are complying with their obligations. Reports suggest that these visits will increase going forwards.

Paterson: Within the last three years, some of the region's largest economies have implemented comprehensive reforms to foreign worker policy, with Australia, China and Singapore taking a stronger stance in compliance by increasing penalties and granting wider investigative and enforcement powers to immigration and labour departments. In China, for instance, monetary penalties for unauthorised employment have been doubled for employers, and are now 20 times the previous level for employees. Apart from reputational loss, there can also be substantial exposure to civil fines and potential criminal liability for businesses and their senior management. That said, immigration policy decisions are politically charged, hence the positioning fluctuates depending on the economic health of the country and perceived views of the electorate. The protection of local workforces is a consistent concern in most of the region, despite the prevalence of trade agreements which provide for the movement of businesspeople. In recent times, this has been demonstrated by the use of labour market tests and foreign worker limits to varying degrees.

Mazzeschi: According to IOM, a growing number of governments have attempted to address irregular migration by reform of their immigration systems, promotion of return of irregular migrants or regularisation programmes. Seventy-five percent of 146 countries with available data in 2011 thought irregular migration was a major concern. Growing flows of illegal immigrants is also having an impact on business migration. Although many destination countries are adopting policies to attract highly

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skilled workers, the focus on compliance with immigration rules is increasing. A special attention is dedicated to compliance with social security provisions for workers on assignment and tax compliance, since countries want to be sure that workers and companies are duly contributing to the increasing costs of health assistance.

FW: What advice would you give to companies wishing to achieve effective immigration planning, including navigation of visa issues, sponsorship schemes and points-based systems?

Paterson: It is critical to engage relevant stakeholders within the company – such as the human resources, tax, legal and compliance departments – and strategically plan an effective immigration compliance programme. Responsible stakeholders should be appointed to work with expert counsel to fine-tune immigration strategies. If the assignment involves a challenging destination from an immigration perspective, this should be identified early on and followed by information and education measures as appropriate to prepare the business. Education of senior management is important to achieve buy-in for important decisions inherent within the process, thereby avoiding last-minute moves or potential noncompliance. Plans and strategies may also be developed around high-profile transfers, or for rapid or high-volume deployments so as to create a ‘travel-ready’ culture among stakeholders. Understanding sponsorship requirements is important – for instance, training, notification and other sponsor obligations in Australia, and meeting knowledge transfer requirements for local ‘co-labourers’ in Indonesia.

Mazzeschi: It is important for companies working on a global level to appoint skilled immigration managers with experience in managing global assignments. It is also very useful to adopt a case management system to keep track of all assignments, to monitor the business trips of all workers, and to receive alerts about the expiry of any

permits and actions to be taken. Company managers should receive periodical training and be given tools to receive regular updates on changes in legislation in countries where the company operates. The company should also check the availability in the most important countries of fast track procedures and other incentive policies designed to attract foreign investors and that allow the issuance of special categories of visas, linked to the volume and quality on the investments.

Goldsworthy: The key feature of an effective immigration policy is preparation. UK companies need to appreciate that in order to employ migrant workers they will need to comply with the Immigration Rules and accompanying Home Office policy. This can take time. The individuals will also need to apply for a working visa, either at a British Consular Post in their own country or at the Home Office, if the application can be submitted within the UK, and this will take time to pull together and process. Understanding the immigration requirements and processing standards is essential to ensuring that stakeholders understand what they need to do and how long it is likely to take in order for these constraints to be factored into the recruitment process.

FW: Has the billion dollar investment in ‘smart borders’ technology to make borders safer placed additional pressures on businesses to ensure their immigration compliance programmes are up to date?

Mazzeschi: The European Commission is enacting a piece of legislation aimed at establishing the Registered Traveller Programme which will facilitate the fluid access to the Union of pre-screened travellers, without undermining security. This should offer simplified, automated border checks to non-EU nationals complying with certain criteria and an entry/exit system. More importantly, it will make it possible to identify overstayers – people who entered the EU lawfully but have stayed longer than they were

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entitled to. Previously, the monitoring of overstayers in the Schengen countries was left to the discretion of the border police of each country. Once the new system has been fully implemented, overstays of even just a few days will be automatically recorded. This puts a tremendous amount of pressure on individuals who are travelling with a business visa or, for those non-visa nationals under a business status, who have a 90-day stay limitation in the Schengen Area every 180 day period, because any minor noncompliance will be automatically detected by the system.

