

# Dentons Global Mobility Guide

Multinational employers need to know the existing laws and the evolving legal trends to compete in an international market where business transcends borders.



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# Introduction

Dear Reader,

The ability to move skilled workers globally is essential to the success of the world economy and the companies that drive it.

Global mobility is a complex topic, encompassing a number of different legal disciplines. Laws vary by country — even by localities within each country — with bilateral and multilateral agreements and treaties often creating an additional level of complexity. **These rules create legal obligations and make corporate compliance essential. But with these obligations often come additional opportunities for savvy lawyers to guide their clients to the best result.**

Employers must have access to the best and brightest talent from around the world in order to keep growing successfully. **The laws impacting global mobility are dynamic, and multinational employers need to know both the existing laws and the evolving legal trends to best compete in the international market. Dentons professionals can provide that.**

Our Global Mobility practice helps multinational employers navigate the local laws of the countries where they do business, including immigration, as well as employment, compensation, tax, corporate compliance and other related legal disciplines. Dentons' network of offices and qualified staff around the world provides you with experienced legal resources — wherever and whenever you need us.

Yours sincerely,

**C. Matthew Schulz**

Global Mobility Practice Chair

# What is global mobility?

**Global mobility** *n.* support business needs that require personnel to move across borders.

## Business without borders

Business routinely transcends borders. Business needs often require personnel to move across borders to support and expand operations or manage strategic relationships, and suddenly your small local company has become a multinational, with suppliers, business partners, customers and personnel in many countries.

Even the best laid plans could go awry. You may think that you diligently planned your business entry into a new country with due consideration of the best legal structure to manage tax and liability exposure, personnel policies and employment agreements that conform to local law — but you could still find yourself liable to the other country's government for corporate income taxes, payroll taxes, fines and penalties for having effectively established an office there

through the business activities of just one employee in the country.

"Global mobility" minimizes the risks for doing business internationally by providing the legal framework to identify and analyze business problems, and develop and implement creative solutions. Getting it right means getting people to the right place at the right time with the right advice.

## Dentons' Global Mobility Guide

Dentons' *Global Mobility Guide* is the right resource for global mobility specialists, human resource professionals and in-house counsel.

There are important global mobility issues to consider any time an employee crosses borders. The best — and only — approach is an integrated strategy that addresses all of the intertwined issues: immigration, employment, compensation, employee benefits, taxation and social insurance.

Moving personnel to new countries requires the understanding and handling of interconnected legal issues and concerns. Dentons provides integrated legal counsel on personnel movement through the firm's vast network of locations around the world. Dentons collaborates with employers to devise and implement staffing strategies for global transfers. We provide local counsel to support clients in all major business communities.

Our network of lawyers and professionals who focus on business

immigration, employment, employee benefits and tax matters provide pre- and post-assignment support to ensure that visas are secured, employment agreements are locally enforceable, employee benefits comply and satisfy legal and business needs and taxes are appropriately handled. Dentons is global, giving our firm the unique ability to develop and implement comprehensive global mobility strategies and solutions.

## Integrated approach

Dentons' integrated approach to global mobility services includes:

- Immigration, employment, employee benefits and tax guidance and case management for international assignments.
- Workplace trainings and compliance audits, including counseling and litigation defense related to government recordkeeping and enforcement actions to ensure compliance with employers' obligations to prevent unauthorized employment and other rules.
- Regulatory and legislative advocacy.
- Timely delivery of important news regarding proposed and pending changes in global mobility best practices.
- A host of other global mobility-related concerns, including moving personal belongings, customs and excise taxes, structuring business operations abroad and corporate and securities issues.





# The importance of planning

Margie Mobility Manager started her planning as soon as she heard Danny Development Director was looking into the establishment of an offshore development facility outside the United States.

