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COMMENT: Why US needs immigrants

Can there really be some mysterious logic linking the US President's concerns about the proportion of goods and services consumed in America that are made in America and his wish to reform the H-1B work visa? There is clearly a 'quart out of a pint pot' problem here that is not being addressed.

Evidence abounds that there is a severe shortage of highly skilled workers in the USA and the only way the dream of onshoring production can be achieved in the short-term is if talent is creamed off from the rest of the world. Far from being abused, the H-1B visa manages to attract many of the best IT and research professionals, particularly from India. What's more, these are clearly not being hired on the cheap. In fact, Indian high-tech professionals are the most highly paid group of recent immigrants in the USA.

The other thing to bear in mind is that there are just 85,000 H-1B visas issued each year.

This might seem a lot, but it is a drop in the ocean when compared to the US working population that currently tops 160 million – if only legal workers are included.

In fact, at the other end of the skills spectrum, the USA lacks people prepared to do many of its more menial tasks. There are some 90 million adult economically dependent people – the lawfully resident population of working age who are not in work or seeking work – in the USA. If illegal workers are to be rounded up and deported then somehow the US administration is going to have to find a way to persuade the non-employed to take their place. Some of these jobs can be automated out of existence, but for the rest the cost of labour will need to rise to tempt previously inactive citizens into the formal economy. It then begs the question whether this re-enlisted workforce will be as capable and as productive as the illegal immigrants they replace.

CHINA: Streamlining immigration

A number of changes are taking place in China's immigration systems and protocols.

The foreign national's permanent residence card, known as the Chinese 'green card', is to be renamed as the 'foreigner's permanent residence identity card'. From July 2017, details of individuals will be embedded into chips on machine-readable cards issued to resident foreigners. This will allow personal details to be verified by railways, airlines, insurance agencies, hotels and banks – making such cards similar to the identity cards used by Chinese citizens.

The hiring of foreign experts is being simplified with the introduction of a single document called 'the foreign work licence permit'. Foreign employees will be assigned a permit number that is valid for life. This change requires the establishment of a nationwide electronic application system and combines the three previous categories used to designate foreign highly skilled personnel.

GLOBAL: The FedEE top 20

Which country is it best to invest in from a HR point of view? There are hundreds of factors to take into account from a general business perspective, but ultimately the HR list can be reduced to just six.

In an increasingly troubled world, multinationals are ever mindful of a country's political stability. An investment is never a wise one in a potential war zone or where there is little rule of law. It is also beneficial if those in the same company can speak a common language, and this is now most frequently English. Although not directly a

HR concern, it makes little sense to trade in a country where the tax-take on generated profits is excessive. That is why the USA is not an attractive country for foreign investors, with its excessive rate of corporation tax. The other three factors are all classically HR in nature – the size of the pool of available graduates, hourly labour costs and the framework of employment law.

Our legal factor is made up of four sub-factors: the maximum statutory length of fixed-term contracts, the minimum overtime premium, the length of paid annual leave and the liability level for redundancy severance payments (after 5 years' service).

An analysis of conditions under each of these headings produces a shortlist of just 20 countries – all with populations of at least 500,000. These are: Austria, Canada, Croatia, Cyprus, Denmark, Finland, Ghana, Hong Kong, India, Ireland, Jamaica, Netherlands, New Zealand, Norway, Philippines, Singapore, Sweden, Switzerland, Trinidad and Tobago, and the United Kingdom.

So, which countries came out on top? There was a tie for first place between Ireland and Jamaica, followed by the UK. Then, also equally ranked, Cyprus, Hong Kong and New Zealand. Other countries ranked well in some areas, but were dragged down the rankings very often by a single factor, such as severance payments in Ghana, corporation tax rates in India, labour costs in Switzerland, and the poor available graduate labour pool in Hong Kong and Singapore. Moreover, some countries such as Germany and Australia never even made first base.

