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COMPLIANCE RISKS FACED BY MULTINATIONAL COMPANIES DURING SHORT-TERM ASSIGNMENTS AND THE BEST APPROACH TO MITIGATE THESE RISKS

SUNITA JENA-BARAVIK

LEGAL ASSOCIATE IMMIGRATION, BRIDDDGE B.V.

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Introduction

The professional field of Global Mobility consists by and large of managing the complexities of the movement of workforce as they are assigned across the globe. The landscape of global mobility has changed rapidly over the last decades and an increasingly large portion of global mobility projects now consist of short-term assignments (as opposed to the more traditional assignments requiring long-term relocation) and this is trend that seems to be growing.

As short-term international assignments become increasingly popular within multinational companies, the risks that these companies are exposed to during such assignments (in the areas of labour law, immigration, tax, social security and duty of care) also increases. Therefore, companies must ask themselves: **What are common compliance risks multinational companies face during short-term assignments and what is the best approach to identify, address and mitigate such risks?**

Short-term international assignments will be defined as the cross-border relocation of an employee for business purposes with a specified duration for the period of 3 months to 1 year. In considering case-specific situations and examples, this paper will limit itself to inbound short-term assignments from the USA and EU to the Netherlands and outbound assignments from the Netherlands to other EU countries, whereby the assignees are nationals of the home country (the country from which they are being sent out).

This paper will focus on common compliance issues that arise in the field of tax, social security, immigration, labour law, and safety (duty of care).

The subquestions that will be considered are:

- What is the relevance of compliance with regards to short-term assignments?
- What are common compliance risks during short-term assignments and what form does non-compliance take?
- What are the consequences of non-compliance during short-term assignments?
- Which parties are involved in compliance processes and which responsibilities should each party bear in assuring compliance during short-term assignments?
- What is best practice for a company to assure compliance during short-term assignments?

Chapter 1 will look at the relevance of assuring compliance during short-term assignments. Chapter 2 will explore what form non-compliance frequently takes on during short-term assignments and what the common causes of non-compliance in different areas might be. Chapter 3 will visit the issue of whose responsibility it is (or should be) to assure compliance during assignments and also the role of key stakeholders involved in the process of assuring compliance. Chapter 4 will look at the best approach a company can take to mitigate the risks related to compliance during short-term assignments.

Chapter 1: The relevance of compliance for short-term assignments

Short-term assignments: Duration & popularity

In the field of Global Mobility, a short-term assignment consists of relocation of an employee for business purposes that lasts anywhere between 3 months to 1 year.¹ 3 months seems to be a clear threshold for most immigration authorities in defining the type of stay and determining the type of visa (or residence and work permit) that a traveller requires. Given the demographic limitation of this paper, 3 months is significant marker for immigration programs of the USA and EU countries, where stays of longer than 3 months require residence permits (as opposed to visitor visas) and trigger a local registration requirement. As 3 months is such a defining factor, it is quite understandable that 3 months is seen as the lower limit of a short-term assignment. (Assignments shorter than 3 months are generally considered short-term business trips or meetings as opposed to actual assignments.) When perusing through global mobility journals and online discourse, 1 year is often considered the higher limit of the short-term assignment.² From a tax perspective, “generally the 12-month mark reflects a shift in tax home for many countries.”³

As derived from the Employment Conditions Abroad (ECA) Managing Mobility Survey 2016, “shorter-term assignments of 1-6 months are becoming more prevalent, now making up over 20% of all assignments ... [while] in 2008, nearly two thirds of international assignments consisted of long-term assignments (greater than one year, typically around three years). In 2014, that figure fell to just over half and ...[was] predicted to fall to just 45% in 2017 [(see Fig. 01)].”⁴ This essentially means that short-term assignments make up at least 50% of international assignments, if not more.

Nonetheless, while short-term assignments have become increasingly popular, a decrease in the duration of assignments unfortunately does not mean a decrease in the risks involved with the

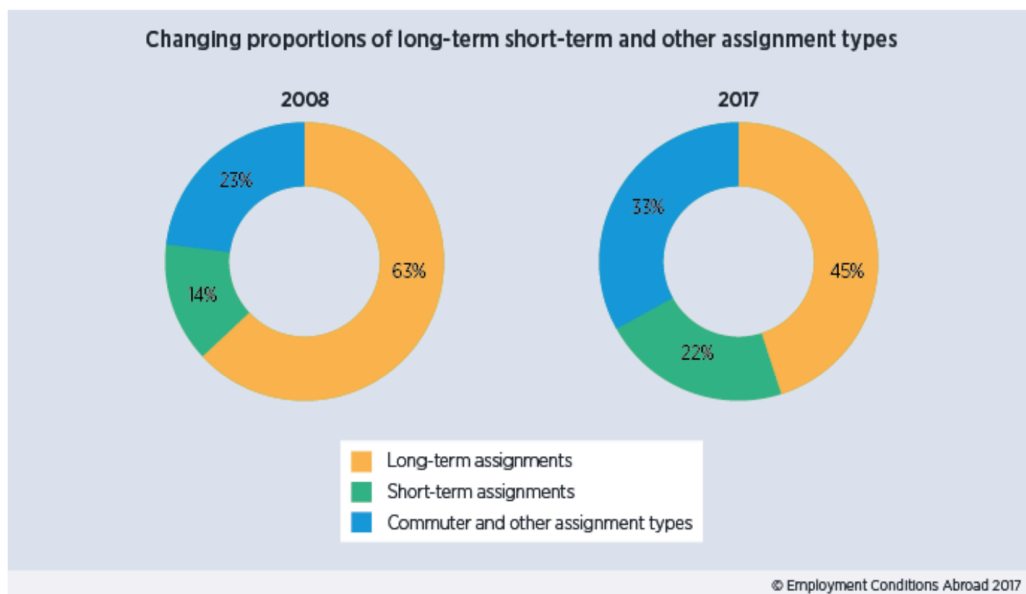


Fig. 01 Harrison, Mark. “The decline of the traditional expat?” *ECA International*, ECA International, 19 May 2016, www.eca-international.com/insights/articles/may-2016/the-decline-of-the-traditional-expat. [Accessed

assignments, both from the standpoint of the employer and employee. As local legislation concerning taxation, payroll, immigration and labour law keep changing and tightening at break-neck speed, the chances of regulatory non-compliance increase and come at greater cost to employer and employee. ECA has noted that many employees are sent to work on short-term assignments in another country with just a business visa (instead of applying for the necessary residence and work permit) “to avoid the expense and bureaucratic process of getting work authorisation ... [and] many managers may inadvertently create ‘stealth’ expats by asking short-term assignees to stay on for another month or two, thereby creating host country tax and social security withholding requirements, and possibly immigration infringements too.”⁵ Such situations put employee and employer at a great non-compliance risk and the consequences can be severe.

Chapter 2: Common forms and causes of non-compliance

Compliance refers to adhering to certain standards, rules, regulations or other such requirements. The 2017 results of KPMG's Global Assignment Policies and Practices survey outlines the most challenging compliance topics that companies face during international assignments (see Fig. 02). The main compliance considerations (and challenges) during cross-border mobility are generally in the field of:

- Tax
- Social security
- Immigration
- Labour law (employment conditions)
- Duty of care (Employee safety & well-being)

Please identify the top three compliance topics in terms of those that represent the most challenges when relocating personnel.



Source: KPMG International, GAPP Survey 2017.