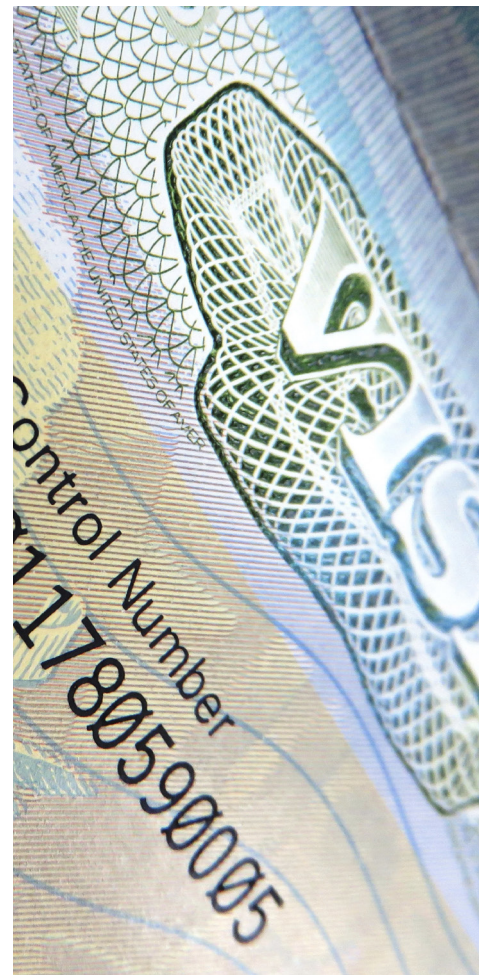
She reviewed materials published by her human resource professional association, spoke with friends who dealt with this at other companies and consulted the company's legal advisers. She obtained information about the local laws regarding immigration, employment, tax, etc., including estimates on processing times and costs. When the CEO considered Danny's proposal, Margie was able to save the company time and money by identifying the key issues and suggested resolutions.

The development facility opened on schedule and under the leadership of the experienced manager chosen by Danny, due in no small part to Margie's plans, which had to be adjusted more than once when management decided to accommodate the expatriate employee's demand that the family's pony be included in the expatriate assignment package.

## Global mobility is a race

Global mobility professionals should follow the same advice given to race car drivers:

- **Look ahead.** There are many potential obstacles to avoid. You should know the entire course of events — not just the next turn — in order to achieve the most optimal approach for the fastest and most efficient processing time.
- **Identify your options and have a plan long before you meet obstacles.** Government adjudicators, providers of key documents like diplomas, passports and birth/marriage certificates, flight schedules, government holidays, corporate reorganizations, mergers and acquisitions, etc., are potential obstacles that can lead you to make choices that diverge from the original line of approach.
- **Pay attention to what happens ahead of you and learn from it.** There are frequent changes. Monitor proposed new laws and regulations.
- **Keep informed of processing times and enforcement trends.** Maintain expatriate employee policies and practices that adopt best practices from the experiences of your prior employee placements and the experience of the professionals advising you.
- **Stay in control and do not let the process drive you.** Business needs can change. Family needs of the employee can change. You may need to adapt to those changes, but should do so in a controlled fashion that keeps the process on course.
- **Smoothness is king.** Avoid radical shifts in practices. Adapt and make changes in a considerate fashion that does not derail other parts of the process.
- **Advance planning is key.** The global mobility assignment process is complex and, more often than not, takes longer than expected. Plan — plan early — and keep the plan nimble.



# Immigration

Danny Development Director told Margie Mobility Manager the good news that he already had “boots on the ground” in the destination country chosen for the new offshore development center. “Eyal Expat, an experienced employee from headquarters, has been living there with his family to handle site selection, negotiate office lease and supply contracts and even recruit new employees to get the development center productive quickly.”

Margie quickly collected information about how much time Eyal and his family had already spent in the destination country, their visa status and passports details and their activities to date. She was able to use this information with legal counsel to determine if the company, and Eyal and his family, were in compliance with local law and whether the activities to date would impact the processing of the visas for the expatriate assignment. She also organized an internal training with the management team on the importance of compliance with local immigration laws to protect the company, as well as the employee and accompanying family.

## Overview

Immigration laws balance a country's interests to promote the economy, improve conditions for the populace, and protect against foreign threats. Attracting investment and key labor skills often motivates business immigration laws.

Requirements vary by country, but there are common practices that make it easier to plan international business assignments. Countries tend to have specific immigration laws to address the needs of short-term travel on business trips, training opportunities in other countries and work assignments of varying lengths. The permitted activities, duration, source of compensation, qualifying education/experience/investment required, etc., are often key distinguishing characteristics. Special visa privileges may be afforded to citizens of designated countries by treaty.

## Enforcement

Countries tend to aggressively enforce prohibitions against visa overstay and unauthorized work. The companies involved, as well as foreign visitors, may be subject to a range of civil or criminal penalties. It is important to maintain documentation of compliance to protect the ability to secure visas and work permits, as well as maintain a company's public reputation and stock value.

## Importance of planning

Do not rely on quick fixes that create big problems in the future. Tourist visas are for tourists and not business travelers. Further, countries often require visitors to depart and apply for the proper visa at a consular post outside the country — often in the country of last residence.

