

**Baker
McKenzie.**

The Accidental Expat



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Rethinking mobility

Although modern mobile workers go by many names — digital nomad, cross-border telecommuter, extended business traveler, or accidental expat — one thing is clear: they have come to constitute a crucial part of the workforce for any multinational company. Explosive growth in emerging markets has created a significant demand for companies to move workers around the globe to explore and seize new opportunities. At the same time, there has been an equally significant demand for companies to reduce their mobility costs. As a result, traditional employees are now more likely to be sent on short trips to fill specific business or customer needs, and project-based assignments are often more likely to be filled by a modern workforce that includes a variety of nonemployees.

A large majority of companies have seen an increase in these new types of assignments. Nevertheless, many still do not have formal guidelines for managing frequent cross-border travelers, and they admittedly fall short of properly educating their managers and mobile workers on the potential risks of these arrangements. Consequently, many vulnerabilities and misconceptions persist. Additionally, the growing prevalence of accidental expats has led to heightened scrutiny, incentivizing governments to crack down on business travelers and, with the assistance of technology, to become more adept at catching transgressions.

In short, the continued evolution of the mobile modern workforce has turned mobility from an HR administrative function to a high-risk, multifaceted compliance concern involving immigration, tax and employment law challenges.

In this environment, multinationals find themselves in an ongoing balancing act between the desire to cut costs and quickly fill critical talent shortages on one hand, and the desire to maintain compliance on the other. While many have embraced the "gig worker" as a creative way to fill the demand for skilled overseas labor, this approach is not immune to risk. Therefore, forward-thinking companies must adjust policies and procedures, create new systems, and expand institutional knowledge of rules in the countries where they do business. This will provide that the mobile modern workforce continues to be an asset and not a liability.



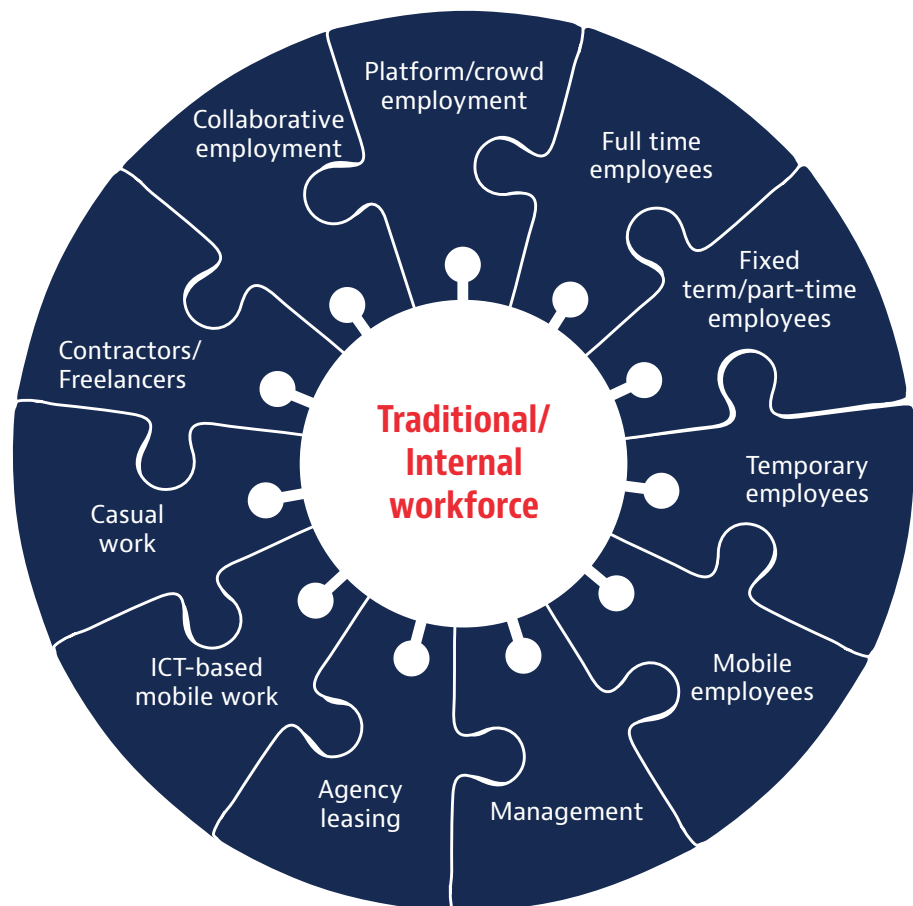
WHY A NEW MOBILE WORKFORCE?

