

# HOW A U.S. UNIVERSITY CAN EMPLOY FACULTY, RESEARCHERS, ADMINISTRATORS AND FOREIGN LOCALS AT AN OVERSEAS PROGRAM

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A full century has passed since Yale professor Hiram Bingham discovered Machu Picchu and University of Chicago professor James Henry Breasted led his expeditions into Egypt and the Sudan for Chicago's Oriental Institute amassing one of the world's great collections of ancient Near East artifacts. Mostly led by peripatetic, internationally-focused faculty like Bingham and Breasted, American higher education has long engaged internationally. Not only have American professors long taught at universities abroad, but American faculty and graduate students have long conducted research abroad and of course American college students have long studied abroad. Now the scale and ambition of American higher education outreach overseas is spiking as U.S. colleges and universities launch initiatives at the *institutional* level.

U.S. universities' foreign presences these days take many different forms, from full-blown brick-and-mortar campuses down to one-off overseas summer courses and temporary research projects. For example, higher education institutions these days are launching:

- Overseas stand-alone brick-and-mortar branch campuses that grant degrees to local students
- Overseas brick-and-mortar campuses that do not grant degrees but offer classes primarily to U.S. main campus students and support in-country research by U.S. researchers
- Overseas programs and degrees offered in joint venture or partnership with foreign universities
- Overseas summer sessions and semester courses on foreign university campuses or other borrowed sites abroad
- Distance learning/online courses for U.S. main campus students taught by foreign adjunct faculty who live and work abroad
- Overseas research projects that employ faculty, researchers, administrators and locals abroad (for example, overseas public health projects, anthropological studies, climate change research, archeological digs)

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- Visiting faculty exchange programs with overseas branch campuses and partner universities
- Paid consulting projects conducted abroad (for example, a U.S. university contracts with a foreign university for “knowledge transfer” advising the foreign university on setting up a new program or graduate school)
- Local overseas college or university offices, agents or representatives recruiting local students in a foreign market for the U.S. campus and handling the institution’s in-country alumni network, marketing and other local business
- “Stealth” overseas presences—a college or university’s administration learns that some program (such as a distance learning course or overseas research project) employs people on the ground somewhere abroad, having somehow emerged from an academic department without the approval of anyone in administration or the general counsel’s office

Public and private American research universities are among the most vital, complex, and sophisticated organizations in modern society. But as compared to multinational businesses and multinational NGOs/non-profits, U.S. higher education institutions have relatively little expertise and history with the nuts-and-bolts logistics of operating and employing staff on foreign soil. This shortfall in experience too often leaves American colleges and universities operating abroad facing unbudgeted compliance costs and doing a less-than-ideal job complying with local host country laws. Unfortunately, the local host country rules that the institutions risk violating here can be serious—sometimes criminal—laws.

- *Foreign partners:* Many U.S. college and universities have found that engaging an active partner abroad (such as a foreign university or business facilitator) to handle logistics can shift, to the partner, many of the burdens and tougher aspects of operating abroad. Indeed, successfully delegating overseas operational logistics to a foreign partner can be a big step to complying with many of the legal challenges we discuss here.

This is a primer on the corporate establishment, tax, licensing and—in particular—employment law compliance hurdles that a U.S. college or university needs to clear when starting up a presence overseas that will employ faculty, researchers or administrators from main campus and, perhaps, foreign locals (or when fixing compliance problems at an existing overseas locale). The discussion breaks into four parts: (I) the case for compliance (II) overseas corporate establishment, tax and educational licensing mandates (III) distinguishing main-campus business travelers/expatriates from foreign local employees/contractors/agents and (IV) the four ways to structure overseas employment relationships.

## **I. The Case for Compliance**

Compliance is a big issue in overseas educational and research programs because these programs trigger lots of foreign laws. Like the United States, most countries—from Japan, Canada and the rich countries of Europe to the poorest developing nations of Asia, Latin America and Africa—

impose corporate, tax, licensing, immigration, payroll and employment laws. Just as in the U.S., overseas these laws are serious. Violating them can be expensive, sometimes even a crime, and can cause reputational damage.