Remember accompanying family. There may be children in school, so

factor in academic terms, school admission, language exams, etc.

Does the employee or any accompanying family members plan to drive? It is important to identify if or for how long an international driving license can be used, the requirements and process to secure a local driving license, including any insurance requirements.

Will automobiles, furnishings or other household possessions be transported? Will electrical components work in the destination country? It is important to determine how long delivery will take to know if temporary rental/leasing is needed.

Are family pets making the move? There may not be animal visas, but there are restrictions, vaccinations, quarantines and other controls.



## Visas

### Business travel visas

Often the same type of visa will authorize travel for tourism and short business visits, so long as the visit does not involve productive employment.

Key factors to consider generally include the scope of activities planned in the destination country, the citizenship of the employee, the source of compensation during the trip and the length of stay. (Length of stay and source of compensation are often the least important of these factors!)

In most countries, business travelers are allowed to visit customers, attend meetings, negotiate contracts and carry out similar activities for the benefit of the employer back home. In contrast, most countries consider it a violation of business traveler visa status to engage in productive employment that benefits the destination company, including providing training, installing or servicing equipment, etc.

The normal requirement to apply at an embassy or consular post to have a visa issued prior to travel is waived by many countries for tourists and short business travel. Visa waiver benefits are usually based on bilateral agreements between specific countries and limited to citizens of those countries. Departure tickets and other requirements may still apply.

### Training visas

Visas to authorize training assignments are often available. Some permit the trainee only to shadow local workers to observe how work is performed or for classroom-type settings. Others may permit on-the-job training with a productive work component.

### Work assignment visas

Although there are many names and types of work assignment visas around the world, most countries have some type of visa for:

- the transfer of experienced employees between offices of multinational companies in different countries;
- workers with desirable education and skills; and
- investors and qualified employees based on business investment.

The requirements for these visas differ and there are often many other types of visas designed to meet a specific country's needs.

### Work permits

Besides visas, some countries will separately require a work permit for travel on work assignments. Work permit requirements differ by country, often ranging from obligations to provide appropriate working conditions and compensation to showing local workers are not available and will not be displaced by the work permit applicant.

### Residence permits

Further, many countries also require the employee to receive a residence permit or otherwise register their new address in the destination country with local authorities. National security and crime prevention are the common rationale. Background checks for criminal and military records are not uncommon.

## Accompanying family members

Derivative visa benefits usually facilitate the travel of qualified family members. Who qualifies to accompany the employee often depends on how the destination country defines family. While a spouse and unmarried children generally qualify, the age by which a child ceases to qualify and which spousal relationships vary. Unmarried, common law spousal relationships, same sex partners, polygamous relationships, etc., reflect the diversity of what is acceptable (or not) around the world. Family values in some countries result in derivative visa status being available for other members of the employee's household, such as parents, older offspring and other dependents.

### Additional issues

Concern about the spread of contagious disease and health care costs result in many countries requiring medical and physical exams.

Translation of documents into the language of the destination country is normally required. The documents that need to be translated vary, but often include birth and marriage certificates, academic transcripts and work experience letters.

Some countries accept photocopies of required documents that are certified as accurate. Many countries require official records be subjected to the apostille process involving authentication by both the government controlling the issuing authority and the destination country's diplomatic post in the destination country.

# Permanent establishment and taxes

The alarm bells started going off as soon as Margie Mobility Manager learned Danny Development Director wanted to have Farokh Foreign Student continue to work on Release 3.2 after his employment authorization ended and he left the country. Danny told Margie, "Don't worry, Farokh does not need a visa to work in his own country and does not need a visa to remain on the company's payroll after he departed the country. Easy peasy, this is how it is done, case solved!"

But Margie realized that Danny's approach could expose the company to substantial liability in Farokh's country. She explained that directly employing Farokh could make the company responsible for local payroll taxes on compensation paid and compliance with local employment laws. She explained the risk of exposing the company's income to income tax liability in Farokh's country as well. Margie suggested that they evaluate whether it would be better to structure the relationship with Farokh as an independent contractor abroad or transfer his employment to the development center entity the company had already established.

## Impact of having a permanent establishment in another country

Companies sending employees around the world risk tax exposure in all the countries where employees are sent. Not only long-term assignments, but even short business trips can create tax exposure for the company for company income tax, as well as payroll tax reporting and withholding.

Local tax authorities are likely to assess income taxes on deemed revenue arising in the country and payroll taxes on the income paid to employees whose efforts help generate that revenue.