As multinationals enter newly emerging markets to capitalize on growing consumer populations or to explore new territories, they need the ability to send workers abroad quickly to scout new locations, set up operations, provide specialized skills and fill critical talent shortages. Further, the evolution of country-based multinationals into truly global entities has created an increasing need to make sure their workers have the right skills. With traditional expatriate assignments being so expensive, it's no surprise that many companies have implemented a less costly mobility methodology by simply sending workers to particular locations on an as-needed basis.

This shift has led to the increased use of the "accidental expat." Also called the extended business traveler, digital nomad, stealth visitor, business commuter and short-term assignee, accidental expats may engage in many of the same activities as the traditional expatriate, but do so from the country in which they're based, traveling frequently to and from the destination country to perform their duties.

The accidental expat's rise in popularity should be particularly worrisome for companies whose workers are constantly moving in and out of countries. Why? Because those workers are often not subjected to the same level of organizational oversight as their traditional expatriate counterparts and typically fall outside of a company's formal global mobility program.

Changing trends in the workforce



WHAT'S THE REAL RISK?

■ Mobility misconceptions

In today's environment of heightened scrutiny and enforcement by the home and host country authorities, these are some of the most common mobility misconceptions that can get workers and the companies who engage or employ them into trouble:

It is the length of time a worker will be in another country that determines what kind of visa he or she needs (not necessarily).

It is easier and less expensive to send workers on a series of short business trips than to relocate them during a project (not really).

If workers limit their overseas stay to less than six months, they or the companies won't be subject to local income taxes or social security contributions (not always).

The worst thing that can happen if our workers get caught traveling without proper visas is being denied entry to the country (unfortunately not).

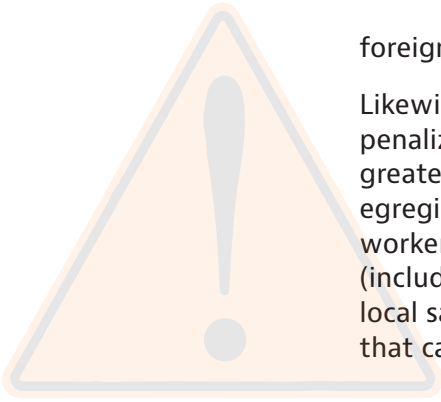
Common mobility misconceptions

■ Types of risk

With a large percentage of their revenues now coming from overseas, companies can no longer afford to risk the consequences of noncompliance. By remaining in the dark about regulations for how they move, manage and classify their workers, companies may inadvertently create foreign income tax and social security withholding obligations. And depending on the length of the accidental expats' stay and the nature of the work they perform, overseas travel could have a host of other unforeseen effects: creating a corporate presence with accompanying tax obligations; subjecting the company to local employment requirements, anti-corruption restrictions, and severance obligations; raising issues of equity compensation, duty of care (health and safety), data privacy and other labor concerns; and risking immigration and visa violations — all of this in addition to potential double income or social taxation for the workers themselves and a potential employee-relations debacle.

It's not just a matter of companies being forced to consider new types of regulation and enforcement. By sending workers into a host jurisdiction without proper work authorization, the company places itself and the workers at risk of legal and monetary repercussions. The company could face fines, penalties and heightened scrutiny. It could also be banned from applying for or sponsoring work permits for










WHAT'S THE REAL RISK?



foreign nationals altogether and, thus, from completing its project in that country.

Likewise, workers face the possibility of getting turned away at the border or being penalized for tax violations, both of which have started happening with much greater frequency. In certain circumstances, some jurisdictions may even consider egregious noncompliance to be a criminal offense for both the company and the workers. Companies that are prosecuted for violation of immigration or other laws (including labor law violations like not providing a work environment that meets local safety regulations) face civil — and even criminal — action as well as penalties that can undermine revenues and damage reputations.