Companies making investment decisions should also bear in mind critical HR-related

cost factors we did not take into account, such as social security tax. There are often many bureaucratic issues also relating to the registration and establishment of an enterprise. Nevertheless, if potential customers and supply chains allow, and your company does not currently have a presence in one of our top-rated countries, maybe it is time now to ask yourself why ever not.

GLOBAL: Resignation – or not?

Common law courts in different jurisdictions often take differing views on similar issues.

It was recently decided in Canada, by the Ontario Superior Court of Justice in *Johal v Simmons da Silva LLP*, that an employee's quitting statement was not sufficient evidence of their resignation. Following a departmental restructuring exercise, the employee concerned – who did not agree to the changes – packed her personal belongings and did not return to work for three days, following which her employer emailed her to accept her resignation. To their surprise, the employee responded by disputing that she had actually resigned. The court ruled on the basis of the facts that the employer should have communicated with the employee and enquired about the reasons for her absence prior to considering it amounting to a resignation.

By contrast, British courts tend to rule that a resignation statement – whether it be verbal or written – suffices and cannot be revoked by an employee without the acceptance of the employer. This approach has been followed too in South Africa. A South African court recently ruled that an employee who disagrees with a department's restructuring, and as a result quits, cannot suddenly

withdraw their resignation. In such a circumstance it is for the employer to decide whether the employee will be reinstated. In this case – *Sactwu v Celrose Ltd* – an employed driver with 20 years' service announced that he was leaving when he learnt about structural changes in his company. However, he subsequently revoked his resignation. The employer offered him casual employment - but reinstatement was refused. The court overruled the employee's claim.

Although legal presumptions differ, employers are advised, whatever the circumstances of the resignation, to follow up on any action that may appear to amount to resignation or spontaneous decision that causes an employee to walk away from their job. A heated reaction at work that causes an employee to walk out may not always be a valid resignation, hence employers ought to take reasonable steps through their HR department or their managers to examine the reasons behind the actions and find an appropriate solution. In any case, it should not be automatically presumed that an employee's action amounting to resignation is actually an unequivocal decision on their part. It should also be taken into account that an employee could have walked away because of other reasons where the employer is potentially liable, such as a perceived health and safety problem or harassment from a fellow worker.

ITALY: Time-off for female employees

The 2016 Bill, submitted last year, allowing women up to 3 days paid menstrual leave is causing controversy as it resurfaces in a heated debate in the Italian national parliament.

Although this right currently exists in Japan, Zambia, the Chinese regions of Hunan and Hubei, and the policies of some private companies, Italy's Bill, if passed, will be the first European legislation of its kind.

The law runs the danger of decreasing women's ability to enter employment, as they will be considered as even more expensive than men to employ; whilst it may further reinforce other prejudices concerning their perceived employability in certain roles. On the other hand, an – albeit spurious – argument may be posed about the legislation being discriminatory against men and older women, who would have to take on an extra workload to cover for the younger female colleague's absence.

PACIFIC: Raising the threshold

Both Australia and New Zealand have announced fundamental changes to their work visa systems.

The Australian Prime Minister, Malcolm Turnbull, has announced that he is going to end the 457 visa programme, which has allowed employers to recruit skilled labour from overseas in recent years. The scheme allowed a worker to bring their family to Australia for up to 4 years. The scheme is being replaced by two new work visas – one valid for two years (with scope to renew for another two years) and a longer-term visa aimed at higher-level skills in particularly short supply.

The New Zealand government has tightened access to skilled work visas to give nationals preference over migrants in the labour market. Under the new rules, employers would need to provide a minimum income of NZ\$49,000 (US\$34,367) for anyone entering

on a prioritised 'skilled' employee. Anyone earning more than NZ\$73,000 (US\$51,200) would be classed as highly skilled.

UNITED KINGDOM: Buyer beware

A UK print finishing company has recently taken its case to the Employment Appeal's Tribunal (EAT) claiming compensation for the fact that the transferor of a printing contract included misinformation about the obligation to pay Christmas bonuses. The transferor had stated that the bonuses were 'non-contractual', when, in fact, they had proven to be contractual. An employment tribunal had struck off the case as not founded and it therefore went to appeal. The EAT supported the tribunal decision, in spite of the clear misrepresentation by the transferor.