Fig. 02: KPMG Global Mobility Services. "Global Assignment Policies and Practices survey - 2017 Results." KPMG International, 2017. <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/10/2017-gapp-survey-report.pdf> [Accessed 12-01-2018]

Understanding the most common forms and causes of non-compliance during short-term assignments will help us to identify suitable solutions. This chapter will look at common pitfalls in the field of taxation, social security, immigration, labour law and duty-of-care. (As mentioned in the introduction, application of theory and examples will be limited to inbound assignments from the USA and EU to the Netherlands, and outbound assignments from the Netherlands to EU countries.)

Intentional vs Unintentional Non-compliance

While most of this segment will focus on and assume unintentional non-compliance, in reality intentional non-compliance does also occur. A big risk of short-term assignments is that the brief nature of these assignments can lead to the faulty conclusion that since the chance of non-compliance being discovered by authorities is rather small, adhering to all the rules and regulations will be more expensive (in terms of time, finances and other resources) than the revenue or other benefits that the assignment will ultimately generate; i.e., that non-compliance is worth the risk. Often, bad planning and/ or pressure to meet business goals leads to intentional non-com-

pliance as the rush to get an employee to the host country means that shortcuts have to be taken (without pause for consideration of the possible grave consequences of non-compliance).

Non-compliance and Taxation

Non-compliance related to taxation during short-term assignments usually takes on the form of:

- a) not withholding and paying the necessary wage taxes that are due (partially or in their entirety) over an assignee's salary in the host country, and
- b) possible corporate tax that arises out of creating a permanent establishment in the host country.⁶

It is crucial to remember that, while it is the employee who may owe income and wage tax, in many countries the employer is ultimately held liable for unpaid taxes, even if the assignment has been completed and the employee has left the employment of the company. The employer is also held liable for any corporate tax that may be due based on the creation of a permanent establishment as a result of the employee's activities in the host country (during the assignment). Unpaid taxes, in addition to interest, and possible fines and penalties placed on the employer due to tax non-compliance, can get very costly for the employer. For example, in the Netherlands, tax authorities can charge penalties of up to 300% of the original amount owed for offence penalties related to income tax.⁷ Tax "non-compliance can also affect ... business reputation and invite ongoing scrutiny by the host country authorities. ... In addition, employees with tax law violations could have their visa status affected, and may encounter future immigration problems."⁸ For example, in the Netherlands, a company's special status as recognized sponsor with the immigration authorities can be withdrawn if large tax penalties are placed on the company due to tax non-compliance.⁹ This special status is essential to bring in highly skilled migrants and speed up the process of permits for intra-corporate transferees (the two categories that most international assignees fall under). A loss of this status will prevent the company from hiring highly skilled migrants or hosting intra-corporate transferees and/ or also significantly delay immigration procedures in the future.

Non-compliance with regards to tax seems to most often result from:

- a) the wrong application of the 183-day rule
- b) incorrect, untimely or lack of income tax filing and payment
- c) underestimating or not comprehending the risk that short-term assignments carry of creating permanent establishment for tax purposes in the host country (corporate income tax liability)

A.) Wrong application of the 183-day rule (resulting from misinterpretation of terms and concepts, and inaccurate (or lack of) tracking and reporting of days of physical presence in a country)

While having to pay taxes may be a certainty in life, in the ever-changing landscape of Global Mobility, *how* taxes may apply to assignments is not certain, nor as clearcut as one would like. When employees prepare for short-term assignments to or from the Netherlands, compliance with regards to tax is often overlooked (or quite simply, ignored) based on the assumption that if the employee's stay in another country is limited to under 183 days, he/she will not be subject to that country's tax requirements. Unfortunately, taxation is more complicated as each country ad-

heres to its own national taxation rules. In addition to the number of days being worked, several more factors play a significant role in determining where and when the employee is subject to taxation - such as applicable tax treaties, a country's definition of fiscal residence, the type of work being done on assignment, the role of the employer (formal and/ or economic), and the employer's presence (permanent establishment) in the country of work).

To avoid double taxation, many countries have concluded tax treaties that determine which state has the right to levy taxes during cross-border assignments. Most of these treaties are based on the OECD model tax treaty (the OECD Model Tax Convention of 1992). The so-called 183 days rule derived from Article 15 of the OECD seems to have become the cornerstone for many companies to claim exemption from taxation in the host country (where the work is actually performed). Article 15, paragraph 1 of the OECD states that "wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State."¹⁰ In short this means that taxes are normally supposed to be levied by the host country. The exception to this rule, where right to taxation may remain with the home country (the country from which the employee is sent out by the employer), known as the 183 days rule, is specified in paragraph 2 of the same article and can be summarised as follows:

The home country may levy taxes on an employee's salary (in the event of a cross-border assignment with a contracting state) if **all** of the following conditions are met:

1. The employee does not spend more than 183 days in any 12 month period of a fiscal year in the host country;
2. The employee's salary is paid by an employer, or on behalf of an employer, who is not physically present in the host country;
3. The employee's salary is not borne by a permanent establishment of the employer in the host country.¹¹

While this interpretation of the 183 days rule seems straightforward enough, a company seconding an employee can easily and erroneously use it to conclude that the home country has the right to levy taxes because they fail to look closely at the different definitions of specific terms that countries hold to. There are some common pitfalls related to the interpretation of the 183 days rule by all parties involved in short-term assignments (home country employer, host country entity and employee):

- i. Fiscal year: Taxable year, calendar year and 12-month period
 - ii. Formal vs. Economic employer
 - iii. Inaccurate reporting of days of presence
- Fiscal year: Taxable year, calendar year and 12-month period: The definition of a fiscal year differs from country to country. The applicable 12-month period of a fiscal year is not always seen as a calendar year in all countries. In some countries the fiscal year starts later or the 12-month period is considered to start with the employee's date of entry in the host country. The tax treaty between the Netherlands and the USA refers to a taxable year.¹² Fortunately, both countries adhere to a taxable year of 1 January to 31 December for individuals. So for inbound assignments to the Netherlands, the taxable year must be adhered to when considering the

183 day rule. However, it is good to note that not all EU countries with which the Netherlands has an EU tax treaty refer to a taxable year if they are the host country. (No tax treaty exists between the Netherlands and Cyprus so the 183 day rule is irrelevant for inbound or outbound short-term assignment between the two countries. Such assignments would require thorough review and advice from Dutch and Cyprian tax advisors to identify and plan for possible (double) taxation issues.) Some EU countries adhere to a calendar year, while others to a 12-month period and others to a taxable year.¹³ So with inbound and outbound assignments between the Netherlands and most EU countries, the definition of the period of 12 months should be reviewed with (international or) local tax advisors well in advance. Assumptions according to local definitions (of home and host company) regarding taxable year vs. calendar year vs. 12-month period may need to be corrected and the planned duration of stay may need to be adjusted accordingly.