Sometimes when an academic institution sets out abroad, the first challenge to clearing the overseas legal hurdles is getting faculty engagement and “buy-in.” Faculty sponsoring an overseas course or research program inevitably face tight time and budget constraints. They rarely show much patience for compliance problems they see as extraneous to their core mission. When compliance gets too tough or expensive in relation to scale of effort, foreign legal rules start looking like bureaucratic roadblocks better detoured around than climbed over.

But legal compliance is not optional, even where a program is small. Certainly U.S. domestic laws, for example, are not optional and do not offer any *de minimus* exception. Still, ignoring or downplaying applicable law in the short term can be tempting because it can be clean, quiet and cheap. But doing that just makes compliance in the long run messier, louder and more expensive. Anyone who has ever tossed a speeding ticket out a car window understands why compliance deferred is compliance enlarged.

Sometimes faculty championing an overseas program will volunteer to “accept the risks” of non-compliance. But of course legal duties are non-delegable. Law enforcers go after the institution, not the agent (especially when faculty sponsors are safely back home on campus). And besides, flouting host country laws is inconsistent with U.S. educational institutions’ “good citizen” value system, and raises reputational risk.

It is easy to advise others to follow all applicable laws. But in the real world a college or university sometimes tiptoes into a foreign country—for example with just a temporary study-abroad program or a tiny research project (rather than a full-fledged brick-and-mortar foreign campus), unaware of the need to comply with local laws or at least reluctant to spend unbudgeted resources scrupulously following every local bureaucratic rule, especially when faculty sponsoring the overseas program decide the risk of detection is fairly low.

Yet surprisingly, the very same academics who can seem so ambivalent about complying with *foreign* laws tend to take the opposite position as to complying with corresponding *American* rules. Consistent with the classical liberal tradition, mainstream American academics across all disciplines (even those whose field is not law, ethics, philosophy, public policy or political science) tend to insist that their home institutions follow American corporate, tax, immigration, payroll and employment laws. When has any U.S. academic ever advocated that his institution commit U.S. tax fraud, employ illegal aliens in the U.S. or violate U.S. social security or employment mandates?

Further, when we flip the cross-border higher education scenario *inbound into the U.S.*, mainstream American academics would almost uniformly advocate that even *foreign* academic institutions scrupulously comply with our domestic U.S. law. For example, imagine hypothetically if a Canadian or British university like McGill or Oxford decided to open a recruiting office in New York, or to hire a Boston-based adjunct professor to teach a distance learning course, or to expatriate one of its Canadian or British professors to teach a year-long course “in the field” on an archeological dig in Montana or at a film studio in Hollywood. What

if, under one of these scenarios, the Canadian or British university failed to get a visa for faculty assigned to the U.S.? What if the Canadian or British university paid American local hires in cash “under the table” or payrolled them offshore on its home (Canadian, British) payroll in violation of U.S. federal and state reporting/withholding/contribution mandates? What if the Canadian or British university ignored U.S. overtime pay laws? Both out of a sense of propriety and to minimize legal and reputational risk, mainstream American faculty and administrators would urge an incoming Canadian or British university not to flout American laws.

The analysis works the same way in reverse when a U.S. academic institution rolls out an initiative overseas. And so U.S. educational institutions going abroad should always follow (and resist internal pressures to flout) host-country laws on corporate registration, tax filings, licenses, visas/work permits, payroll, wage/hour and employment.

Now we address strategic approaches for how to comply.

## **II. Overseas Corporate Establishment, Tax and Educational Licensing Mandates**

When faculty, researchers or administrators from a U.S. academic institution venture into a foreign country to launch some new educational or research program, the institution—whether it wants to or not—needs to confront three distinct issues under foreign host country law: corporate establishment and corporate tax law; licensing; and immigration, payroll and employment rules.

### **A. Corporate Establishment and Corporate Tax Law**

Of the three legal issues confronting a college or university that sets up an operation abroad, first is overseas *corporate establishment and corporate tax* law. This includes the “permanent establishment” problem—corporate presence and “doing business” (even if on a non-profit basis) in a foreign host country. The public policies behind these issues are basic: Sovereign countries impose corporate establishment and corporate tax requirements as a condition of doing business locally, because countries want to know who is operating in their borders, they want to impose structure on “juristic persons” (corporate entities), and they want to collect taxes.