On the face of it, most companies would assume that EU acquired rights requirements place a duty on employers during a business transfer to inform the transferee about all aspects of the employment contractual relationship in respect to employees being transferred. This is, in fact, not the case in the UK because certain employment details are not included in Section 11 of the TUPE regulations.

Section 11 refers to "those particulars of employment that an employer is obliged to give to an employee pursuant to section 1 of the [Employment Rights Act 1996]". This, in turn, refers to "the scale or rate of remuneration or the method of calculating remuneration" and "the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals)". However, it does not specifically state that information need be given about whether the payments are 'contractual'. This is partly because it might be assumed to be implicit under the

Act that regular payments become contractual though custom and practice. However, then there is the question of misrepresentation to deal with and the wording of the EU Directives that underpin the TUPE regulations.

The EAT outlined a solid argument for the transferee's case to be subject to both the EU Employment Particulars and Acquired Rights (ARD) Directives, but came perversely to the opposite conclusion. The tribunal Chairman failed to understand that 'employment particulars' do have contractual standing. Moreover, the ARD does give substance to the claim that it is an obligation by the transferor to inform the transferee about "all the rights and obligations that will be transferred". There is also the small matter of misrepresentation, which, given that the additional costs amount to some £100,000 (US\$ 128,740) over the life of the contract, could be construed as amounting to fraud.

Employers should invariably operate on the proviso of 'buyer beware' when considering obligations arising from business transfers and assume that all payments are contractual, whether the transferor claims that they are or not. If things go wrong, then the courts will clearly not offer the solace of justice so long as those who administer justice remain incapable of simple logic and oblivious to the status of EU Directives.

Pay, Tax and Benefit Trends

MONTENEGRO: Average gross monthly earnings in Montenegro rose by 4.1% to €767 (US\$824) over the year to February 2017, whilst average net earnings (less taxes and social security contributions) rose by 2.4%

to €511 (US\$549) over the same period. Only 44.8% of the adult population is in the labour force and unemployment now stands at 17.7%. Montenegro is a small democratic republic on the Adriatic Sea, with a population of around 700,000. Its currency is the euro, although it is not an EU member state or formally part of the Eurozone.

MOZAMBIQUE: The new minimum wage effective this month ranges between 3,642 meticaïs (US\$51) for the agriculture sector to 10,400 meticaïs (US\$145.5) for banking, financial and insurance. Workers in large gas, electricity and water companies received a 22.3% rise in their minimum wage, whilst the smallest increase in minimum wage was 5.5% for hotel workers. The annual rate of consumer price inflation to March 2017 was 21.57%.

POLAND: Average gross wages and salaries in companies employing more than nine people in Poland rose by 5.2% year-on-year in March 2017 to PLN4,577 (US\$1,155) a month. The latest labour cost data indicates that total employment costs rose by 5.4% over the year to Q4 2016. This is a sharp rise on the annual increase of 2.9% recorded over the year to Q2 2016.

SOUTH AFRICA: Two rulings by the South African Revenue Service have recently been made concerning the tax treatment of free or subsidised commuter transport. These deal with situations where an employer has a workforce that is geographically scattered and operates shift systems that often do not conveniently fit into local public transport schedules. In such a case, the company may operate a shuttle service between the workplace and the nearest public service collection point, or arrange pick up points in

different locations to bring employees directly to and from work. In neither case will the employee be taxed for the cost of this service as a benefit in kind.

SRI LANKA: A dispute over bonus payments at Sri Lanka's container port in Colombo has ended with an undisclosed increase in performance-related payments. The 13-day disruption over the operation of a collective agreement signed six months ago, had brought operations to a standstill. The underlying problem is that Colombo Port is still paying the debts of Hambantota Port, where there is a need for a huge investment to upgrade facilities and equipment. A massive investment from Chinese investors is promised, but only when certain conditions are met. Last December the modest bonus paid to Colombo port workers was LKR30,088.00 (US\$198).