- **Formal vs. Economic employer:** The OECD model does not offer a clear or detailed definition of the term *employer*. When considering condition 2 and 3 of the 183 days rule, it is important to make the distinction between the concept of formal employer and economic (or material) employer. Tax treaties can and increasingly do depart from the traditional concept of formal employer and adhere to the concept of the economic employer to determine taxability. In the case of short-term, cross-border assignments, the employee often has an employment contract with the home entity which sends the employee to the host entity and continues to pay the employee while charging costs to the host company.¹⁴ The formal employer, the entity with which the employee has signed an employment contract, is therefore the home company. Before a home company hurriedly assumes that the employee is not subject to tax in the host country because the salary is being paid by home country, it should check whether the tax authorities of the host country apply the concept of economic employer. The economic employer is the entity that assumes daily authority over the employee and bears the costs of assignment (despite not having a legal contract in place with the employee). Since the host entity is the economic employer in this case (and is physically present in the country), the exemption to taxability provided by the 183 rule would not apply in a country where tax authorities adhere to the concept of economic employer. A lack of understanding of the distinction between formal and economic employer, and failing to register which concept applies in the host country for taxation purposes, can easily lead to non-compliance in tax matters. The USA and most EU countries adhere to the concept of economic employer, which means that for short-term assignments into the Netherlands and into the EU, where the host company will have the authority to instruct the employee and will bear the costs of the assignment, the employee will be subject to tax in the host country.
- **Inaccurate reporting of days of presence (due to misunderstanding or simply not keeping track at all):** The Netherlands counts all days of physical presence with regards to the 183 days rule, so weekends, holidays and vacation also count (as opposed to just days when work is performed). Therefore it is crucial for employees on inbound assignments from the US and EU to take into account that weekends, national holidays, sick days and personal trips (even well after the work assignment is over) in the Netherlands could push them over the 183 days and make them subject to tax in the Netherlands. Even days of arrival and departure during which no work may be done will count towards the 183 days. Additionally, employees who fail to keep careful track of the days spent in the Netherlands are also at risk of being non-compliant, while their failure to report their days of physical presence put the employer at risk of non-compliance too.

B. Incorrect, untimely or lack of income tax filing and payment.

If an employee is taxable in the host country, this most often brings with it the requirement to set up a payroll administration in the host country and for the home company to be registered in the host country for wage tax purposes. If an employee is clearly subject to income tax in the host country due to a stay in the country of longer than 6 months, the employer must normally withhold wage tax from an employee's salary and remit these to the tax authorities. If the employer does not correctly process wage tax declarations (or even processes them too late), the tax authorities can penalize the company with exorbitant fines. The employee must also submit an annual income tax declaration and non-compliance on part of the employee can take on the form of incorrect and untimely income tax declarations or simply failing to submit tax declaration at all.

C. Underestimating or not comprehending the risk that short-term assignments carry of creating permanent establishment for tax purposes in the host country (corporate income tax liability)

Increasingly, tax authorities across the globe are tightening the criteria based upon which a company is considered to have a permanent establishment in the country so as not to miss out on corporate taxes. Companies may fail to recognize that sending an employee on an assignment to a country may create a permanent establishment there even if an entity is not registered there. If a company has (unknowingly) created a permanent establishment, it will most likely be liable for corporate tax payments. In the Netherlands, there is still some leeway for rep offices as "an establishment that carries out solely support activities, such as research, advertising or the provision of information" is not considered a permanent establishment.¹⁵ However, due to the increase of digital commerce, it may be that in the near future the European Commission may introduce legislation that will allocate the right to levy taxes based on " 'significant economic presence' or 'virtual permanent establishment'" rather than just physical presence.¹⁶

Non-Compliance and Social Security

Normally, when an employee is required to register in the host country for stays of longer than 3 months, this triggers social security obligations. This is certainly the case in the U.S., in the Netherlands and in other EU countries. However, if a certificate of coverage or A1 certificate has been obtained for the employee in question, he or she is exempt from paying most social security contributions in the host country.

It is important for an employer to apply for a certificate of coverage well in advance of start of the short-term assignment so that it is clear whether or not an assignee will be exempt from paying into local social security schemes. Sending an employee on a short-term assignment without considering or with false assumptions regarding social security can lead to non-compliance in the form of not withholding and remitting the necessary contributions to local authorities.

In some countries, like the Netherlands, obligation to pay into the Dutch social security schemes also comes with the obligation to take out a national health insurance plan. If an employer wrongly assumes that a short-term assignee is exempt from paying into Dutch social security schemes, the employee will also be non-compliant by not taking out the mandatory national health insurance plan. The U.S. and the Netherlands have a social security agreement in place (also known as a totalization agreement) while the European Commission (EC) Regulations help

determine in which country an employee must pay social security contributions for assignments within the EU.

For US employees assigned to the Netherlands, the existing totalization agreement determines that for “an international assignment ... [which lasts] less than five years[,] the employee and the employer only pay contributions to the US Social Security system ... [but] a certificate of coverage should be requested from the US Social Security Administration.”¹⁷ For assignments within the EU, when an employee is “temporarily sent to another country to work for a period no longer than 24 months, the individual will remain insured under the “old” country even while posted in a “new” country” but an A1 certificate should be obtained from the home country.”¹⁸

Nonetheless, before employers assume that a certificate of coverage or an A1 certificate will cover any and all compliance risks, it is possible that such certificates will not be granted or can even become invalid or be withdrawn (retrospectively) by authorities under certain conditions. For example, a requirement for obtaining such a certificate is that the employee has been socially insured for a minimum period of time (usually one month) in the home country prior to being sent to the host country. If this is not the case, the home country will most likely not grant the certificate. Under the EC regulations, exemption from local social security contributions is also not possible if an employee is being assigned to replace a previous assignee.¹⁹ Additionally if an employee is sent on consecutive short-term assignments, from one country to another, or works in several countries at the same time, or also works in other capacities (in addition to his/ her employment under the short-term assignment) he or she may not remain covered under the certificate of coverage (or the A1 certificate) that was initially granted.²⁰ There are several situations in which an exemption from local social security contributions are not allowed. As circumstances of the employee and the work situation change, so may the social security situation, making current certificates of coverage or A1 certificates invalid without the employer, employee and the authorities being aware of it.

Another key consideration is the social security situation of accompanying family members of the assignees. While family members do not often accompany the employee for short-term assignments, it is certainly a possibility. It is not always the case that accompanying family members will be covered under the seconded employee's certificate of coverage or A1 certificate. For example, the nationality and/or the working situation of the accompanying family member will influence their own social security situation.

And finally, a certificate of coverage or A1 certificate does not exempt an employee from contributions towards all fields of social insurance in the host country. The EC Regulations only cover the field of “sickness, maternity and equivalent paternity benefits, old-age pensions, pre-retirement and invalidity benefits, survivors' benefits and death grants, unemployment benefits, family benefits, benefits in respect of accidents at work and occupational diseases.”²¹

Non-compliance and Immigration

During short-term assignments, compliance with immigration laws of the host country is often the first thing that HR managers and global mobility officers may think of. However, it can be quite easy to be non-compliant in this area during short-term assignment due to short duration of the assignment. While travel between the EU countries for EU nationals is unrestricted and without any immigration requirements, one can fail to realise that any stays of longer than 3 or 4 months

in another EU country results in a requirement to register with the local municipalities. (In some EU countries you are required to report your presence even for stays that are shorter than 3 months.) Registration with the local municipalities in turn can trigger further obligations, such as income taxability. In the Netherlands, registration brings with it the requirement to have a national health insurance plan or prove that one has the necessary certificate of coverage. (Austria, Malta, the Netherlands, Slovenia and the United Kingdom apply restrictions on workers from Croatia while Croatia also restricts access to its labour market for nationals of the aforementioned countries, until at least 1 July 2018.²²)

For American employees that are sent on short-term assignments to the Netherlands, a point of concern is the use of the 90 visa-free days that an American can spend in the Schengen area during any period of 180 days. While this paper limits itself to assignments that last longer than 3 months, it is good to keep in mind that if the business visits of American nationals throughout the Schengen area are not properly tracked, they could easily be crossing the 90 days threshold and actually be in the Netherlands (or other Schengen countries) illegally. For an employer, it is also crucial to remember that these visa-free days in the Netherlands only apply to activities such as business meetings, signing contracts, and attending conferences or trainings.²³ If actual work will be done, even for shorter than 3 months, a visa and a work permit will be required for American nationals in the Netherlands. Beyond 3 months, American nationals are required to apply for a residence and work permit (often combined in a single procedure) to be able to reside and work in the Netherlands.