## What is permanent establishment?

Business activities that result in revenue being generated, regardless

of whether it is generated directly in the country or through activity in the country that contributes to a company's revenue, is likely to be deemed by tax authorities as having created a permanent establishment.

Permanent establishment may be:

- the head or the registered office, as stated in a corporation's charter or bylaws;
- the principal place where a company conducts business;
- any place where a company is registered or licensed to do business;
- any fixed place of business;
- each place where a company carries on a substantial portion of the business;
- any place where, and at the time when, the employees of a company use substantial machinery or equipment;
- any place where employees produce, grow, mine, create, manufacture, fabricate, improve, pack, preserve, process or construct anything (in whole or in part);
- any land or premises owned or leased by a company; or
- any place where a business carried on through an employee or agent who has general authority to contract for the company or fill orders from a company's merchandise.



## Implications

Employers should:

- Implement systems to manage the business activities of employees abroad to control the risk of inadvertently creating a permanent establishment in another country.
- Determine and comply with company payroll tax reporting and withholding requirements globally by monitoring employee business travel.
- Determine and comply with company income taxes generated by employee activities abroad.





# Employment relationships

Danny Development Director selected Eyal Expat to manage the company's new offshore development center and Margie Mobility Manager was tasked with the job to "make it happen."

Eyal was reluctant to exchange his current employment agreement with the rather more limited package of employee benefits and modest compensation levels that were common at the offshore center. In addition, Margie learned that termination with the current employer could trigger some severance obligations that the company preferred to avoid.

She realized that the goals of the employer and employee could both be achieved through either a secondment or dual employment arrangement, and consulted with legal counsel to learn how either of these structures would impact visa eligibility, taxes and employee benefits.

## Identify the employer(s)

What company will serve as the employer for the employee sent to another country? The answer depends on how the employment relationship is structured.

The key employment component in managing global mobility is to structure the employment relationship to balance the business goals of the assignment with the laws of each country where the employee will travel.

Destination countries often impose specific employment relationship

requirements to qualify for specific visas, work and residence permits, as well as to serve in top level positions, such as managing director.

## Dual employment

Perhaps the most common relationship, even if created unintentionally, is dual employment, where the employee has two or more employers concurrently.

Dual employment can be created unintentionally where an employee's efforts benefit more than one company. Multiple job titles and lines of reporting are common attributes.

It can also arise where an employee is recruited by the parent company in one country for an assignment with a subsidiary in another country.

Dual employment may be desirable for tax planning to allow an employee who works in more than one country to benefit from better tax regimes.

Properly structured, there should be a separate employment agreement per employer with the employee that documents the lines of reporting, duties, time allotment and compensation. The employers will





each be responsible for the payroll tax reporting and withholding compliance in their own countries and should review benefit plans to determine an employee's eligibility to participate.

### Transfer

The most logical relationship is the transfer of the employee from one employer to another.

Employment is terminated with the original company and the employee is hired by the new company in the destination country. This transfers future employment responsibilities to the new company.

The potential problem with a transfer arises from the termination of employment with the original company and resulting termination obligations. There may be substantial expenses as a result of severance, vacation, benefits and other payouts due on termination.

### Secondment assignments

This is the relationship chosen most often, but not always for the best reasons.

A secondment is where the employee remains employed by the original company and "seconded" to provide services to benefit the destination company in another country. The original employment relationship

continues, with modifications setting forth the terms of secondment. The cost of the secondment can be allocated between the two companies by agreement, taking into consideration transfer pricing and other tax obligations.

Secondment agreements should address repatriation scenarios such as whether the employee can request an earlier return, what will happen if the home country employer no longer has an equivalent position available, what will occur if the destination country company no longer requires the seconded employee's services or is not satisfied with the employee's job performance. Many secondment agreements fail to consider these eventualities, resulting in preventable legal liability and/or litigation.

Employees tend to favor secondments to maintain tax qualified retirement or other existing employment benefits when on assignment in the destination country.

The problem is that secondment assignments are more likely to subject the original company to permanent establishment tax risks in the destination country. Yet another potential problem is that the employee will likely be able to benefit from the employment laws of both countries.

Regardless of the parties' intentions or the terms of the secondment agreement, certain laws of the destination country will apply where these are based on the location of the performance of work.

### Global employment companies

This relationship provides the greatest freedom to structure compensation and employee benefits, as well as the handling of payroll tax withholding and reporting.

A separate company is maintained for employees on global assignments. The employee is terminated by the original company, hired by this global employment company, and then seconded to the destination company.