- “*Doing business*” versus *non-profit status*: We are discussing “doing business” abroad—but colleges and universities, as non-profits, might see themselves as exempt from rules regulating “business.” Yet it does not work that way. To be a non-profit, an entity needs to be registered. All countries insist that any entities operating inside their borders have locally-recognized corporate or “establishment” status. An entity’s tax status is separate. Often, as in the U.S., corporate identity precedes tax status, although some countries offer a special entity form that by its nature is non-profit (for example, “associations” in Brazil).

Unfortunately, a U.S. college or university’s U.S. §501(c)(3) status means almost nothing as to its foreign tax position—just as tax-exempt status under (say) Australian, Brazilian or Congolese law gets an entity nowhere as to any U.S. corporate tax obligations. A U.S. higher education institution enjoys no tax-exempt

status abroad until the local host country's equivalent of the IRS grants it "local §501(c)(3) equivalent" status.

- *Foreign tax exposure:* When confronted with the obligation to file corporate tax returns abroad, U.S. colleges and universities sometimes assume their overseas activities surely must not be taxable, perhaps because they do not see themselves as generating income abroad. But again, in the eyes of a foreign local tax authority, an institution without "local §501(c)(3) equivalent" status is a for-profit business. If that "business" is not registered as a local corporate entity, maybe the local tax agency might try to tax it on its worldwide revenue. Maybe under foreign local law, tuition collected stateside for study in-country is taxable. Maybe U.S. endowment income, the U.S. donations or U.S. grant money that funds the in-country program is taxable. This is a question of host country tax law.

When a U.S. college or university tiptoes into a foreign country with a temporary study program or small research project, the threshold corporate establishment and corporate tax question becomes: *Is our initiative small enough that we can ignore host country corporate establishment and corporate tax obligations? Or does our initiative require us to register as an entity locally and, perhaps, file corporate tax returns?* The issue here is whether the institution's in-country initiative is "doing business" (even if on a non-profit basis) in the host country. Where a new (or existing) college/university program triggers a host country's definition of "doing business" in-country, under host country law the institution needs to register a local corporate entity—a branch, representative office or subsidiary. Then, at tax time, the institution likely needs to file a local corporate tax disclosure or return (even if the return shows no profit generated).

So the question becomes: *When does a U.S. institution trip a foreign country's definition of "doing business" in-country and become a local "permanent establishment" subject to corporate registration and corporate tax filing requirements?* The answer depends on the circumstances and on local law. Local laws on the core question here—*what kind of activity constitutes "doing business" locally?*—vary from country to country. But there are some common themes. For example:

- *Malawi* requires only those businesses with a "local established place of business" to register—but Malawi uses a broad definition for "place of business" that can include, for example, even a government department office that hosts a local company employee, or a home office.
- *Mexico* requires organizations with a local physical presence and organizations with local agents who hold power of attorney to register.
- *Qatar* requires every natural or "juristic person" to register before "engaging in commerce"—but Qatari commercial registration law is murky as to what "engaging in commerce" means, particularly in the educational context.
- *Singapore* requires organizations to register if they "de[a]l with [personal or real] property situated in Singapore...whether by employees or otherwise." But the

Singapore Companies Act sets out a long list of exceptions—actions that do not implicate an organization as doing business in Singapore.

- *Spain* requires an organization to register if it has in-country employees, agents or a fixed place of business (which of course might be an employee’s, agent’s or adjunct professor’s home office)
- *Syria* sets out a list of factors that can determine when a foreign organization does business locally and so triggers a local registration requirement:
  - hiring workers paid by the organization
  - buying or renting local real estate in the organization’s name
  - opening a local bank account in the organization’s name
  - listing the organization in a local telephone directory
  - subscribing to a post office box (in Syrian parlance, a “telegraph address”) in the organization’s name

If a U.S. academic institution “does business” abroad under the local definition, it might likely have a local “permanent establishment.” If it fails to register as a local in-country corporate entity and fails to make local corporate tax filings, its overseas activities might subject the U.S. institution to liability locally on two grounds: local-country fines for failing to register as a corporate entity and corporate tax assessments and fines. On top of that liability is the reputational risk when a high-profile U.S. university comes in-country and violates corporate tax law. No one envies the hapless U.S. academic whose modest overseas program triggered such steep consequences.