Non-compliance in immigration can take the form of:

- a. applying for the wrong type of work and residence permit;
- b. not adequately meeting the requirements of a granted work & residence permit
- c. starting work before the application for a residence and work permit has been approved
- d. non-compliance with regards to accompanying family members of employees

a. Applying for the wrong type of work and residence permit

Local legislation surrounding immigration can be complicated and continually changes. This can make it difficult for global mobility officers to identify the correct application procedure for residence and work permits of short-term assignees. The result could be applying for the wrong type of residence and work permit. For example, with the implementation of the Intra Corporate Transferees (ICT) Directive (2014/66/EU) as of 29 November 2016, employers may have failed to realise that this directive takes precedence over the popular Highly Skilled Migrant (HSM) procedure. This means that if the employee sent on a short-term assignment to the Netherlands falls under the scope of the ICT Directive, he or she will not be eligible for the Dutch HSM program. This is especially important for short-term assignments where the employee remains on an employment contract with home office in the US. Prior to the implementation of the ICT Directive, the HSM program was one of the most popular immigration procedures for American companies sending US citizens to work in the Netherlands as the main requirements for this procedure are a specific salary requirement for the employee and commitment from the host employer to fulfil the obligations of a good employer and sponsor. Whether the employee was sent on an assignment letter or hired on a local contract did not play a significant role. However, the nature of the employment contract is now of utmost significance since the implementation of the ICT Directive. If the employee in question is sent on a transfer letter and maintains his/ her employment in the home country, he/she falls under the scope of the ICT Directive and therefore must

meet all other criteria of the procedure to apply for a Dutch residence and work permit. In addition to a salary requirement, the ICT Directive brings with it educational requirements and limits the duration of stay in the Netherlands to 3 years. Also, both the ICT Directive and HSM program exclude certain candidates from applying under specific circumstances. If an uninformed employer accidentally applies for a residence and work permit under the HSM procedure instead of the ICT Directive, while the latter category is correct one (or worse, if none of the procedures are applicable) the employee's stay in the Netherlands would be non-compliant.

b. not adequately meeting the requirements of a granted work & residence permit

Even if the correct residence and work permits have been initially applied for, another important factor to keep in mind is the ever-changing living and working situation of an employee. It is very possible that even though a short-term assignee initially met all the requirements of the residence and work permit he/ she has been granted, his/her situation could change in such a manner during the course of an assignment that he/she no longer meets the conditions of the permit. Failure to report these changes in a timely fashion to the local immigration authorities would result in non-compliance. For example, one of the strict requirements of both the ICT Directive and the HSM procedure is that a minimum salary is paid out monthly to the foreign employee in question.²⁴ If at any time during the employee's assignment in the Netherlands, the salary is not paid out monthly or falls below the required threshold, the conditions of the residence permit are not being met, resulting in non-compliance. Another example of reporting requirements is in the event that a short-term assignee separates from a partner that accompanied him/her to the Netherlands during the assignment in the Netherlands (for which the employer must also apply for a residence permit as dependant). In such a case, the employee is required to notify the immigration authorities of the end of the relationship, and the partner would be expected to leave the country if no other valid grounds for residence could be applied for.²⁵ The employee could be held liable for non-compliance by the immigration authorities if such a change in living circumstances is not made known. The employee in turn could hold the employer liable if he/she was not informed of such immigration regulations in advance.

c. Starting work before the application for a residence and work permit has been approved

Since US citizens are free to travel to the Netherlands without an entry visa (as long as they still have some allowance in their 90 days within any 180 day period), there is the option of applying for a residence permit in the Netherlands after an American citizen has already arrived. While this gives the American employee the right to remain in the Netherlands awaiting the decision on the application, it does not give him / her the right to start working in the Netherlands. It is during this period that an employee may be non-compliant by starting work prior to receiving the necessary permits. As the sponsor of the employee, the authorities will hold the employer responsible if non-compliance is discovered.

Non-compliance and Labour Law

Short-term assignments are rarely planned for with the expectation that they may end in labour law disputes between the employee and employer. Since there are at least three parties involved in a short term-assignment (home employer, the host employer and the employee), it is important to structure the assignment appropriately, and to record the conditions of the employment

and the assignment clearly prior to its start. With cross-border assignments, the local legislation of host countries also comes into play. Each country abides by its own set of rules and regulations when it comes to labour law. A dispute between the host employer and employee, or home employer and employee, or even between the host and home employers can lead to a conflict in determining which country's labour laws apply to the assignee and the assignment in order to settle the dispute. Mandatory legal provisions in local labour law can conflict with the home country's labour regulations and/ or the employee's employment conditions prior to the assignment. If local employment laws are not adhered to where required, in addition to legal disputes with the employee, this can lead to fines and penalties for the employer. Non-compliance with regards to labour law can easily occur when the home office assigns an employee without abiding by the host country's local mandatory legal provisions related (but not limited) to:

- Minimum salary requirements
- Vacation
- Sickness & disability provisions
- Maternity and parental leave provisions
- Notice periods
- Non-complete clauses
- Termination and severance payment

The above list is by no means exhaustive but highlight a few areas which illustrate the areas in which labour law legislation can differ greatly from country to country, even within the EU. Dutch immigration procedures for Americans under the highly skilled migrant and ICT Directive programs will dictate a specific salary that American assignees must abide by. For EU nationals being assigned to and from the Netherlands, the Posted Workers Directive plays an important role in securing equal labour law conditions in the host country.²⁶

Non-compliance and safety (Duty of care compliance)

In the world of global mobility, the concept of *Duty of care* - an employer's responsibility "to ensure the safety and well-being of their employees"²⁷ is not new. Duty of care involves adherence not only to a country's legal obligations of employers towards employees but also to ethical expectations - i.e. what is commonly accepted from a social and cultural standpoint of an employer towards the employee - and abiding by usual practices which form part of the corporate culture (and therefore create certain expectations among employees).²⁸ Non-compliance in this respect takes on the form of not taking all the necessary steps as required by law to ensure the health, safety and well-being of an employee while he or she is on assignment. However, what this exactly entails — i.e. when is an employer certain that all safety measures have been taken? — is rather broad and open to interpretation. This is why non-compliance in this field can happen rather easily. While the EU has occupational health and safety regulations in place that employers must abide by, a company must also consider ethical expectations and usual company practices.²⁹ "Under duty of care laws, employers are generally required to take reasonable steps to protect employees against foreseeable risks to their safety and well-being. What is reasonable will depend on individual factors, including the riskiness of the location or assignment and whether the company was negligent or reckless when dispatching employees abroad."³⁰ While compliance in terms of ensuring an employee's physical safety and health can be covered by engaging an external, international medical and security agency, such as International SOS, non-compliance can still occur if such a third party is not properly and accurately informed about

the details of an employee's assignment and health condition. Without accurate and timely information, a third-party medical and security agency cannot prevent and/or ensure an employee's safety during any type of workplace accident, natural and civil disaster or a personal medical crisis. In such cases, the employer would be guilty of negligence and non-compliant in its duty of care. When looking at ethical and corporate cultural expectations, an employer may unintentionally become non-compliant by failing to take into account an employee's personal history and the prevailing norms at the host company. Going back to the initial definition of duty of care we also run into the problem of how the term "well-being" should be interpreted. Given the stressful nature of relocation and the impact this can have on the well-being of an employee, it is "arguable that taking every action to prevent the disruption and stress to the employee and their family also falls within the scope of the company's duty of care."³¹ From this perspective, the chance of non-compliance increases enormously as the employer is responsible for thoroughly informing and preparing an employee (and possibly even accompanying family members) regarding all aspects of a foreign assignment. For example, an oversight with regards to (or not adequately informing an employee of) tax and immigration policies which result in unexpected tax liabilities or government fines for an employee, could lead to significant stress for an employee and his/ her family. Even if the employer rectifies the situation later, the stress resulting from the situation could lead an employee to claim damages from the employer due to negligence (in failing to take the necessary steps to prevent such a stressful situation).