The global employment company limits the potential liability of the original company to permanent establishment tax and employment concerns in the destination country. The global employment company may be funded by service payments by either or both the original company or destination company. Income tax liabilities for the global employment company are limited by its relatively low net income and may be managed further by locating the global employment company in tax-friendly countries.



# International assignment employment agreements

Danny Development Manager was very displeased with Eyal Expat's performance, "That was his last mistake! Time to terminate his 'at will' employment." Margie Mobility Manager explained to Danny that "at will" employment did not exist in the country where Danny choose to set up the offshore development center where Eyal was employed.

Danny should have looked at the international assignment employment agreement (written with legal counsel) which spelled out the termination provisions. Margie worked with legal counsel knowledgeable in both the laws of the original employer's country and the destination employer's country to understand which and how the laws of each country could be applied, and what the potential liabilities were to the two companies. She was then able to determine when and where to best terminate Eyal.

## Employment laws vary by country

Each country has its own laws governing employment within its borders. There may also be laws by state, province or even more local government authority. Each government is likely to enforce its own employment laws for any employer with an employee working within their boundaries. This is true even where employers and employees may have voluntarily agreed in writing to the application of a specific country's laws.

These employment laws can be very different. Employment agreements developed for use in one country may not be valid in another country, a common issue that multinational employers sometimes fail to consider.

A formal employment agreement, rather than a US-style job offer letter, is common in most countries. The "at will" employment that prevails in the United States does not generally

apply in other countries. Choice of law provisions in employment agreements are often disregarded as contrary to public policy in most countries. In other cases, while the choice of law provision is valid for some purposes it is not possible to contract out of certain basic legislation such as rules governing public holidays, vacation, hours of work, overtime pay, data protection, maternity leave and discrimination.

The distinction between employees and independent contractors is generally recognized. It is common in most countries to look at independent contractor relationships for possible misclassification of what the local law deems to be employment relationships. Documenting the relationship in the appropriate written employment or independent contractor agreement is important, as is evaluating the facts to determine the relationship claimed.

The terms of the agreement will also depend very much on how the employment relationship is structured. International assignment agreements are primarily used for secondments, dual employment and global employment companies. Transfer structures rely instead on the termination agreement with the home country employer and a more standardized local employment agreement with the destination country employer.

## Key provisions

### Immigration approval

The best practice is to include a provision making the assignment contingent upon approval by the destination country of any required visa, work and/or residence permit.

### Compensation

International assignment agreements often include cost of living adjustment provisions to compensate employees for the cost of relocating and



maintaining a residence in the destination country. A hardship allowance or tax equalization payment may be included as well.

Local laws and/or practices in the destination country may vary from the home country in terms of overtime compensation, holidays, bonuses, etc. Such legal requirements usually cannot be altered by employment agreement, but it may be possible to adjust compensation to take such mandatory payments into account.

Depending on treaty provisions, it may be possible in some cases for the agreement to allow for an election to remain on the home country's social security, social insurance, medical and/or related schemes.

#### Medical

The agreement may provide for how medical emergencies are handled. There may be additional medical insurance required.

Health conditions and medical practices vary greatly around the world. Immunization requirements/recommendations are common. Some countries may require medical examinations as a condition for living and working in the destination

country, with individuals excluded for designated medical reasons.

#### Housing

In addition to housing allowance terms, the agreement may include terms that help the employee with the sale of the existing home, shipment of furniture and belongings, the new home search, etc.

#### Orientation

There may be terms to assist the employee with local orientation issues, such as language and cultural instruction. Employers may consider a mentoring program to facilitate the employee's adjustment to the new work environment.

#### Termination

Since "at will" employment is not the norm in most countries outside the United States, termination provisions must be written to conform to local law. There may be mandatory severance due, post-employment benefits, a requirement to consult with the labor council, etc.

#### Repatriation

The agreement may also include terms regarding the handling of costs related to the employee's eventual departure from the destination country

at the end of the assignment. These terms will likely differ if termination is early and for cause or a voluntary termination by the employee.

#### Dependents

If there are accompanying family members, the agreement may include provisions related to the handling of additional expenses for travel, insurance, education, lodging, etc.

#### United States Foreign Corrupt Practices Act (FCPA)

United States employers and their foreign affiliates are subject to the United States Foreign Corrupt Practices Act or United States Code of Business Conduct. These laws are applied even to business dealings outside the United States. That said, it is important to also review the local laws where the worker will be employed to ensure no violations. In jurisdictions where there are local or extraterritorially applied equivalent laws, those provisions should be included as well.