## **B. Licensing**

Beyond corporate/tax issues, the second legal issue confronting a college or university setting out abroad is educational *licensing*. The requirement here parallels U.S. regulations that require licenses for colleges and universities offering education and engaging in similar activities stateside. Foreign sovereigns, too, require these registrations and licenses. A college or university that comes in from abroad and sets up shop locally needs a license if its in-country activities implicate the local licensing obligation. Of course, an institution that plans to grant degrees or educate local students is far more likely to trigger local educational licensing requirements than, say, an institution merely conducting in-country research or offering study abroad for American students only.

Corporate establishment/corporate tax law and licensing aside, the third major cluster of legal issues confronting U.S. higher education operating abroad is local foreign *employment* laws, including immigration and payroll—the topic of the rest of our discussion.

### **III. Distinguishing Main-Campus Business Travelers/Expatriates from Foreign Local Employees/Contractors/Agents**

*Employment* tends to be the trigger of the corporate, tax and licensing issues we have been discussing. A U.S. college or university tends to operate physically abroad through personnel on the ground locally. With no one on the ground abroad, a U.S. institution likely has no foreign presence. For example, a college or university with just one or two people working on a small project on foreign soil may well be “doing business” in that country. On the other hand, even a university hosting a huge Massive Open Online Course with students enrolled around the world likely does not operate physically abroad, chiefly because it has no people on the ground overseas.

Personnel or services providers on the ground abroad working (or rendering services) for a U.S. college or university program fall, broadly, into three categories that are important to distinguish: (A) business travelers working for the institution in the U.S. and theoretically based at main campus, but rendering some services overseas (B) expatriates employed by and formerly working at the main campus but now stationed abroad, and (C) employees, contractors or agents hired or engaged locally abroad.

#### **A. Business Travelers Working for the Institution in the U.S. and Theoretically Based at Main Campus, but Rendering Some Services Overseas**

A business traveler from main campus is a U.S. college or university faculty member, researcher or administrator who shoots off abroad to handle some tasks so briefly or intermittently that his “place of employment” never becomes the foreign site. The business traveler is a main campus employee who parachutes into a foreign program for a short time (say, up to about four months or at most a semester) to handle some one-off educational, research or administrative tasks with no intention of staying or being based at the foreign site, not even temporarily. If a business traveler stays abroad too long (say, over four months or at most a semester), the institution’s foreign site becomes his new, if temporary, place of employment. The business traveler becomes an expatriate—maybe a so-called “stealth expatriate” whom the institutional employer improperly misclassified as a business traveler (as a “stealth employer,” the institution could be subject to local host country corporate, tax, licensing and employment law).

While colleges and universities always payroll their business travelers on the home campus payroll, a business traveler going abroad may well need a host country visa or work permit. France, for example, may require work visas for those who work in-country for 90 days—so even a professor teaching a one-semester course in France on a “business trip” basis needs a visa. Obviously a higher education business traveler who teaches, researches or administers programs at an institution’s overseas site without a locally-required visa/work permit becomes what Americans call an “illegal alien” (euphemistically, an “undocumented worker”). Beyond visas/work permits, foreign host countries usually extend their local wage/hour laws and sometimes their other employment laws to protect inbound business travelers working locally. D.Dowling, [“Wage/Hour Law, International Business Travelers and Guest Workers”](#) (5/08) (White & Case *Global HR Hot Topic* available at [http://www.whitecase.com/hrhottopic\\_0508/](http://www.whitecase.com/hrhottopic_0508/)).