The consequence of non-compliance

The consequences of non-compliance are far-reaching. Non-compliance in just one area, such as taxation (i.e. not paying taxes), can and often does impact other aspects, such as immigration (work permit withdrawals, entry bans).

Non-compliance in terms of taxation, social security, immigration, labour law, and duty of care can result in large fines and penalties from local authorities. Fines and penalties as a result of non-compliance in any of these areas can impact other fields and have a domino-effect. For example, in the Netherlands, incurring large tax penalties or fines from the labour inspectorate as a result of non-compliance during an assignment, would mean that an employer that is a recognised sponsor with the IND would lose the special status that allows it to sponsor the residence permits of foreign employees. All residence permits of employees working for the company could then be withdrawn and the employer may receive a ban from sponsoring new permits in the near future. This will have a significant business impact as business revenue and growth may be negatively affected. Tax non-compliance also brings with it the risk of additional, unexpected tax liabilities, which can have a big financial impact on the company. Non-compliance in terms of immigration carries with it the risk of entry bans and can even be punishable as a criminal offence.

Some examples of the possible results of non-compliance:

- Fines & penalties from local authorities
- Entry bans
- Special status withdrawals
- Financial loss for the company
- Loss of business reputation
- Loss of commercial contracts

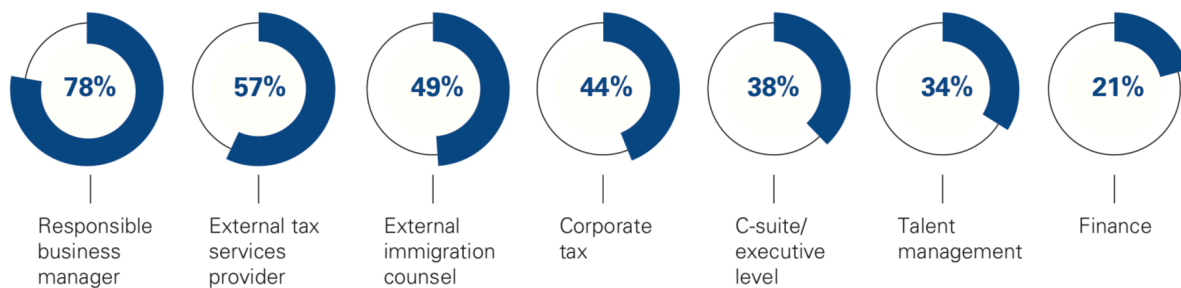
- Loss of employees (due the poor management of assignments)
 - Prosecution from government authorities and employees
 - Prosecution from an employee for negative impact suffered as a result of the company's non-compliance.
-

Chapter 3: Key Stakeholders

Given that there are so many non-compliance risks, and the consequences of non-compliance can be so grave for employees and employers, the logical question is whose responsibility is it or should it be to assure compliance? By identifying the key stakeholders, considering what role they play in short-term assignments and which aspects of compliance they might be responsible for regarding the assignment, we can better determine what their role should be in the procedures a company should have in place for assuring compliance.

The key stakeholders are all parties that can influence and are impacted by the consequences of non-compliance. Figures 03 and 04 below, taken from KPMG's 2017 GAPP Survey, show us a glimpse of how various companies view roles and responsibilities of different stakeholders:

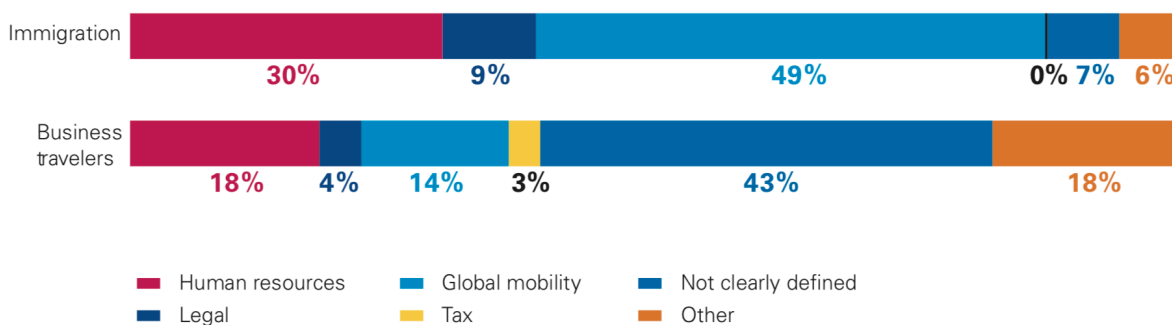
In addition to global mobility, what other stakeholder groups are involved in the pre-assignment cross-border risk review and selection process? (Select all that apply.)



Source: KPMG International, GAPP Survey 2017.

Fig. 03: KPMG Global Mobility Services. "Global Assignment Policies and Practices survey - 2017 Results." KPMG International, 2017. <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/10/2017-gapp-survey-report.pdf> [Accessed 12-01-2018]

Who is responsible for immigration and business travelers within your organization?



Note: Total may not add to 100% due to rounding.

Source: KPMG International, GAPP Survey 2017.

Fig. 04: KPMG Global Mobility Services. "Global Assignment Policies and Practices survey - 2017 Results." KPMG International, 2017. <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/10/2017-gapp-survey-report.pdf> [Accessed 12-01-2018]

The Internal stakeholders for compliance during short-term assignments would be:

Stakeholder	Role & Responsibility in assuring compliance
Employee (the short-term assignee)	While the employer carries the duty of care obligation towards the employee at all times, the employee has the Duty of Loyalty to "not ... compete with the interest of the organisation and to follow the employer's Duty of Care policies and procedures." ³² Part of the Duty of Loyalty is the requirement to be honest regarding personal situations that may impact the organisation's compliance situation (to the extent of the employee's knowledge). It is also crucial to include compliance training for the employee in any preparations made for an overseas short-term assignment. During such a training, the employee should be informed of all compliance risk areas and the possible consequences of non-compliance. During the assignment, there should be regular checks with the employee to receive updates regarding any changes in the employee's work and living situation which could trigger compliance issues.
Employee's accompanying family members	Since a company can suffer the consequences of non-compliance related to an accompanying family, they should also be well-informed and prepared with a compliance training.
Home line manager	As the employee's direct supervisor, the home line manager plays a significant role in compliance issues. The employee's direct reporting line can affect tax liabilities and employment law obligations. The home line manager should be well-informed of compliance issues and should be included in regular updates regarding the employee's current situation. The home line manager is also most likely the party that submits a request for the employee's assignment, or selects the employee for assignment. Therefore, if this manager is knowledgeable of global compliance matters beforehand, he can better assess the compliance risk of suitable candidates and certain working situations.
Host line manager	Like the home line manager, the host line manager also has significant impact on compliance issues (since the employee's direct reporting line can affect tax liabilities and employment law obligations). The host line manager has frequent contact with the employee and therefore has better knowledge of actual situations that may trigger compliance issues. A host line manager should also be included in regular updates regarding the employee's current situation, and generally be well-informed about global compliance matters.

