

iGlobal Strategic Guidance Series 2: Compliance

(3) Employment Documents



Getting employment documents right, particularly for a global business, is a critical but often neglected part of the employment process. Surprisingly often, a business that has grown through acquisition delays a review of its employment documents. As a result, businesses end up paying larger termination payments or having little or no business

protection against former employees. The liability cost of poorly worded documentation will usually far outweigh the investment needed to get the documentation right.

In this edition of the iGlobal Strategic Guidance we focus on the issue of getting global employment documentation right.

Employment documents – a perspective on the issues

The range of employment documents a business needs will depend on its size and nature.

The core documents are typically: (1) an Offer Letter, (2) a Contract of Employment and (3) a Handbook.

In addition, there may be documents (some of which might be included in the Handbook) dealing with direct employment terms such as: (1) sales/bonus plans, (2) commission schemes, (3) stock option plans, (4) retention bonus letters and other side agreements, (5) benefits plans, including medical health schemes, (6) Non-Disclosure Agreements.

Then there may be general operational policies such as: (1) mobility/assignment/secondment policies; (2) communication policies such as email/internet usage or (3) ethics and conduct policies (discrimination and harassment).

Finally, there may be a range of regulatory compliance policies such as: (1) data protection rules or (2) health and safety obligations.

For the global employer, the range and structure of the documents must be considered in both global and local terms.

A key strategic choice for an international employer is between taking a more centralised, global approach to its documents and policies or a more de-centralised, local approach. The balance between global and local can have significant consequences.

Here are some of the more general issues that arise:

- **Inconsistencies between documents:** for instance, a bonus scheme is referred to as contractual in one document and non-contractual in another.
- **Inconsistencies between global and local documents:** for instance, a global standards and ethics policy which sends a different message to a local ethics policy;

- **Choice of applicable law:** global (and sometimes local) documents that fail to state which law applies, often leading to the local law applying, which may not be ideal;
- **Poor understanding and management of the local practice:** for example, issuing a global ethics policy which conflicts with local privacy laws, leading to confusion and potential claims;
- **Failure to take proper account the local laws:** a global bonus scheme that allows claw back of payments may not be effective in some countries;
- **Contractual status of documents:** failure to make clear whether a benefit is a contractual right or a non-contractual/discretionary option;
- **Administrative errors due to lack of training:** for instance, issuing a junior employee with a contract meant for senior employees which contain unnecessary covenants that the employer must pay for on termination and cannot get out of.

The Core Documents

At country level, the core documents are the Offer Letter, the Contract of Employment and (if relevant) the Employee Handbook. These inter-relate and overlap and require careful thought.

Typical issues include:

- **Contract:** This is the most important employment document. Proper management and administration of the contract is critical to minimise risks. The most common issues include: contracts becoming inconsistent between employees, poor drafting and cross-referencing; lack of updating; junior employees being given the wrong benefits; inadequate or misapplied business protection clauses; failure to update to reflect changes in local law.

It is often a false economy to postpone a review and update of your employment contracts in much the same way as it would be to postpone updating your IT security.

- **Offer Letters and Contracts:** Not all employers use Offer Letters, but they are common because a formal employment offer can be made quickly to secure the candidate and then followed up with a more detailed contract of employment. Offer Letters are contractual but typically state that the offer is subject to signing the employment contract. This approach gives rise to issues in certain countries. In some jurisdictions, it is not possible to make the Offer Letter conditional on signing the contract. The Offer Letter remains binding even if the contract is not signed. An employee may use this to try and negotiate more favourable terms. Also, an employer must be careful not to include “non-contractual” items or administrative matters in an Offer Letter. For example, a bonus scheme intended to be non-contractual or other procedural requirements (which need to be flexible) should not be referred to.

If you use Offer Letters, iGlobal recommends separating benefits intended to be non-contractual and routine administrative matters from the formal Offer Letter. These can be placed in a general non-binding one page “welcome letter”, which is attached to the Offer Letter. Take care that the Offer Letter is consistent with the Contract and that HR staff are properly trained to ensure correct and safe usage of the documents.