**B. Expatriates Employed by and Formerly Working at the Main Campus but Now Stationed Abroad**

A university *expatriate* is an employee (faculty, researcher, administrator) whose original place of employment with the institution was the main campus, but who has now been stationed (assigned or “seconded”) abroad on a temporary assignment. His place of employment, temporarily, has shifted overseas. The institution intends someday to “repatriate” the expat back to main campus (if it did not intend to bring him back, he would not be an expatriate at all—he would be a localized “transferee”). D.Dowling, [“Structuring Expatriate Postings”](#) (8/11) (White & Case *Global HR Hot Topic* available at <http://www.whitecase.com/hrhottopic-0811/>).

- *Permanent establishment*: Sending an expatriate to work abroad can subject a U.S. college or university to a host country “permanent establishment” finding (corporate establishment, corporate tax, licensing requirements)—even if the expatriate is a “seconded” to a host country institution. This is a particular challenge in China. See China State Administration of Taxation Bulletin #19 (effective 1 June 2013).

Expatriates need visas. They need to be payrolled in compliance with host country payroll law and sometimes also with U.S. payroll law, although there are exceptions. D.Dowling, [“Expatriates, U.S. Tax Withholding, U.S. Social Security Contributions – and COBRA”](#) (4/12) (White & Case *Global HR Hot Topic* available at <http://www.whitecase.com/hrhottopic-0412/>). Expatriates usually enjoy all the protections of host country employment law even if they signed a U.S. choice-of-law clause that purports to impose U.S. employment-at-will in place of local law. But an expat who is a U.S. citizen simultaneously enjoys rights under U.S. employment discrimination laws. D.Dowling, [“Whose Laws Reach Border-Crossing Employees?”](#) (8/12) (White & Case *Global HR Hot Topic* available at <http://www.whitecase.com/hrhottopic-0812/>) and D.Dowling, [“Employment Context Choice-of-Law Clauses,”](#) (9/12) (White & Case *Global HR Hot Topic* available at <http://www.whitecase.com/hrhottopic-0912/>).

**C. Employees, Contractors or Agents Hired or Engaged Locally Abroad**

U.S. colleges and universities often engage native in-country locals, usually local citizens, to teach and to support programs and research projects “in the field” overseas. The easy compliance piece here is that local citizens do not need visas. Otherwise, though, employing locals raises compliance hurdles for a U.S. institution’s nascent overseas program. Where a U.S. institution hires foreign locals as employees to work in-country, local law usually requires the university payroll local staff in compliance with host country payroll laws and make local reporting, withholding and contributions to local tax and social security agencies. To pay in-country local employees in cash without reporting to the host-country government is illegal most everywhere and in some places is a crime. Also, to payroll in-country local employees on the U.S. main campus payroll without reporting to the host-country government can be illegal offshore payment of income, also possibly a crime. Of course, the challenge here is that payrolling locals in



compliance with local payroll laws almost always forces the institution to register a legal corporate presence and get a local taxpayer identification number.

- *Payroll providers:* Unfortunately, engaging a local payroll provider is no work-around here, because the payroll provider is merely an agent, not itself an employer. To issue a legal local payroll, the payroll provider usually needs the employer's local in-country registration and taxpayer identification number.

Beyond immigration and payroll laws, in employing foreign locals a U.S. institution needs to comply with the full suite of local host country employment laws—wage/hour laws, mandatory benefits laws, health/safety laws, holiday/vacation laws, discrimination/harassment laws, unionization laws, severance pay laws, and the rest. Asking locals to agree to an employment-at-will arrangement under U.S. law simply does not work. D.Dowling, [“Whose Laws Reach Border-Crossing Employees?”](http://www.whitecase.com/hrhottopic-0812/) (8/12) (White & Case *Global HR Hot Topic* available at <http://www.whitecase.com/hrhottopic-0812/>) and D.Dowling, [“Employment Context Choice-of-Law Clauses.”](http://www.whitecase.com/hrhottopic-0912/) (9/12) (White & Case *Global HR Hot Topic* available at <http://www.whitecase.com/hrhottopic-0912/>).

