Executive summary
The Employees’ Provident Fund Organisation (“EPFO”) has issued an updated Frequently Asked Questions (“FAQs”) on 25 May 2012, in relation to “International Workers”. The EPFO has also issued a related circular dated 25 May 2012 to its regional offices. The FAQs and circular have been posted on the EPFO’s website and can be downloaded by accessing the following links:

Individuals defined as “International Workers” are subject to a higher allocation of contributions towards the Pension Scheme and restrictions on withdrawal from the Provident Fund Scheme until retirement after attaining 58 years of age. And consequently, most organizations have sought to shield their outbound assignees from this categorization.

Key clarifications
The FAQs and circular clarify the following key points:

► In the context of Indian employees sent on assignment outside India:
An Indian employee working in a foreign country with which India has entered into a social security agreement becomes an “International Worker” only after being eligible to avail of the benefits under the social security programme of the host country. After obtaining a Certificate of Coverage from the EPFO, the Indian employee is generally exempted from contributing to the social security system of the host country. Hence, such an Indian employee is not typically expected to be eligible for benefits under the social security programme of the host country and therefore, does not qualify as an “International Worker”.

This clarification reflects a major change in the view of the EPFO and completely overturns the earlier position.

The previous clarification had stated the following:
a. An Indian employee working
or having worked abroad in a country with which India has entered into a social security agreement is an “International Worker” (FAQs issued in 2009).

b. The Indian nationals are to be treated as “International Workers” with effect from the date of commencement of the Certificate of Coverage issued by the EPFO (clarification issued on 30 August 2011).

The revised FAQs would mean:

a. The category of “International Workers” comprises only those Indian employees who are employed by an Indian employer and have contributed to the social security programme of the host country, which has a social security agreement with India, and having gained or will gain eligibility for benefits under that social security agreement.

b. An Indian employee who obtains an exemption from contributing in the host country by obtaining a Certificate of Coverage from India, and who contributes to the social security system in India, will not fall under the category of “International Workers”.

This will require an amendment in the EPFO records for employees who have been previously reported as “International Workers” but who are not to be considered as “International Workers”, given the most recent clarification.

► Other clarifications

a. If an Indian employee is employed by an Indian employer and sent to a posting outside India, to a country with which India does not have a social security agreement, the Indian employee is required to continue as a member under the Provident Fund Scheme and Pension Scheme as a domestic Indian employee if he was a member before going for such posting. Such an Indian employee is not an “International Worker”.

b. An “International Worker” remains an “International Worker” until such time he/she obtains benefits under the Provident Fund Scheme and Pension Scheme. In other words, once an individual has been classified as an “International Worker”, the individual will remain so until the age of 58 or later, when the individual may draw these benefits.

c. The provisions of inoperative accounts are not applicable to “International Workers”. Thus, “International Workers” shall continue to earn interest on their accumulated balance lying in the Provident Fund account until these become eligible for withdrawal.

d. An India national working in a host country (under a local contract) with which India has a social security agreement and contributing to the social security scheme of such a host country will not qualify as an “International Worker”.

Based on the new categorization of “International Worker”, a consequence would be that an outbound Indian employee going to work in a country with which India has a social security agreement, contributes into the social security system of the host country (does not obtain Certificate of Coverage) and therefore becomes eligible to get benefits under the social security agreement between India and the host country, will be considered as an “International Worker”. Once the person becomes an “International Worker”, such a person will have a mandatory requirement to become a member of and will have to contribute into the Provident Fund Scheme and Pension Scheme. This would be the case even when the employee was not a member of the Provident Fund Scheme and Pension Scheme before becoming an “International Worker”.

Next steps

It is essential that employers with Indian outbound cross border workers evaluate the following open issues:

1. Review the EPFO returns to update/amend the status of employees previously reported as “International Workers” who would now not be considered as “International Workers”.

2. Analyze whether an India outbound employee will be considered as “International Worker” in the case where under a partial social security agreement, even after holding a Certificate of Coverage, the employee may be required to contribute to some elements of the host country social security regime.

3. Revise the possibility of applying for continued coverage taking into consideration:
   a. Assignments may already have started some time ago;
   b. The “detached worker” provisions in each social security agreement entered into by India should be considered to see if the company meets the required criteria.

4. Analyze whether an India outbound employee, who does not obtain a Certificate of Coverage and goes to a country with whom India has a social security agreement and contributes to the social security of the host country, will be considered as an “International Worker” even if the employee does not get entitled to any benefit under the social security scheme of that country even after making social security contributions in the host country.

5. Review the status of Provident Fund compliance in respect of the India outbound population that would now be designated as “International Workers” under the updated FAQs.

The ease with which the EPFO has been changing its position via FAQs and circulars may be a cause for concern. It remains to be seen whether the Courts will uphold the most recent FAQs as a legally valid interpretation of the notification dated 1 Oct 2008 and the subsequently amended notification dated 11 Sep 2010 covering
“International Workers” under the ambit of the Provident Fund Scheme and Pension Scheme.

The latest update to the FAQs may be considered as a quick fix to reduce the “hardship” caused to Indian outbound employees when designated as “International Worker”. However, the open issues set out in the next steps above will also need to be considered.