- **Contracts and Handbooks:** If you operate a Handbook, it must be clear which of its terms are intended to be contractual and which non-contractual? On the one hand, you need flexibility in order to make changes to the Handbook without employee consent. Equally, some employers wish to make certain benefits contractual in the Contract and then refer to them in more detailed policies in the Handbook. Further complications arise in jurisdictions which limit the use of ‘non-contractual’ status.

iGlobal’s recommended approach is to keep Handbooks non-contractual for maximum flexibility. Where non-contractual status does not exist in the local jurisdiction, the Handbook should be kept limited in content to avoid creating too many contractual rights. If you wish to include contractual and non-contractual items in a Handbook, this should only be done in jurisdictions which permit the distinction. In countries that do not, a different approach should be taken. For instance, issuing separate policy documents or including specific contractual powers to amend or vary the benefit without employee consent. Finally, ensure that all cross references to the Handbook in other documents such as the Contract correctly reflect contractual or non-contractual status.

- **Global Handbooks–v–Local Handbooks:** This is a common challenge. Many global employers want to operate a worldwide Handbook to create a single business culture across their extended group. However, it is not

easy fully to harmonise global Handbooks with local laws. The legal differences are often too wide and full harmonisation can create more problems than it solves.

iGlobal’s recommended approach is a global Handbook focussing on matters that are not likely to be regulated at local level. A separate more localised Handbook would then be developed to deal with local laws. Alternatively, the local Handbook could appear as a separate section in the Global Handbook.

Bonus and commission schemes

This topic has been covered in more detail in Strategic Guidance: Compliance Part 2: Bonus Schemes. However, below is a quick overview of the issues:

- **Status:** getting the contractual status of bonus schemes (usually discretionary) and commission schemes (usually contractual) right.
- **Local Restrictions:** many jurisdictions heavily regulate matters related to pay and often include regular bonus and commissions within these rules. For instance, there are often restrictions on making changes to scheme rules and on employer rights of clawback.
- **Issues on terminations:** Some countries control payment of bonus and commission on termination and in many cases an employer is penalised if the scheme is not properly drafted. For example, in Germany, if an employee is terminated part way through the year, the employer must pay any bonus for the unexpired part of the bonus year on the basis of having achieved 100% of target.

iGlobal’s recommends that all bonus schemes are based on local laws. We consider the opportunity to develop a global bonus scheme to be limited and quite high risk. We also recommend that the bonus scheme operates in a separate scheme document which applies for a single year. It should not be in the contract of employment.

Stock Option Plans

Stock Options Plans are normally issued by the parent company and relate to parent company shares. As a result, these plans are not usually administered under the local employment documents. The typical issues that arise are:

- **Applicable laws:** The Stock Option Plans are mostly governed by the law of the country in which the parent company is based or listed, such as the US. Issues can arise on whether a local country’s labour laws override the US employment laws. This depends on the country in question.

- **Inconsistent documents:** It is a common mistake to refer to stock options in a local contract of employment or Offer Letter without stating that the laws of the parent company apply, or even that the options are granted subject to the rules of the plan. This creates legal uncertainty and arguably amounts to an agreement that the stock options are governed by the laws of the local country.

iGlobal's recommendation is to have a programme of regular reviews and updates for employment policies globally and locally.

Global policy documents/self-standing policies

These are often used by global companies to cover matters such as Ethics and Standard of Conduct; Whistleblowing; Global Mobility and/or Assignments; Data Protection and Electronic Communications etc. As illustrated above, the typical issues are:

- **Status:** Most operate as non-contractual policy documents. However, some employers make key policies contractual, such as Data Protection and Electronic Communications.
- **Applicable Law:** This choice is often wholly omitted, leaving a risk of a dispute.
- **Local compliance:** The conflict between a global approach and local rules applies as much to these types of policies as it does to the core documents. The safest way through this conflict will be careful drafting based on a good knowledge of local rules and employment practices.

Checklist of key points to consider

- Given your business and its structure, what employment terms and practices need to be documented? The list will reflect both regulation and commercial need. Don't burden yourself with unnecessary terms or documents.
- Does the business prefer to take a globally centralised or de-centralised approach to employee management? This choice will heavily impact the structure of the documentation.
- How are the employment documents to be managed over time: reviews, updates, training, monitoring and feedback on issues?

Employment documentation routinely gets overlooked, resulting in unnecessary legal costs and liabilities. This will prove a false economy over time.

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