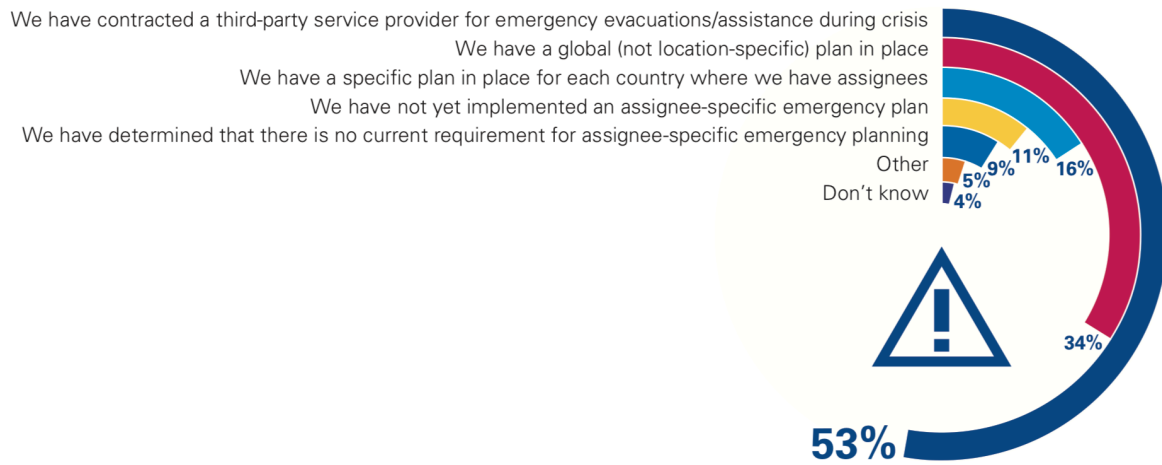
Global Mobility departments (home and host)	As Global Mobility is responsible for all mobility matters within a company, this department is best-suited to (and generally expected to) own and run the compliance procedures, making sure that all steps are being taken for compliance assurance by coordinating between the different stakeholders. Global Mobility should develop/ organise the necessary compliance trainings for key stakeholders in collaboration with HR. The Global Mobility departments should monitor the assignee (and accompanying family members) closely through regular check in's with the HR department during the entire assignment.
HR Departments (home and host)	In most companies, HR is responsible for recruiting, hiring and retaining employees, as well as managing compensation and benefits programs. HR is expected to be well versed with local employment, compensation and workplace safety regulations, while also having a good understanding of local requirements, expectations and local corporate culture. HR meets the duty of care obligations by putting together a benefits package that ensures the well-being of the assignee. The HR department in both home and host country therefore are involved in compliance matters related to assignment structure, employment contracts, remuneration and fulfilling duty of care in the broadest sense. The HR departments would be also responsible for applying for certificates of coverage, if applicable. The host HR is often the first point of contact for arriving assignees, assisting them (and accompanying family members) to settle in as they are introduced to the host company, country and its culture. Together with the Global Mobility department, HR Departments should follow the assignee and accompanying family members closely. The host HR Department will carry more of the weight in this responsibility due to physical closeness to the assignee. HR Departments would most likely execute compliance trainings for employees (their family) and managers.
Legal departments (home & host)	If companies have in-house legal counselling, this department would be closely involved in advising HR regarding employment and contract compliance. In companies where executive and line managers may only consider compliance as an afterthought once short-term assignments have started, legal departments can also be called upon by Global Mobility to make an inventory of legal consequences in the event of non-compliance. This can be included in a business case to convince executive management as to why compliance during short-term assignments is of utmost significance to the company.
Tax departments (home & host)	Tax departments will be involved in assessing the risk of non-compliance with regards to a short-term assignee's tax situation and the impact it could have on the company's tax liabilities.

Payroll departments (home and host)	Payroll departments are charged with properly compensating employees, withholding and remitting wage tax correctly, payment of social security contributions or applying exemptions, and running a shadow-payroll if necessary (all in accordance with local rules and regulations).
Immigration departments (host)	The immigration department would ensure immigration compliance by applying for the correct residence and work permits and informing the assignee (through the HR department) of any relocation and immigration obligations.
Executive management (home and host)	The support of executive management is crucial for the success of compliance assurance procedures related to short-term assignments. The consequences of non-compliance can have a significant impact on business revenue, growth and reputation. Executive management should be educated about the business impact of non-compliance and how well-executed procedures can mitigate risk so that Global Mobility has their full support in implementing the necessary procedures.

The External stakeholders would be:

Stakeholder	Role & Responsibility in assuring compliance
Third-party tax, payroll, immigration and labour law advisors	With increasing global traffic and continually changing legislation, it is practically impossible to ensure compliance during short-term assignments without the assistance of specialised tax, payroll, immigration and labour law advisors. Even though local advisors are the experts with regards to host country rules and regulations, a multinational company would do well to seek the services of parties that have experience with international assignments and know the common pitfalls. Global mobility and HR Departments should engage the services of these advisors so that they can consult with in house tax, payroll, immigration and legal departments to prepare a compliant short-term assignment.
Medical & security providers (international and/or local)	Multinational companies often outsource their duty of care obligations with regards to medical and security issues to third party vendors such as International SOS (see Fig. 05). The latter are well-equipped and experienced in aiding employees during medical and security crises. The host HR Department should keep third-party medical and security providers accurately informed with regards to the location of the assignee (and family members), their medical condition and other significant details about the assignment. The host HR department and the medical & security provider should inform the assignee (and family members) about the emergency response plan.

Which of the following statements best describes your emergency planning for assignees? (Select all that apply.)



Source: KPMG International, GAPP Survey 2017.

Fig. 05 KPMG Global Mobility Services. "Global Assignment Policies and Practices survey - 2017 Results." KPMG International, 2017. <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/10/2017-gapp-survey-report.pdf> [Accessed 12-01-2018]

Chapter 4: Best approach for risk mitigation

Having considered the different risks and forms of non-compliance, the business impact of non-compliance, and the roles and responsibilities of key stakeholders in assuring compliance, the next logical step would be to determine the best approach to compliance risk mitigation for short-term assignments.

Policy, processes and procedures

Needless to say, proper planning is essential to mitigating risks during short-term assignments. In order to plan well, there needs to be “a written short-term policy ... [which] can set out logically the steps to be taken in any relocation and the procedures to be followed.”³³ 79% of companies surveyed by ECA, have a written short-term policy in place (see Fig.06). Since the assignee and the organisation are exposed to risk of non-compliance in various phases of the assignment, in so many different fields (tax, immigration, labour law, social security, duty of care) and given that there are various stakeholders involved in assuring compliance, centralization and consistency are key to minimising the risk. Drawing up one compliance policy, that is consistently applied to short-term assignments company-wide (across borders) will minimize compliance oversights as a result of inadequate preparation and planning due to rushed short-term assignments. This policy should be the fundament for the set of processes and procedures that are then put in place to be followed by various parties and departments to assure compliance for every possible type of short-term assignment. The policy should also provide clear timelines so that stakeholders know how far in advance assignments should be planned for.