- *Consultants, contractors and agents:* Many U.S. colleges and universities find a potential work-around here particularly (even dangerously) attractive: Engage local services providers abroad not as employees but as non-employee consultants, contractors or agents who need not be paid on a local payroll and who enjoy no rights under local employment laws. This strategy can sometimes work well, but often it does not. The compliance challenge here is that unless these would-be “services providers” actually do render services as genuine contractors properly-classified under local law, the U.S. institution ends up kidding only itself: Like it or not and acknowledge it or not, misclassified consultants/contractors/agents who work abroad as *de facto* employees actually *do* enjoy all the same rights under host country law as regular local employees—because in the eyes of local law, they actually *are* local employees. We discuss this challenge further below and at D.Dowling, [“Overseas Independent Contractor or de Facto Employee?”](http://www.whitecase.com/hrhottopic-0711/) (7/11) (White & Case *Global HR Hot Topic* available at <http://www.whitecase.com/hrhottopic-0711/>).

#### **IV. The Four Ways to Structure Overseas Employment Relationships**

So how can a U.S. college or university with its strong center of gravity at main campus comply with the complex and expensive mandates under foreign immigration, payroll and employment laws? Unfortunately, because so much depends on specific circumstances, there is no single “magic bullet” answer. For example:

- Expect a college or university setting up a brick-and-mortar overseas campus that will employ dozens of expatriates and overseas locals to select a different compliance strategy from a school tiptoeing into a foreign market and merely engaging a local adjunct professor for a distance learning course or merely doing a short-term research project.

- Expect a college or university expatriating Americans from its main campus to work abroad long-term to select a different compliance strategy from a school merely hiring a single in-country foreign local representative or merely sending over a professor for a single semester.
- Expect a college or university partnering with a foreign institution and migrating its U.S. faculty and staff onto the partner university's local payroll to select a different compliance strategy from an institution "going it alone" abroad.

There may not be any "magic bullet" strategy for how a U.S. educational institution can comply with all foreign immigration, payroll and employment laws, but there are four options for how a multinational might structure its relationships with outbound expatriates, and foreign locals who will work at a foreign location on behalf of U.S. "headquarters" (in the higher education context, the main campus). With just these four choices, the menu of compliance strategies is short. A college or university with an overseas program or research initiative should select the one of these four structures for employing or engaging overseas staff that best meets its program needs and budget while best facilitating legal compliance. By "legal compliance" in this context, factor in: immigration compliance (getting a visa/work permit for non-local-citizens), payroll compliance (following host country and U.S. laws on payroll reporting/withholding/contributions) and employment law compliance. Cf. D.Dowling, ["Expatriates, U.S. Tax Withholding, U.S. Social Security Contributions – and COBRA"](#) (4/12) (White & Case *Global HR Hot Topic* available at <http://www.whitecase.com/hrhottopic-0412/>); D.Dowling, ["Wage/Hour Law, International Business Travelers and Guest Workers"](#) (5/08) (White & Case *Global HR Hot Topic* available at [http://www.whitecase.com/hrhottopic\\_0508/](http://www.whitecase.com/hrhottopic_0508/)).

Putting aside business travelers from main campus whose place of employment never becomes the host country (discussed above), these are the four possible ways to structure employment and services relationships for personnel whose place of employment will be overseas:

1. Direct employment: Registering a foreign local employer entity—a branch, representative office or subsidiary—facilitates sponsoring visas and employing and payrolling expatriates and local hires who will have a local in-country place of employment. This direct employment approach is the "all in," "above the table," most compliant option, and so is the only viable choice for an institution launching a brick-and-mortar campus or permanent program abroad.

A U.S. college or university that opts for direct employment registers a local host-country employer entity and in some cases will even seek local tax-free status equivalent to U.S. §501(c)(3). The host country issues the institution a local taxpayer identification number that lets it sponsor visas and engage a local payroll provider to issue a legal local payroll to expatriates and local staff alike. Even though a college or university will usually want to keep its U.S. main campus expatriate faculty and administrators employed and paid by the main campus entity, having an in-country local entity lets the institution issue for expats a local "shadow payroll" that complies with local payroll law, as regards to them.

2. Consultant, independent contractor or agent: Legitimately engaging an expatriate or foreign local services provider as a non-employee consultant, independent contractor or

agent conveniently sidesteps onerous obligations under local payroll and employment laws. The independent contractor option is particularly attractive to U.S. institutions engaging in-country *locals* (independent contractor status is a tougher sell to expatriates transferred over from main campus and is a “non-starter” for tenured faculty and anyone unable to get a local visa without an employer sponsor).