SWITZERLAND: The Board of Credit Suisse has responded to shareholder pressures by maintaining top executive compensation at 2015 levels and cutting proposed bonuses this year by 40%. The company is struggling to turnaround after two years of straight losses. It made 7,200 redundancies last year and more job losses are planned. Because of a binding Swiss law, shareholders of listed companies have to vote through any compensation plans for executive boards and the next meeting will be on 28th April.

Other Global HR News in Brief

CANADA: Starting 1st May 2017, qualifying nationals of Brazil, Bulgaria and Romania will be able to fly to, or transit through, a Canadian airport with an Electronic Travel Authorisation (eTA) rather than a visa.

GLOBAL: A new report from the International Labour Organisation and European Foundation reviews the impact of telework/ICT-mobile work (T/ICTM) on the world of work. This covers ten European countries plus Argentina, Brazil, India, Japan and the USA. It was found by the researchers that, for instance, across the EU, 17% of workers are regularly involved in such activities. The disadvantages of T/ICTM are longer working hours, upsetting the work-home balance, the difficulty of policing health and safety in private home environments, and a tendency towards work intensification. On the plus side are a reduction in office-related costs, less time lost commuting, lower employee turnover and greater productivity. There was a sharp contrast found too between the health and wellbeing of home-based workers and highly mobile workers. The report further concludes that women adapted better than men to home-based working. ["Working anytime, anywhere". ILO/European Foundation (ISBN: 978-92-897-1568-3)]

JAPAN: On 24th July, the majority of employees in 1,000 companies in Tokyo will spend their day teleworking. This measure was first conceived as a way to ease the traffic congestion on the 2020 Tokyo Olympics opening day, but its impact will be evaluated on its general merits. If there is widespread take-up and much positive feedback then it may become a feature of government policy to promote teleworking – as it would also ease child and elder care problems in Japanese society.

JAPAN: The Ministry of Health, Labour and Welfare has proposed an amendment of the Labour Standards Act that will set a new upper limit to overtime working hours and

heavily penalise any violations. In the meantime, a new guideline has been issued requiring employers to properly account for employees' working hours through time logging systems.

MALAYSIA: Companies are now strictly required to update information in the Expatriate Services Division (ESD) online system annually and also whenever there are any changes to the company's information. Companies that fail to provide e-info updates may have their applications put on hold. From 1st August 2017, the ESD will not process Employment Pass applications based on company information that has not been updated on their system. The ESD has also announced a reclassification of Employment Pass categories to take effect on 1st September 2017.

PERU: Between January and March 2017, female employment in the Lima metropolitan area grew by 33,700, whilst the male working population dropped by 8,300. Women now make up 45% of the working population in the area. Employment growth was highest in the trade and services sectors, amongst those aged over 45 and with a university degree.

PHILIPPINES: Labour growth in the national capital region stood at 3.36% in Q4 2016, up from 0.62 in the equivalent period a year earlier. Although 7.79% of workers left their jobs during the quarter, the accession rate was 11.14%. The improvement was particularly important in industry where contraction in Q4 2015 (-0.92%) turned into 1.7% growth. The greatest expansion, however, was in the service sector where employment in the wholesale and retail

sector increased by a remarkable 11.49% in Q4 2016.

RUSSIAN FEDERATION: Refusal to employ someone from the Christian Jehovah's Witness sect will not be a discriminatory act in Russia - but may, in fact, now be a duty. This follows the Supreme Court ruling that the sect is an 'extremist group' and that an official ban on its activities is lawful. During the case, a Justice Ministry lawyer stated that the sect's members "pose a threat to the rights of the citizens, public order and public security". The decision was made in spite of a 2010 ruling by the European Court of Human Rights (ECHR) in Strasbourg in favour of the sect's right to operate in Russia. However, there is little more that its 175,000 adherents in the country can do to prevent the sect's assets being seized and individual's being imprisoned for open expression of their views.