#### Language

In some countries, the agreement must be in the local language to be enforceable. Interpretation of bilingual agreements may be in favor of the local language.

# Data privacy

Danny Development Director decided that Elena Engineer, currently working at the wholly-owned European subsidiary, should be transferred on a temporary assignment to the head office of the parent company to work on Release 3.02.

Feeling rather pleased with himself and all he had learned through Wikipedia about the European Union Data Protection Directive, he asked Margie Mobility Manager how the company was going to get the information needed for Elena's visa, since the law prohibits the transfer of Elena's personal data to the United States.

Always two steps ahead, Margie explained that the company already had in place a safe harbor privacy policy that complied with the framework agreed upon by the United States and European Union.

## Protecting employee personal data

The European Union Data Protection Directive prohibits the transfer of personal data to non-European Union countries that do not meet the European Union adequacy standard for data privacy protection.

The United States, the European Union and Switzerland take different approaches to protecting data privacy. The United States Department of Commerce, in consultation with the European Commission, developed

a "safe harbor" framework. A similar framework was developed in consultation with the Federal Data Protection and Information Commissioner of Switzerland. Canada, on the other hand, has national data protection legislation, as well as similar legislation that applies to certain provinces. Canada is considered as providing the required level of protection for personal data transferred from the European Union, further to a Decision of the Commission of the European Communities.

## Key considerations

- A safe harbor compliant privacy policy must be established.
- An independent recourse mechanism is required to provide for the investigation of complaints.
- Companies must maintain a compliance verification assessment program, either through self-assessment or via an independent third party.
- A company contact must be designated to handle questions, complaints, access requests and other safe harbor issues.





# Global anti-corruption laws

## In general

The US Foreign Corrupt Practices Act (FCPA), the UK Bribery Act (UKBA), the Canadian Corruption of Foreign Public Officials Act (CFPOA) and other similar anti-corruption legislation around the world prohibit corporations and individuals from engaging in bribery and requires corporations to maintain accurate financial records. Failure to adopt effective compliance programs and procedures can result in serious reputational damage, significant fines, imprisonment for individuals and debarment of organizations from conducting business with national and local governments.

Merely adopting a policy that simply states the requirements of the law is not sufficient. Adopting a robust program that

- effectively fosters a culture of compliance endorsed and promoted by the top leadership of the organization;
- frequently engages in thoughtful risk assessment;
- adopts proportional procedures based on identified risks;
- requires due diligence on third-party partners;
- promotes regular auditing; and
- ensures effective training and communication about the program

can reduce or prevent civil and criminal liability even when a rogue employee engages in an act of corruption or bribery.

## The US Foreign Corrupt Practices Act

The FCPA is the most well-known of the anti-corruption legislation that has, in recent years, been proliferating around the world. The FCPA has two primary provisions, the first prohibits bribery of foreign (that is, non-US) public officials, for the purpose of corruptly influencing the official to assist in obtaining business. The second provision requires publicly traded companies to maintain accurate books and records and to adopt internal financial controls. The US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) have criminal and civil enforcement authority over the FCPA. Both agencies have highly centralized, well-funded and dedicated units that focus exclusively on FCPA enforcement. As a result of their efforts, the US has literally collected billions of dollars in fines, disgorgements, forfeitures and other sanctions. Many US and foreign nationals are now serving significant prison sentences as well.

### A truly global prohibition of bribery

Though focused on “public” corruption outside of the United States, the FCPA has a staggering reach. The anti-bribery provision governs:

- i. all US persons (citizen or resident, individual or entity);
- ii. all agents or subsidiaries (whether US or or informal) of those US persons; and
- iii. all foreign persons (individual or entity) that cause, directly or indirectly, any act within the

territorial borders of the United States that furthers any corrupt conduct in violation of the FCPA. 15 U.S.C. § 78dd-1, 2 and 3.

There is no need for any of the purported offenders to have ever been in the United States, they merely need to have caused an act, even an otherwise legal one, that furthers corrupt activity.

The specific conduct prohibited under the anti-bribery provisions of the FCPA is giving or promising “something of value” to a “government official” in exchange for “corruptly” inducing that official to use his or her official position to “obtain or retain business. . .” or to obtain any “improper [business] advantage.” The US government has successfully prosecuted cases in which the thing “of value” was as direct as a cash payment and as indefinite and vague as “an opportunity.”

Moreover, the definition of government official is extraordinarily broad. The DOJ and the SEC assert that this covers all levels of foreign or international government personnel (and officials of foreign political parties) — from an engineer in a city planning department to the Prime Minister — and any person who works for any foreign government-owned business, such as a public hospital or a telecommunications company.