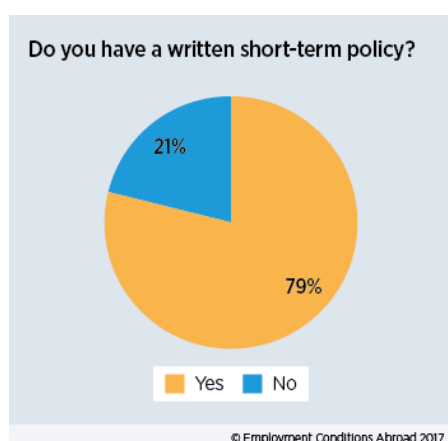


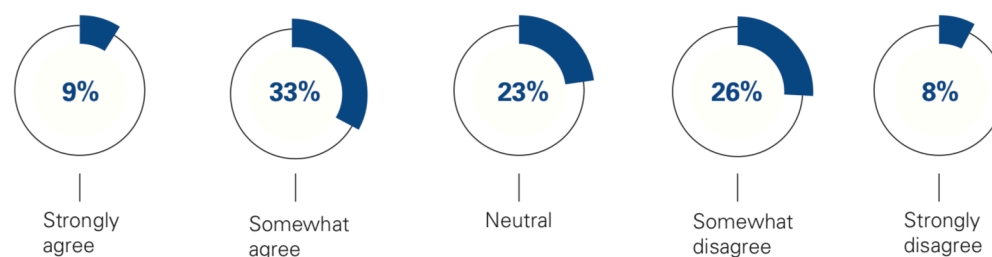
Fig. 06: ECA International. “Short-Term international assignments: How to achieve consistency.” The Forum for Expatriate Management, Centaur Media PLC Group, 8 Dec. 2017, www.forum-expat-management.com/users/13456-eca-international/posts/28376-short-term-international-assignments-how-to-achieve-consistency [Accessed 12-01-2018]

Since it is impossible to eliminate all risk, there should also be a contingency plan in place to deal with instances of non-compliance.³⁴ Since Global Mobility is responsible for managing the mobility of the workforce, this department should be the owner and driver of short-term assignment policy, processes and procedures.

Getting support from executive management & raising awareness

Compliance related to short-term assignments gets overlooked in the fast-paced business world in order to meet business goals as efficiently as possible. Going through all the processes and procedures in place with regards to compliance will be time-consuming and managers will be tempted to take shortcuts (leading to intentional non-compliance). Only 8% of companies surveyed by KPMG in 2017 (GAPP) claimed to manage assignment processing well (see Fig. 07).

Do you agree that your organization manages the assignment planning process well?



Note: Total may not add to 100% due to rounding.

Source: KPMG International, GAPP Survey 2017.

Fig. 07: KPMG Global Mobility Services. "Global Assignment Policies and Practices survey - 2017 Results." KPMG International, 2017. <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/10/2017-gapp-survey-report.pdf> [Accessed 12-01-2018]

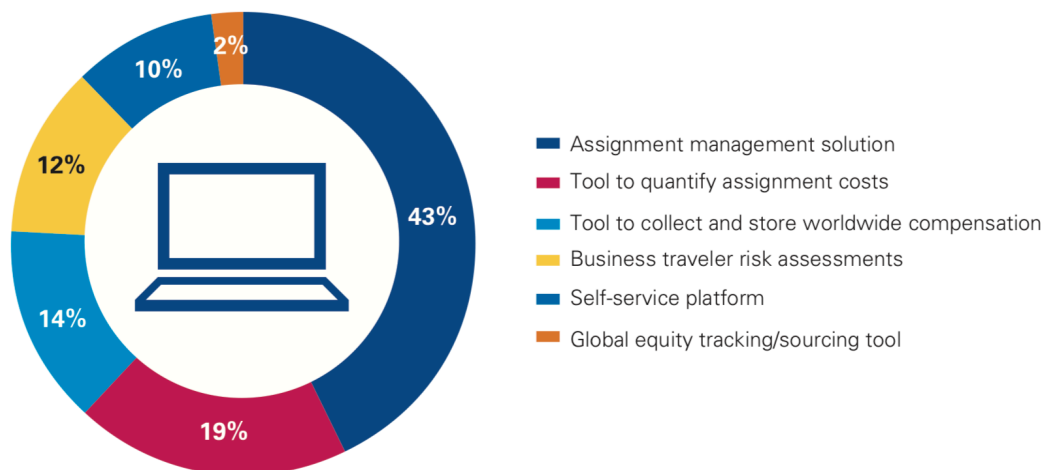
Therefore, successful implementation of policy stands or falls with the full support of executive management. Global Mobility, in collaboration with other departments who have a good understanding of the risks involved in short-term assignments, should prepare several business cases to present the grave impact that non-compliance can have on the business. It is crucial to raise awareness and correct false perceptions that might exist within the ranks of executive leaders about the compliance risks that short-term assignments carry. As a result Global Mobility will have the full support of executive management in implementing a compliance policy for short-term assignments. Ultimately, this should also be done for all key stakeholders so that they are fully invested in the policy too.

Software for centralization, consistency, tracking and planning

Global Mobility and all stakeholders will require adequate tools to implement policy successfully. Tracking is becoming increasingly essential in securing compliance during short-term assignments.³⁵ Despite having one, consistent policy in place, there will still be variables involved in each short-term assignment that will need to be tracked and taken into account for planning purposes. The assignee's days of presence in a specific location and possible changes in personal and working situation also needs to be tracked, as does information from different departments and advisors. And finally, the entire process of securing compliance for short-term assignments will need to be tracked from A to Z to be certain that policy has been adhered to and that all necessary procedures have been followed. It can be rather overwhelming to consider all the information that needs to be extracted from different sources before a proper plan can be drawn up for a short-term assignment. Additionally, the inter-departmental coordination required by Global Mobility and the ongoing checks needed to ensure compliance adds another level of complication. This is where technology to manage assignments can assist companies immensely in mitigating non-compliance risk by reducing the overwhelm of information traffic and tracking. "Assignment management software"³⁶ can help companies to keep a track of their assignees, create a "workflow [...] to involve all necessary stakeholders"³⁷, "store all necessary information and documentation, create alerts and reminders for when visas/work permits/social security agreements need renewing, generate communications to various stakeholders, initiate external vendor operations and kick-off workflow processes."³⁸ 43% of global mobility technology software users

surveyed by KPMG in 2017 (GAPP) assessed assignment management tools as most crucial to their work (see Fig. 08). Based on the results of its 2017 survey, ECA has rightly concluded that “for many companies, technology has become the key to achieving and maintaining compliance [See Fig. 09]. Without proper monitoring, an employer may unwittingly be exposed to tax and social security risks. Diligent tracking of short-term assignees and a solid process to be able to identify risks up-front are key to ensuring compliance.”³⁹

As a user or reviewer of global mobility technology solutions, which system is most important to you?



Source: KPMG International, GAPP Survey 2017.