TURKEY: The chances of Turkey entering the European Union have been set back by President Recep Tayyip Erdogan's recent statements concerning restoration of the death penalty. The referendum giving him additional powers was always going to be found in his favour, no matter what the population actually voted. Now it is a matter of waiting to see what will happen, given that all seems forgiven regarding the shooting down of a Turkish F-16 combat aircraft on the Turkey-Syrian border by Russia in 2015.

UNITED KINGDOM: The fast-food restaurants group McDonald's is rolling out an option to all of its 115,000 UK directly owned and franchisee employees to have a fixed-hours, instead of a zero-hours, contract. In a trail of 23 outlets the company found that

only one in five employees were interested in moving to a fixed-hours basis.

UNITED KINGDOM: Although companies normally check the identities of those they employ, there is always the possibility that someone has managed to deceive the authorities and assumed another person's identity. But what happens if years later their false identity comes to light, especially if they have been a model employee in the intervening years? Should the employee be dismissed and would it be lawful to do so? This was the dilemma faced by the UK's National Health Service (NHS) in the case of a Ugandan nurse. When the NHS learned of the false identity, they were under no obligation to act, as the individual's work permit had not been withdrawn. The NHS dismissed the employee and then faced a legal challenge for wrongful dismissal. An employment tribunal allowed the dismissal "for some other substantial reason" and this was backed on appeal by the EAT. But the EAT members pointed out that dismissal in such circumstances may not always be safe

– if the job held was less responsible than that of a nurse (*Ssekisonge vs Barts Health NHS Trust*).

USA: Employers in the USA are facing a rise in premature deaths amongst their white, middle-aged female employees – a trend that has been evident since 2010. This phenomenon exists even though, on average, white women have the same access to healthcare as white men and higher access than African-American or Hispanic women. Half of the increase is due to drug overdose and the other half to cardiovascular disease related to smoking, overeating and drinking too much alcohol. Back in 2010 less than ten overdose deaths occurred per 100,000 population amongst 15-54 year old white women, but by 2015 this incidence had grown to 20-39 deaths per 100k in many states and even higher in Kentucky, West Virginia and Nevada. Much can be done by employers to educate staff to follow a healthier lifestyle and deal with depression – especially where it is work-related.

Dates for your diary:

May 7th 2017: **French** presidential elections

May 28th 2017: **Italy** referendum on labour issues

June 05-17th 2017: **ILO** Annual Conference

July 1st 2017: **California** employers will be obliged to inform their employees about domestic violence protection rights

October 22nd 2017: Federal elections in **Germany**

April 4th 2018: First report under Equality Act 2010 (Gender Pay Gap Information) Regulation 2017 submission by **United Kingdom** employers

May 25th 2018: Final effective date for **EU** General Data Protection Regulations

Travel Warnings

BRAZIL: Visitors could be delayed at airports, ports, subways and other public transport services in Sao Paulo, as well as in other Brazilian cities on the 28th of April as millions of workers are planning a general strike on that day.

BURUNDI: Higher numbers of malaria cases than expected have been reported in all of the country's 18 provinces. The nine provinces—Gitega, Kirundo, Muyinga, Karusi, Kayanza, Ngosi, Ruyigi, Cankuzo and Cibitoko—have been especially hard-hit.

COLOMBIA: There have been heavy rains in Antioquia and previously in the south-west of Colombia. Certain areas of Manizales and the Putumayo province, especially its provincial capital Mocoa, have been particularly affected. Landslides are a common occurrence in this South American country, with its mountainous landscape, heavy rains and inadequate building construction.

EL SALVADOR: The Chaparrastique volcano remains under close observation. A sudden increase in seismic activity under the San Miguel volcano was reported on Tuesday, the 18th of April, 2017.

EUROPEAN RAIL: Engineering works have been planned for the route Brussels to Amsterdam in April, visitors are advised to check before traveling as timetables are changing. If changing trains in Brussels to travel to or from Germany over the May Day bank holiday (April 29th to May 1st), journeys might be affected by engineering works near Brussels Midi/Zuid. Eurostar will not take bookings for Sunday the 8th of October at the moment as engineering work will be taking place in the Channel tunnel that day.