Repercussions of cross-border work without proper papers

Company	Worker
 Fines	 Denial of entry
 Penalties	 Significant fines
 Heightened scrutiny	 Monetary penalties
 Ban from applying for or sponsoring work permits	 Incarceration
 In certain cases in some jurisdictions, civil, even criminal, action	

■ Heightened scrutiny & political factors

Accidental expats have been around for decades, but governments have become stricter about monitoring and enforcing how companies classify and move workers to overseas worksites for longer term projects. As regulation and scrutiny intensify, an inevitable consequence may be an increase in willful noncompliance. To circumvent strict limits on visas and avoid lengthy bureaucratic processes, companies may be tempted to send workers into other countries without the proper work authorization. Given the penalties of doing so, companies should generally resist this temptation.

As the workforce in developed countries continues to age and the nature of work shifts toward highly skilled labor, many governments are recognizing the need to lower their immigration barriers to allow businesses to import much-needed talent. But change is slow, and in many cases, it is going in the opposite direction.

WHAT'S THE REAL RISK?

Given recent political and civil unrest around the world, many governments have cracked down on visa misuse and have tightened their borders to protect their local workforces and citizens. As a result, the acceleration of global mobility is happening despite government action to the contrary in many regions.

■ Compliance matters between states, provinces or cantons, too

Finally, while most of this discussion has been in the context of international mobility, let's not forget about state-to-state business travelers in the United States (or province-to-province in Canada, canton-to-canton in Switzerland, etc.). Unfortunately, many of the same risks exist when residents of one state are traveling to other states in the United States (even for short periods of time), leaving both employers and employees in jeopardy of being blindsided with additional compliance obligations at the state (and potentially local) level.

For example, Texas does not assess state-level personal income tax on employee wages. However, what if a Texas company needs to send one of its Texas resident employees on a business trip to New York? The mere fact that the Texas resident employee is performing services in New York on behalf of the Texas company may expose the employee to New York state (and potentially local) income taxes on a portion of his or her wages almost immediately, thereby also requiring the Texas company to operate New York state income tax reporting and withholding on the wages attributable to the employee's services performed in New York. Likewise, the Texas company may now become subject to New York corporate income taxes. This is just one example of why it's important to remember that domestic travelers are not immune from the issues generally associated with international mobility.



EMBRACING THE “GIG WORKER”

In this environment of both increased opportunity and heightened scrutiny, companies which are willing to take on challenges and evolve with the times are adapting to the new global mobility risks through creative experimentation. As a result, a growing type of accidental expat called the gig worker has emerged.

Gig workers are individuals who are commonly engaged under temporary or part-time positions — often as alternative workers or independent contractors — and who are sometimes deployed to other countries to fill short-term engagements. The oil and gas industry has utilized a similar strategy, creating a workforce made up, in large part, of what they call “rotators.”

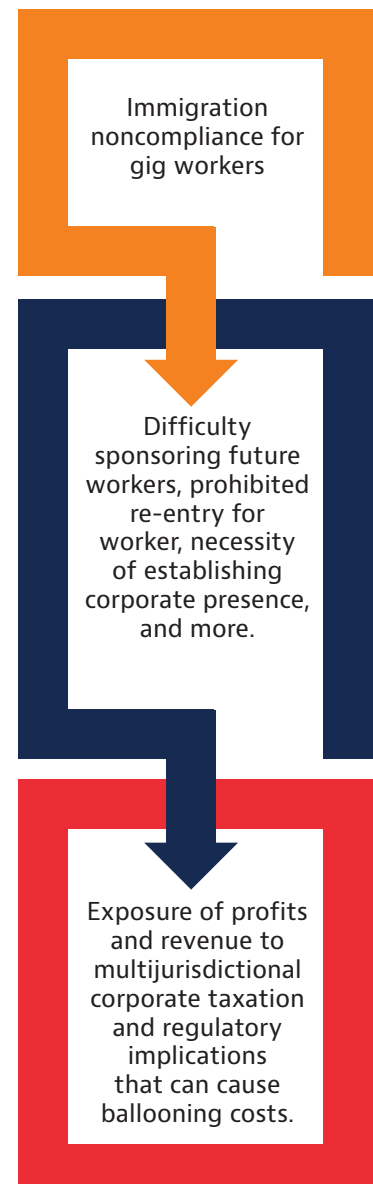
■ What’s the benefit?