Goldsworthy: UK law is clear that a company cannot employ an individual who is subject to 'immigration control' if that person does not have the right to work in the UK. Companies are, therefore, required to check that all of their employees have the right to work in the UK. This obligation exists separately from any checks that are made at the UK borders. Whilst border security initiatives raise the profile of illegal entry to the UK, it is the potential sanctions of failing to comply with illegal working checks, including fines, potential imprisonment and the downgrading or removal of a company's sponsor licence, that are likely to be of principal concern for UK companies.

Paterson: The increasing use of technology in border control systems provides authorities with more sophisticated access to 'big data' and risk profiling, as well as information sharing with other domestic and overseas agencies. These tools allow authorities to introduce more streamlined visa application and arrival processes, such as pre-vetting of short-term business travellers and automated 'kiosks' instead of passport control counters. However, it also means that immigration authorities are more easily able to detect breaches, or recognise travel patterns that are inconsistent with the intended use of visa programmes. The benefit of the doubt that comes with facilitated business entry is coupled with more robust

enforcement regimes and penalties where noncompliance is detected. Current political rhetoric in the region seems to reinforce a 'law enforcement' approach to immigration, such as the recent merger of the Australian immigration and customs agencies to form the new Australian Border Force, with a closer operational relationship to the federal police. This places the onus on businesses to ensure that taking advantage of eased visa processing does not mean taking liberties. Businesses with mobility programmes must have in place robust internal checks and processes to ensure that their people are travelling on the right visa, every time.

FW: For businesses, do tax considerations factor when running a global business immigration programme?

Goldsworthy: As businesses become more global and employees are more internationally mobile it is important for companies to keep track of where employees are based and how long they will be in a particular jurisdiction in order to comply with local tax laws and employee withholding obligations, particularly with assignments that are fluid and can be extended beyond the initial 'end date'. Specialist tax advice should always be taken at the outset of an assignment and tax residency continually assessed during the assignment.

Paterson: Employers must monitor the amount of time spent by business visitors and short-term assignees in any one location to ensure compliance with tax reporting or withholding obligations. For certain countries, entering on the right work visa from day one is important given there may be tax implications later on. Data matching is becoming more common between tax and immigration authorities, such as in Singapore and Australia. It is also becoming more common for audit or monitoring initiatives by one government agency – such as tax, immigration, employment or the police – to expand to other agencies. In the Philippines, the immigration authority has shown

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support to the tax authority's collection and enforcement efforts by requiring more applicants to obtain local taxpayer registration before applying for a work permit. In China, immigration audits in major cities like Beijing led to the passage of a new immigration law which authorised the creation of an information-sharing platform to promote inter-agency enforcement, including with the tax authorities.

Mazzeschi: Compensation and employee benefits, global equity programmes, income taxes and social insurance are key issues for companies doing business across several countries and which need to mobilise a high number of employees of different nationalities. Tax considerations will require employers to develop administrative processes for tracking the travel of employees. In the absence of tax treaties or totalisation agreements, the employee and employer may be liable for income tax and social taxes in more than one country. A company should also develop defined policies and procedures for global assignments as well as for business travellers, in order to maintain consistency while managing costs, risks and expectations. Many global companies have now begun to use, or require their immigration providers to make available, dedicated software that helps to track the assignments and trips of all their workers.

FW: How important is it for companies to regularly review and update their internal immigration policies across multiple jurisdictions? What should this process entail?

Paterson: It is important to recognise that some country systems can be more dynamic or fluid compared to others, and so businesses' internal immigration policies need to be agile enough to accommodate the level of change. This may be illustrated by comparing three systems. Malaysia is currently undergoing a variety of changes, including stability issues with its relatively new online filing system.