GERMANY: Rostock-Laage Airport will be closed for three weeks until the middle of May because of construction work on the runway.

GREECE: All passenger ferries will remain docked in ports across Greece from midnight on the 30th of April until midnight on the 1st of May as the Pan-Hellenic Seamen's Federation (PNO) will go on a 24-hour strike to mark May Day. Travelers who have booked ferry tickets are advised to check with travel agents or contact local port authorities for further information.

ISREAL: There was a stabbing incident near Atarim Square in central Tel Aviv injured 4 Israeli nationals on the 23rd of April. This underlines concerns about the safety of people in public places in the city.

PAKISTAN: Travelers should exercise caution, be extra vigilant and expect security checks at the Benazir Bhutto International Airport in Islamabad – as the Pakistani authorities are investigating reports of a potential terrorist attack.

PERU: Heavy rains have resulted in extensive damage to water supply facilities, hospitals, roads, and bridges in several regions. Visitors are advised to listen to travel alerts and safety instructions from local authorities.

PHILIPPINES: Some flights have been canceled from the 26th of April to 29th of April due to the Association of Southeast Asian (ASEAN) summit in Manila.

ST HELENA, ASCENSION AND TRISTAN DA CUNHA: The RMS is currently undergoing repairs and there are no alternative options to access St Helena. The MOD has temporarily rerouted the South Atlantic Airbridge via an alternative location because of runway repairs.

TURKEY: BoraJet Airlines has announced the temporary suspension of operations starting the 24th of April. Please check with the airline for further details.

UNITED KINGDOM: Virgin Trains East Coast workers have called off two-day strike planned from the 28th to 29th of April.

UNITED KINGDOM: Passengers using London Bridge Tube station could face major disruption on the 7th of May as London Underground workers are to stage a 24-hour strike from 10pm on that day.

UNITED KINGDOM: Travelers should expect heavy traffic on the roads and on crowding on Metrolink during Friday, the 28th of April because Northern Rail plans to run less than half of their normal services following more antisocial actions by RMT union members through a 24-hour strike.

UKRAINE: Kyiv Zhuliany International Airport (IEV) will be closed to all traffic from the 14th to the 24th of May due to runway reconstruction. All affected flights will be operated from Boryspil International Airport (KBP) for the duration of the closure.

USA: Virgin America is moving from Terminal 3 to Terminal 6 at Los Angeles International Airport (LAX) on May the 12th, 2017. Passengers should call the airline for further information.

USA: Visitors should expect further disruption until June 2017 at San Francisco's International Airport (SFO) due to the Runway 28L/10R overlay and reconstruction project.

VENEZUELA: Visitors should be particularly vigilant in the areas where protest gatherings about the current political and economic crisis are taking place.

FedEE News

EMPLOYMENT LAW PROGRAMME: The latest addition to our online law programme presentations covers, hiring, working time and termination in India. The next videos in our new series of online audio-visual briefings will cover Germany and the USA.

FELLOWSHIP MEETING: Our next Fellowship meeting in London will take place on Friday, June 16th. We have selected an interesting new venue which fronts the river Thames. There will be a wide range of highly relevant topics that we have selected from the issues raised by members over the last six months. Discussions will be led by our Secretary-General and FedEE's new head of legal research, Vasiliki Filippou, who is a qualified practicing Barrister with an LLM in International law. If you are not a Fellow, but would like to attend then please contact our Membership Secretary, Julia Zhu (membershipsevic@fedee.com) for further details.

GET READY FOR THE GDPR: FedEE's code of practice that incorporate GDPR-ready elements is now available online to members at (<http://d2rqfo7jzwsuwp.cloudfront.net/wp-content/uploads/2017/03/DP-Code-of-Practice-v5.1.pdf>)

We shall also be covering the GDPR in a forthcoming review on FedEE Radio (<https://itunes.apple.com/app/fedee-radio/id1218883364?l=en&mt=8>)

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