While attractive, the consultant/independent contractor/agent option can be dangerous—the challenge here is *legitimately* classifying a would-be contractor who works in-country as a professor, researcher or administrator without misclassifying a *de facto* employee. In general, most countries use tests to distinguish contractors from employees that are similar to tests used in the U.S.; presumptions tilt toward employee status regardless of the parties’ purported classification. D.Dowling, [“Overseas Independent Contractor or de Facto Employee?”](#) (7/11) (White & Case *Global HR Hot Topic* available at <http://www.whitecase.com/hrhottopic-0711/>).

3. Leased employee: U.S. colleges and universities sometimes engage, abroad, the services of faculty, researchers, and administrators through local third party employers. The local third party “nominal employer” hires the personnel onto its own local payroll and then provides (“seconds”) the individual’s services over to the U.S. university, the “beneficial employer,” through a services contract. This is called the “leased employee” strategy. The in-country nominal employer might be a local partner university or it might be a local manpower or temporary services firm like Manpower, Adecco, or Kelly Services. Leased employee structures can work well because the local nominal employer entity, as a legitimate local employer, is positioned to issue a compliant local payroll and to follow local employment laws (for example, laws on vacation and mandatory benefits). Sometimes the local nominal employer might even be positioned to sponsor visas and work permits, although local law in many countries might prevent a nominal employer from sponsoring a visa on behalf of an employee who will render services for a different (beneficial) employer, in this case the U.S. institution.

A variation on the “leased employee” structure is to keep an expatriate from main campus employed and paid by the main campus entity but to use a nominal in-country employer to issue a so-called “shadow payroll” that complies with local payroll laws. Again, though, the challenge with this approach can be getting the expatriate from main campus a visa.

This said, some countries (for example, Argentina, Brazil, Ecuador, Kenya and a pending bill in Russia) impose laws against so-called “outsourcing” that have the effect, in many contexts, of banning this “leased employee” approach—particularly where the U.S. institution partners with a for-profit “temp agency” as the nominal employer. But even in these countries, a U.S. college or university might be able to find a legal way to structure a “leased employee” arrangement if it involves as nominal employer an in-country local partner university.

4. “Fly under the radar”: A non-compliant but all-too-common cross-border employment structure is to keep a U.S. main campus professor, researcher or administrator employed by U.S. main campus and paid on the U.S. payroll even after his place of employment

shifts overseas, and not to bother getting a work visa or complying with local payroll, wage/hour or other employment laws in the host country. If the U.S. university needs to employ foreign locals, it simply pays them in cash or from the U.S. university payroll, without bothering to comply with local payroll reporting, withholding or contribution mandates.

Obviously the problem with this approach is that in most countries it blatantly violates local laws and can be criminal. A U.S. institution that sets out abroad and employs illegal aliens (American expatriates without work visas) and that “onboards” foreign local employees onto an illegal cash or illegal offshore payroll might, under host country law, be committing crimes. This approach also threatens reputational risk—bad publicity for a high-profile, prestigious U.S. college or university.

“Flying under the radar,” although common, is never a good idea, if only because the university’s in-country operations may well, ultimately, actually register a blip on the local regulators’ radar. One scenario where these situations often come to light is the disgruntled local employee who acts as a whistleblower, denouncing the U.S. employer institution to local courts and authorities. Indeed, while trying to “fly under the radar” in this context can be tempting, U.S. colleges and universities have a strong case for compliance—see *supra* part I.