Therefore, it will be important to prepare the business for inconsistent processing times and technical issues while the system develops. Sri Lanka is a more complex system, with no clear guidance in the rules and with case-specific requirements often needing consultation with the authorities. Businesses should therefore account for more flexibility with onboarding times in light of these constraints. Japan and Hong Kong, on the other hand, have fairly straightforward processes, and thus lead times can be more predictable. A process factoring periodic review by key stakeholders will stand businesses in good stead. This should include a business needs analysis for international moves and strategic planning for critical resources required in specific locations in the region over the coming months.

Mazzeschi: A periodical review and update of company policies and procedures is essential for ensuring that the company is compliant with local regulations in the various jurisdictions where it is operating. Most global companies require their advisers to review and update periodically the company's policy. They also ask to be alerted each time changes to legislation or procedures are implemented, particularly if they could impact the company's operations. Some companies carry out directly or indirectly through their external counsels, a due diligence review on all foreign workers, to ensure that all documents are in order. The increased use of tracking software helps to keep under control the expiry of any permits and any other compliance requirements.

Goldsworthy: It is critical for global businesses to ensure that they understand and comply with the complex and ever evolving UK immigration landscape and that internal policies and procedures are updated accordingly. Failure to do so can have serious consequences including fines and the downgrading or removal of a company's sponsor licence, which can prejudice the company's ability to recruit key talent. If companies do not have dedicated internal

mobility professionals, it is sensible to liaise regularly with external specialist advisers to ensure that policies and HR systems and processes are audited against Home Office requirements and best practice standards.

FW: In terms of future trends and developments, what do you expect will be the key immigration challenges for businesses in the years ahead?

Mazzeschi: Going forward, the major challenges for companies will likely be talent shortage and the need to search in different countries for workers with the adequate skills, and obtain for them the necessary visas. Global companies also need to mobilise their talent around the globe while complying with different local rules and in some cases protectionist or restrictive immigration policies. The need to ensure that all providers and external counsels comply with regulations enacted in one country – such as the FCPA in US – but also apply to operations conducted in other countries, will also be a challenge. Finally, due to the increasing volume of sensitive and personal information exchanged electronically, companies need to implement and keep up to date a data security policy to protect all data from unauthorised access.

Goldsworthy: With the general election looming, immigration continues to be a political hot potato with each of the main parties vowing to curb migration without prejudicing the UK's ability to attract and retain talent. Whilst it is unlikely that the Points-Based System, as an underlying basis for the UK's immigration regime will change, it is likely that whichever party is elected will look to make various amendments to the Immigration Rules to implement its own manifesto on immigration. When coupled with the fact that the Home Office is able to change immigration

policy swiftly to respond to the demands of the labour market, the key challenge for businesses is likely to remain the need to keep up-to-date with current law and policy in order to plan recruitment initiatives and structure talent management programmes effectively.

Paterson: Businesses can expect movements toward enhanced compliance and tightening of requirements in countries where politics and internal pressures are attendant. In Indonesia, the authorities are increasingly focusing on a possible Bahasa Indonesia proficiency requirement for work permit applicants as the government strives to promote wider use of its national language to expatriates, as well as taking a tougher line on the training and development of local workers. In the Philippines, annual reporting requirements have been ramped up even as the government tries to put mandatory foreigner registration on-stream. At the same time, there has been some loosening in certain areas, as shown by Thailand's recent expansion of permissible business activities; previously, even business meetings required work authorisation. Hong Kong has also lined up measures to attract highly skilled professionals by offering generous extension provisions to top-tier applicants under its General Employment Programme. Malaysia, Indonesia and Thailand have recently launched e-filing systems – in Thailand's case, for the 90-day report – and other Asian countries may be expected to follow suit. This may ease challenges currently faced by businesses sending skilled workers to these locations. The upcoming ASEAN Economic Community is also expected to have material effect on skilled labour movements in the region, with a priority accorded to ASEAN-to-ASEAN moves. In short, we expect a dynamic few years ahead in the Asia Pacific immigration arena. ■