Fig. 08 KPMG Global Mobility Services. “Global Assignment Policies and Practices survey - 2017 Results.” KPMG International, 2017. <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/10/2017-gapp-survey-report.pdf> [Accessed 12-01-2018]

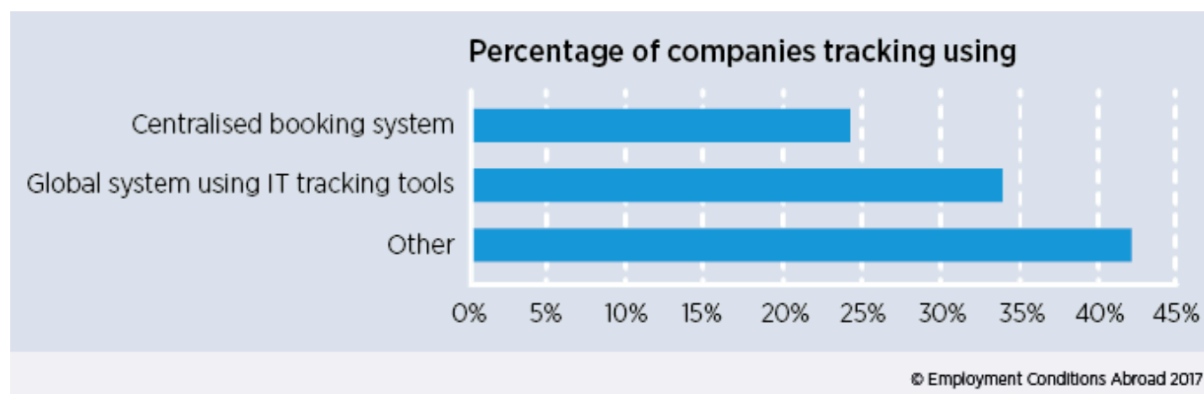


Figure 09: ECA International. “Short-Term international assignments: How to achieve consistency.” The Forum for Expatriate Management, Centaur Media PLC Group, 8 Dec. 2017, www.forum-expat-management.com/users/13456-eca-international/posts/28376-short-term-international-assignments-how-to-achieve-consistency [Accessed 12-01-2018]

Phases of an Assignment

A short-term assignment can be split into several stages, as shown in Figure 10 below:



Fig. 10: Heaps, Warren. "Expatriate Assignment Checklist Part 2 – Assignment Planning." *International HR Forum*, International HR Forum, 24 May 2013, internationalhrforum.com/2012/04/26/expatriate-assignment-checklist-part-2-assignment-planning/. [Accessed 12-01-2018]

Pre-assignment Phase

The assessment, selection, approval and planning stages as shown above would belong to what Alison Shipitofsky of KPMG aptly labels the "pre-assignment phase"⁴⁰ which includes "planning and getting ready for the assignment logistics."⁴¹ This is where multinational companies should do a thorough risk assessment in collaboration with key stakeholders for **all** short-term assignments, without distinction. It seems to be common practice to be selective when it comes to risk assessment as only "over a third of participants in ... [ECA's 2017] survey [chose to] carry out a risk assessment before every business trip..."⁴² and not all areas exposed to compliance risk are consistently assessed (with immigration and the health and safety of the assignee being most frequently assessed).⁴³

However, since any small change in or an unknown aspect of the short-term assignment may lead to non-compliance and its grave consequences, being selective when it comes to risk assessment is not sound practice. For this reason a risk assessment should be made for all short-term assignments.

In this phase it would be best to include "an assignment initiation form"⁴⁴ in the process which provides stakeholders with all the information they need to make the necessary risk assessments.⁴⁵ The employee and any accompanying family members should also be involved in this process to the extent that they need to provide information and be informed regarding compliance risks. Third-party advisors with specialist knowledge of host country rules and regulations

should also be involved in this phase (albeit via communication with the different in-house departments). Based on the risk assessments, a compliance plan should be drafted for the short-term assignment by Global Mobility and sent to all stakeholders for review. The final plan should be approved by all stakeholders and this should be a signal to proceed with the next steps of taking care of the logistics such as drafting contracts, applying for the necessary residence permits and certificate of coverage, seeking housing, etc. This is also when the employee (and possibly accompanying family members) should be given suitable training for the relocation, informed of emergency response plans and reminded of significant compliance risks (as part of the employer's Duty of Care) as well as the expectation of the Duty of Loyalty "to follow the employer's Duty of Care policies and procedures."⁴⁶

The assignment phase

The relocating and ongoing support section as shown in Fig.10 would be a part of the actual assignment phase. From a compliance perspective, the focus during this phase should be on tracking the assignee and any changes in his/ her working and personal situation, as well as tracking changes in host country legislation (and the implications). This way there can be an ongoing compliance risk assessment by all key stakeholders. Global Mobility would need to coordinate this process and maintain open communication lines between the various stakeholders. As the assignment comes to a close, the policy should dictate a debriefing involving all key stakeholders to assess compliance risk as a final element of the ongoing compliance risk assessment described in the previous phase. Care should be taken to go through all procedures as legally required for immigration, tax, payroll, labour law and duty of care obligations. In the event of non-compliance at any stage, the contingency plan should guide all parties on the best next steps to take.

The post-assignment phase

The end of an assignment and the subsequent repatriation naturally belongs to the post-assignment phase. An employee's return to the home country does not necessarily mean the end of compliance risks related to the assignment. For example, there could still remain an obligation to file an income tax declaration later in the year and/ or the option to claim benefits that an assignee may have accrued if he/she did pay local social security contributions. Therefore it is important that even in the post-assignment phase, Global Mobility coordinates with relevant stakeholders to ensure that the any outstanding tasks resulting from the short-term assignment are properly completed.

Recording each step of the process as dictated by the company's compliance policy (with the help of assignment management software) should result in a thorough report or case file. This an invaluable helpful reference for future assignments, business reporting and stand as evidence of the company having made the best efforts to meet all compliance requirements and fulfil its duty of care towards employees.

CONCLUSION

As the frequency of international short-term assignments continues to grow, multinational companies increasingly face the challenge of minimizing their exposure to non-compliance during such assignments in the areas of taxation, social security, immigration, labour law, and duty of care. The consequences of non-compliance in any one of these areas can have a significantly negative business impact. Therefore, the risks of non-compliance during short-term assignments must be addressed and mitigated for the sake of business continuation.

It is crucial for companies to have a thorough compliance policy in place for short-term assignments, which outlines clear processes and procedures for all the key internal and external stakeholders to follow (based on their roles and responsibilities). Global Mobility would normally be the owner and driver of the short-term assignment compliance policy and the related processes and procedures.

The best tool to help implement the policy would be an assignment management software which acts as a centralised platform to track all relevant information, facilitate inter-departmental communication between key stakeholders and push all compliance processes and procedures forward in a timely fashion. Based on the compliance policy, a risk assessment should be made of all short-term assignments in the pre-assignment phase, in collaboration with all key-stakeholders. Once potential risks have been adequately addressed and an approved assignment plan is in place, the assignment may commence. During the assignment, the assignee's situation should be monitored on an ongoing basis to identify and address any new risks that may arise. Ending the assignment well with a final risk assessment and several follow-ups post-assignment is also a must, to ensure that no outstanding requirements are left unattended. And finally, despite one's best and most thorough efforts to minimize the risk of non-compliance, it is impossible to eliminate all risk. For this reason, companies should always have a contingency plan in place which will guide parties on the best path to follow in the event of an unexpected compliance breach.

If implemented and tracked well (with the help of the right assignment management technology) the entire compliance assurance process for a short-term assignment will be well documented, resulting in a thorough report. Such a report can be referenced for future assignments, used for business reporting and stand as proof of a company's dedication towards assuring compliance and fulfilling its duty of care towards its most valuable resource: the employee.

ENDNOTES

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⁹ Vreemdelingenwet 2000. (2017, 16 December). Artikel 2c - 2g. <http://wetten.overheid.nl/BWBR0011823/2017-12-16> [Accessed 12-01-2018]

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