# Employing Personnel Overseas: Getting It Right

National Association of Colleges and Universities  
Attorneys (NACUA) Annual Conference

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# Road Map

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- **Institutional Outbound University Presences**
- **Examples of U.S. Universities' Foreign Presences**
- **The Compliance Challenge**
- **Overseas Corporate Establishment, Tax and Educational Licensing Mandates**
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- **The Four Ways to Structure Overseas Employment Relationships**

**Questions—?**

# Institutional Outbound University Presences

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- **History formerly ad hoc; now institutional**
- **Compare multinational businesses and NGSs to university's campus “center of gravity”**

# Examples of U.S. Universities' Foreign Presences

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- **Overseas stand-alone brick-and-mortar branch campuses that grant degrees to local students**
- **Overseas brick-and mortar campuses that do not grant degrees but offer classes primarily to U.S. main campus students and support in-country research by U.S. researchers**
- **Overseas programs and degrees offered in joint venture or partnership with foreign universities**
- **Overseas summer sessions and semester courses on foreign university campuses or other borrowed sites abroad**
- **Distance learning/online courses for U.S. main campus students taught by foreign adjunct faculty who live and work abroad**



## Examples of U.S. Universities' Foreign Presences (*cont'd*)

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- **Overseas research projects that employ faculty, researchers, administrators and local abroad (for example, overseas public health projects, anthropological studies, climate change research, archeological digs.)**
- **Visiting faculty exchange programs with overseas branch campuses and partner universities**
- **Paid consulting projects conducted abroad (for example, a U.S. university contracts with a foreign university for “knowledge transfer” advising the foreign university on setting up a new program or graduate school)**

## Examples of U.S. Universities' Foreign Presences (*cont'd*)

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- **Local overseas college or university offices, agents or representatives recruiting local students in a foreign market for the U.S. campus and handling the institution's in-country alumni network marketing and other local business**
- **“Stealth” overseas presences—a college or university's administration learns that some program (such as a distance learning course or overseas research project) employs people on the ground somewhere abroad, having somehow emerged from an academic department without the approval of anyone in administration or the general counsel's office**

## Hypothetical:

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- **University-paid faculty lives full time in foreign country and conducts research there in collaboration with a foreign university. The foreign university administrative systems are becoming too cumbersome, so researcher would like to buy her own supplies, retain a full time assistant, and retain part time research assistants. For this, she calls home to request permission to open an institutional bank account.**

# The Compliance Challenge

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- **The Case for Compliance**

- Why countries regulate corp. tax, licensing, immigration, payroll, employment
- Faculty sponsors; time and budget constrains; “accept the risks”
- But: “good citizen”; U.S. compliance; advice to inbound university

# The Compliance Challenge (*cont'd*)

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- **Foreign Partners**
  - Local University
  - HR services provider
  - Personnel/manpower provider
- **Legal compliance challenges in initiatives abroad**

# Overseas Corporate Establishment, Tax and Educational Licensing Mandates

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## A. Corporate Establishment and Corporate Tax Law

- *“Doing business” versus non-profit status*
- *Foreign tax exposure*
  - Malawi
  - Mexico
  - Qatar
  - Singapore
  - Spain
  - Syria

# Overseas Corporate Establishment, Tax and Educational Licensing Mandates (*cont'd*)

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## **B. Licensing**

- Type of overseas foreign presence

## Employment: Distinguishing Main-Campus Business Travelers/Expatriates from Foreign Local Employees/Contractors/Agents

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- A. Business Travelers Working for the Institution in the U.S. and Theoretically Based at Main Campus, but Rendering Some Services Overseas**
- B. Expatriates Employed by and Formerly Working at the Main campus but Now Stationed Abroad**
  - Permanent establishment
- C. Employees, Contractors or Agents Hired or Engaged Locally Abroad**
  - Payroll providers
  - Consultants, contractors and agents



# The Four Ways to Structure Overseas Employment Relationships

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## Why there is no “magic bullet”:

- Brick-and mortar overseas campus that will employ dozens of expatriates and overseas locals **vs.** tiptoeing into a foreign market and merely engaging a local adjunct professor for a distance learning course or merely doing a short-term research project
- Expatriating Americans from main campus who will work abroad long-term **vs.** merely hiring a single in-country foreign local representative or merely sending over a professor for a single semester.
- Partnering with a foreign institution and migrating its U.S. faculty and staff onto the partner university’s local payroll **vs.** “going it alone” abroad.

# The Four Ways to Structure Overseas Employment Relationships (*cont'd*)

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- 1. Direct employment**
- 2. Consultant, independent contractor or agent**
- 3. Leased employee**
- 4. Fly under the radar**

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*Questions?*