### Accurate books and records and internal controls

The second provision of the FCPA is often simply described as imposing a requirement for accurate books and records on publicly traded

corporations. 15 U.S.C. § 78m(b)(2)(A). While this view is accurate as far as it goes, it is too simplistic. Accuracy under this provision of the FCPA is not limited to mathematical precision. The accompanying description of the transaction must describe a bribe as a bribe. In other words, this provision creates a second basis for liability for corruption for publicly traded corporations.

In addition, the FCPA “books and records” provision requires publicly traded corporations to have adequate internal controls to provide reasonable assurances that transactions are only executed with management’s authorization, that those transactions are accurately recorded, that access

to company assets is limited to those with management’s authorization and that the system is regularly audited. 15 U.S.C. § 78m(b)(2)(B). These controls must be able to detect and deter violations of the FCPA.

### Focus of global anti-corruption schemes grows beyond the public sector

The organic growth of global anti-corruption statutes has produced schemes that sometimes mirror the US focus on so-called “public corruption” — the corruption of government officials and entities — and sometimes it has produced far more all-inclusive prohibitions against corruption. In North America, there is a common focus attempting to end the corruption

of public officials. Canada has its CFPOA and Mexico has its Law Against Corruption in Public Procurement (Ley Federal Anticorrupcion en Contrataciones Publicas). In contrast, the United Kingdom chose to focus on bribery in general, prohibiting engaging in or accepting any bribe regardless of whether the recipient is a government official or a private citizen. This prohibition applies to any UK citizen or resident, and to companies formed in the UK.

Continuing its ground breaking approach, the UK also introduced a new crime: the corporate offense of failing to prevent bribery. Such liability has a global reach for any company that “carries on a business, or part of



a business, in any part of the [UK],” wherever it is based. See Bribery Act 2010, c. 23, § 7. Known as “Section 7 liability”, this provision criminalizes the failure to have a sufficient compliance program to combat bribery, and is triggered if any person associated with the business (employed or otherwise) engages in an act of bribery, anywhere in the world, with the intent to benefit the company.

The broader UK approach has begun to have a significant impact on the US view of corrupt conduct and will likely influence other jurisdictions as well. For example, now that the UK Bribery Act has introduced the idea of prosecuting both commercial bribery and public corruption, in the US, the DOJ has expanded its own anti-corruption reach through the Travel Act. 18 U.S.C. § 1952.

The Travel Act prohibits travelling in interstate or foreign commerce for the purpose of distributing the proceeds of unlawful activity, including violations of state laws prohibiting commercial bribery. There have already been several celebrated prosecutions of US persons and foreign nationals under the Travel Act, subjecting them to criminal liability in the US for both corrupting public officials and private persons. Following suit, the Security and Exchange Commission’s FCPA Unit Chief, Kara Brockmeyer, emphasized that commercial bribery not accurately reported and described in the financial documents of a public corporation can qualify as a books and records violation.

### **Effective compliance should provide one solution to address all corrupt conduct**

Although the global growth in new anti-bribery regimes and enforcement can be daunting, the message is

clear: establish a simple program prohibiting all forms of bribery and sufficient controls to detect efforts to violate that prohibition. To accomplish this holistic approach, companies should focus on the similarities of the enforcement regimes, not the distinctions. While the formal statutes differ, the focus of enforcement is usually the same: prosecute corruption in all of its forms.

To be viewed favorably by the US, Canadian and UK law enforcement authorities, anti-corruption compliance policies must clearly prohibit bribery in all its forms, warn of criminal sanctions applicable to individuals and impose clear employment sanctions for violation of the anti-corruption policy. But that is not enough — indeed limiting a policy to these topics can be counterproductive. Most law enforcement agencies will view a policy that merely states what the law is, without creating a culture of compliance or a system of internal controls, as a “paper tiger.” Such an acknowledgement of the law — without controls, audits and enforcement from the top leadership — will be used as a weapon by the prosecution in any enforcement action in the US or the UK.

The guidance provided by the US and the UK consistently state that commitment, direction and control from the very top of the organization is the first critical requirement for an effective compliance program. Second, any effective program must be based on a regular and evolving assessment of risk, based on the industry, product or service in question, the geographic location of customers and critical self-assessment of controls and personnel. This risk assessment should inform the adoption of procedures that are

proportionate to those risks, and those procedures should evolve as new risks are uncovered or failures in controls are detected.