The benefit of these arrangements seems simple on its face — provide individuals with the flexibility to work for any employer, wherever they want and whenever they want — and simultaneously reduce costs for the company.

■ Not so fast!

It may be tempting for companies to assume that hiring gig workers will eliminate all the costs associated with traditional employee contracts — no more need to budget for vacation entitlement, overtime, minimum wage, health insurance, payroll taxes, severance, workers compensation, and so on. In fact, the company may still be subject to all of these mandates and more, including the extensive global mobility risks discussed throughout this paper. In addition, with gig workers, companies now face the added risks associated with engaging independent contractors and sending them across borders.

RISKS



EMBRACING THE “GIG WORKER”

■ The reality

All countries regulate whether foreign nationals require work authorization by analyzing the services to be provided while in country. Work authorization options for independent contractors can be limited in many jurisdictions. This process can be complicated by the fact that many employers inappropriately use the business visa category for gig workers who, based on the activities they perform, actually require work authorization and, likely, local sponsorship or employment. The prior experience of using business visas without incident in this context can provide a false sense of compliance for the engaging company.

Government enforcement regarding work authorization for gig workers is always changing, largely inconsistent, and likely to come up in a variety of settings — at the border, on site visits, during labor and tax audits, etc.

■ Pitfalls to avoid

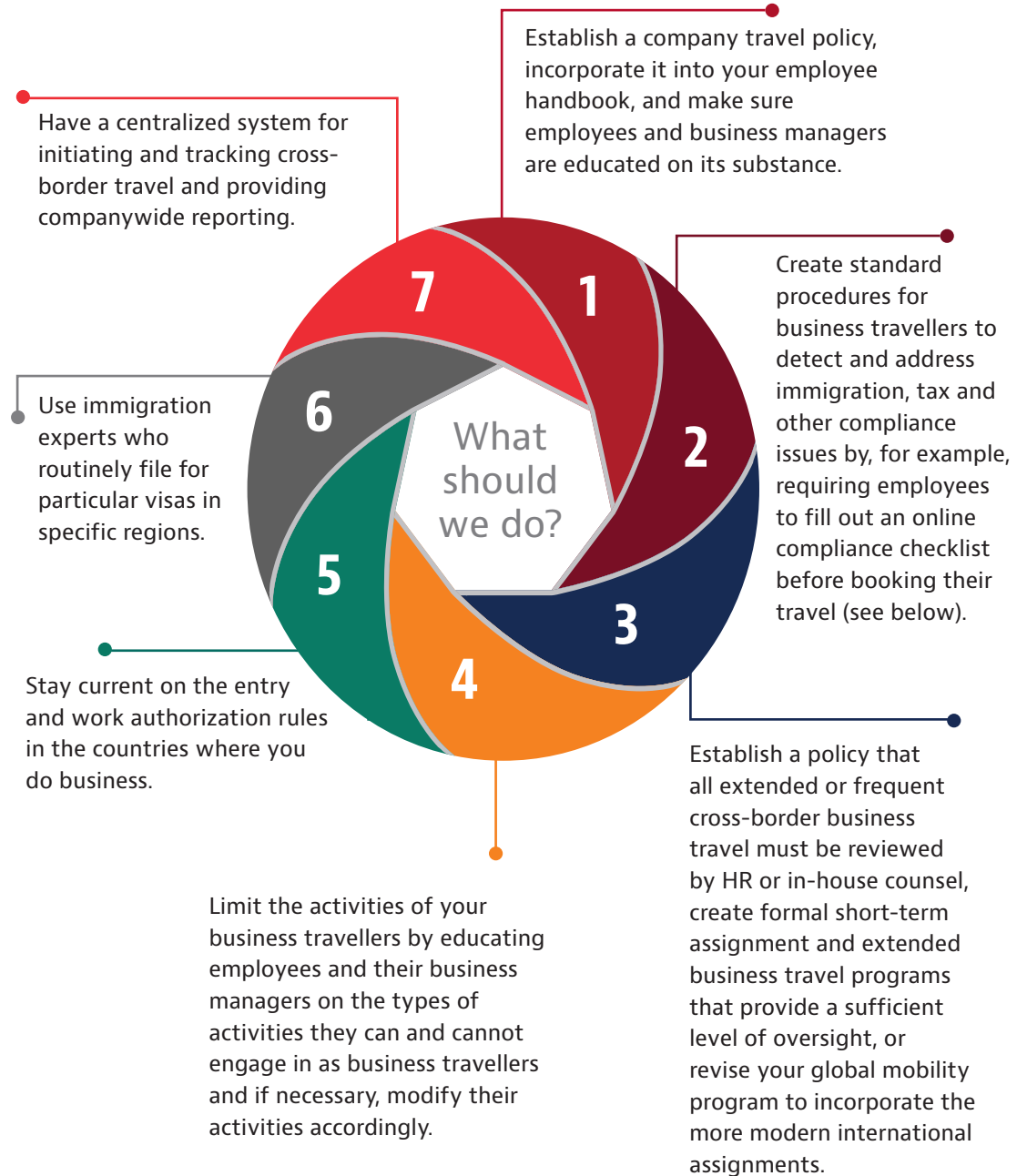
In addition to fines and potential detainment of the gig workers, immigration noncompliance can lead to difficulty in sponsoring foreign nationals in future and may even result in the individual being prohibited from re-entering the jurisdiction. It may also be the case that a company cannot by law engage gig workers in a given country without an established corporate presence in that country; or perhaps can't engage them at all. To get this wrong could expose the company's profits/revenue to multijurisdictional corporate taxation and regulatory implications (which is where the potential costs can grow exponentially).

