Last month, the Employment Special Interest Group (SIG) held a conference call to discuss common pitfalls in employment law in members' respective jurisdictions. Participants included lawyers from member firms in the UK, US, Germany, France, and China.

China: Local Talent is Growing More Appealing

Robin Tabbers, Chair of the SIG and Partner at R&P China Lawyers, kicked off the discussion. For multinationals facing rising costs in China, there are significant cost savings involved in turning to local talent versus expatriate executives, whose salary and perks frequently run upwards of $300K USD per year. "Companies can hire a Chinese national with an MBA from the US and pay that person a hundred grand," says Tabbers.

Under PRC law, there is no recognition of seniority with companies outside the country, so unless an executive's contract specifically lays out severance entitlement based on years with an organization, he or she can be terminated under the assumption of a one-year contract. "That means a very senior person can receive severance equivalent to only one month's salary," says Tabbers, who frequently represents individual executives. "While it may be fiscally appealing to terminate your big CEO for $10,000 versus a much higher amount, it doesn't play well for your company's reputation. With corporations, I advise them to strike a balance so that people will still want to do business with them in China."

US: Defining Independent Contractors

Stephanie Berntsen, who practices employment law at the Seattle firm of Schwabe, Williamson & Wyatt, offered up her take on challenges in the US market. While there are Federal standards in the US that apply, she says, there are also 50 different state regulations around wage and hour regulations, non-compete and non-solicitation agreements, and definitions of independent contractors. Each state has unique requirement to comply with the standards of whether someone is an employee or an independent contractor, and misclassification can result in back penalties and taxes.

An even bigger consequence of misclassification in the US, says Stephanie, is that a company "can be identified as a bad actor, and they are then set up for future audits which can be costly and challenging to the company." She says when businesses enter Schwabe's jurisdiction, she asks a number of questions. Where are people working? How are you classifying them? How are you paying them? "We want to make sure clients are getting it right or fixing it before it comes to any regulators' attention."

UK: The Unexpected

A surprise to many multinational employers operating in the United Kingdom is the 'reach' of the jurisdiction of the UK Employment Tribunal, says Linky Trott, a Partner at Edwin Coe LLP in London. The Tribunal is a dedicated court in the UK set up to deal in the main with employees' statutory rights (and some limited contractual rights) such as discrimination and unfair dismissal, and Ms Trott says the Tribunal may seize jurisdiction of claims by overseas nationals who are based in the UK for a period of time. Sometimes "this can come as quite a bit of a shock to an employer who has people on international assignment in the UK for a few months. If something happens that affects their employment whilst they are here, they may lodge claims with the UK Tribunal against their overseas employer. The employers often aren't aware of the 'UK' rights of the employees while working under such an arrangement."

Germany: Pseudo Contracting

Martin Koller-van Delden, Partner in the Heidelberg office of Melchers, says he frequently encounters clients who have small permanent operations in Germany who then subcontract services for the sake of efficiency.

If the personnel utilized by the subcontracting company are too narrowly linked to the operations of the client, German law regards them as employees and not truly contractors. The line of distinction is quite difficult to draw, says Koller, "The problem is if you don't have a real subcontractor but someone who is hiring out personnel to you, you're automatically the grantor for all the salaries of the employees of your subcontractor. The employees of that subcontractor have the right to demand of you, as a company, to treat them as employees, with all the pay and benefits that entails." Things can get interesting, says Koller, if a company subcontracts services without carefully thinking through how the rules function in Germany.

France: Tough on Employers

Tribunals in France are notoriously stringent with employers, says Pascal Paillard of Cabinet Normand & Associés. "A traditional but ongoing consideration is with employers trying to maintain flexibility with fixed term rather than unlimited term contracts. But French employment tribunals regularly translate a chain of fixed term contracts into an unlimited arrangement."

A second and more specific issue relates to executives. For those classified as senior executives—defined as having a high degree of autonomy within his or her job and a true managing role within the firm—there is no limitation on working hours per day. "Plain" executives will have to benefit from a

minimum of 11 hours' rest a day. The only global rule for the exemption is that, in any case , the executive should work no more than 216 days per calendar year.

Paillard says that he frequently sees executives with claims that in fact they do not have autonomy but are receiving regular and detailed instructions, and therefore the exemption no longer applies to them. “In these cases, an executive may say, ‘I’ve worked all of these extra hours over the past three years, and I expect to be paid for this,” says Paillard. “Should the employee win, companies will also have to pay significant fines. If not managed exactly, this can be a dangerous system for employers.”