Ongoing monitoring and auditing of those procedures are likewise an important process to incorporate in any effective compliance program. Programs can only remain effective if they evolve. Authorities also highlight the importance of conducting effective due diligence on third-parties, including agents, intermediaries and customers. Merely requiring third-parties to promise to comply with anti-corruption laws is rarely sufficient. Finally, key to any effective program is effective communication about the policy (again from the top leadership of the organization) and ongoing training.

Useful information about the US, Canadian and UK government’s view of what constitutes an effective compliance program is available at:

(US) <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>,

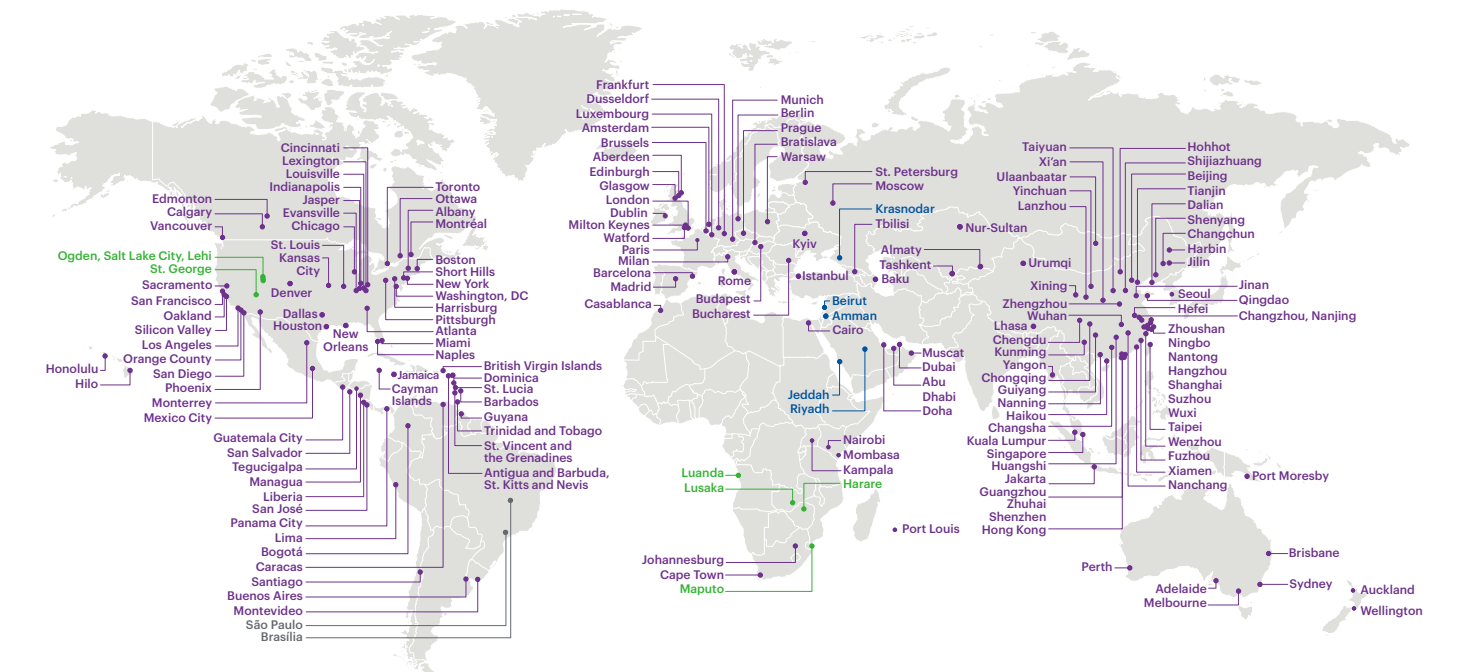
(Canada) <http://www.international.gc.ca/crime/corruption.aspx> and

(UK) <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

Dentons professionals from around the world, steeped in anti-corruption compliance, criminal and civil defense and in conducting effective, on-site investigations, can develop a single solution for corporations, assess existing solutions and assist in responding to national enforcement inquiries.



# Our locations







## About Dentons

Dentons is the world's largest law firm, connecting talent to the world's challenges and opportunities in more than 75 countries. Dentons' legal and business solutions benefit from deep roots in our communities and award-winning advancements in client service, including Nextlaw, Dentons' innovation and strategic advisory services. Dentons' polycentric and purpose-driven approach, commitment to inclusion and diversity, and world-class talent challenge the status quo to advance client and community interests in the New Dynamic.

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