Next is the obvious issue of misclassification and co-employment. While the concept of employee versus independent contractor may be global in nature, all jurisdictions take a nuanced approach to making this determination, and most, if not all of them are starting to include gig workers in the discussion.

The U.S. Department of Labor stated in 2015 that “[w]hen employers improperly classify employees as independent contractors, the employees may not receive important workplace protections. Further, misclassifications will result in lower tax revenues for government and an uneven playing field for employers who properly classify their workers. Although independent contracting relationships can be advantageous for workers and businesses, some employees may be intentionally misclassified as a means to cut costs and avoid compliance with labor laws.” The United States is not alone with this view of misclassifications. Indeed, this kind of thinking indicates that governments are taking notice and will continue to scrutinize the social and financial utility of these new “gigs,” so approach with caution.

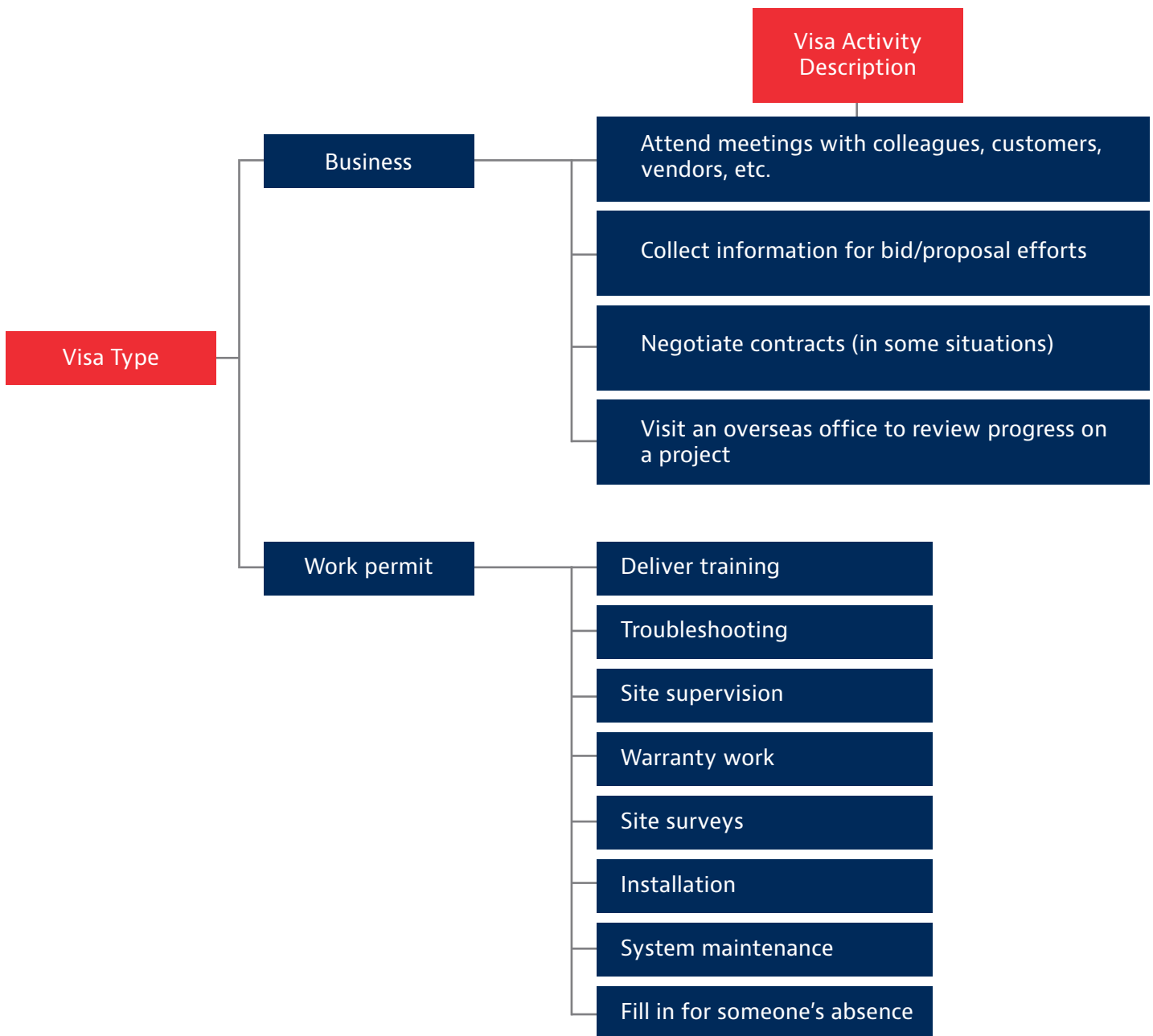
WHAT YOU CAN DO

Companies must adjust their policies and procedures to account for risks and to keep pace with an increasingly mobile modern workforce. These recommendations will help manage the process.



WHAT YOU CAN DO

Some companies have designed online forms that individuals must fill out before they book their travel to determine whether the activities they will be performing require work authorization or create tax or employment law risks. The individuals are asked to explain details of their trip and based on their answers, receive direction (eg, whether they can travel with a business visa or need to obtain a work permit or limit the duration of the trip). Although these distinctions can vary by jurisdiction, the examples below outline the main types of activities that fall under the two immigration categories.



For illustration purposes only. Each fact pattern is different and will trigger additional considerations. Seek counsel to evaluate specific situations.

THE FUTURE

While extended business travelers and short-term assignments are nothing new, the mobile modern workforce as a whole has gained prominence on the global stage. The prevalence and popularity of these informal arrangements, coupled with the desire of governments to increase revenue, has resulted in stricter scrutiny of how companies classify, engage and move staff. Moreover, while new technologies have opened up creative options for mobile workers, that technology has also made governments increasingly adept at catching transgressions that may have gone unnoticed in the past.

Practices that used to be commonplace are now facing much greater exposure, making talent recruitment and extended business travel hot button issues. With more global workers than ever, companies must stay ahead of the curve by finding new ways to track individual movement and confirm cross-border trips and activities are compliant with the growing number of rules and regulations that span numerous legal and tax areas.

Not only is it cheaper to prevent problems early, but it is also the best way to protect your workforce, your business and your reputation.





THANK YOU

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