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Doing your homework when offering online programs internationally

25 March 2020

The COVID-19 pandemic has sparked renewed interest in offering online programs, both in the United States and internationally, as a means for students to continue their studies on an uninterrupted basis. The U.S. Department of Education (ED) recently issued guidance intended to facilitate domestic online offerings, which we summarized on March 9, and further guidance is expected from ED, accreditors, and other federal and state agencies as this public health crisis unfolds.

Meanwhile, U.S. institutions offering or planning to offer online programs abroad should also consider country-by-country requirements. While foreign laws and regulations pertaining to online programs continue to evolve, and vary considerably by country, a few notable trends have emerged. (It is possible some requirements may be suspended temporarily or revisited as a result of the crisis.)

First, at least so far, many foreign jurisdictions currently do not require an education regulatory prior approval or license for a foreign institution to offer a 100 percent online program into their country. However, a physical presence (such as on-site faculty or instruction) often triggers the need for host country approval, and potentially other local business registrations and tax considerations as well.

Second, many countries, including China and India, do not fully recognize credentials earned online, especially from a foreign university. This disadvantage creates an important disclosure issue for students who may, for example, wish to apply for work in their home country's government or local industry only to find they do not meet the job's credential requirements. Most countries have consumer protection laws that apply to online programs, and common practice is to use enrollment agreements to provide adequate disclosures and disclaimers to foreign students, even if such agreements are not required under applicable law. As many U.S. institutions begin to provide temporary online courses to foreign students who have returned to their home countries amid U.S. school closures, whether such online components will affect degree recognition remains to be seen.

Next, a common and increasingly important consideration is data security and privacy. Many countries have stronger privacy laws than the U.S., which could affect the collection and use of personal data from students participating in online programs. A well-known international example is the General Data Protection Regulation (GDPR), part of a wave of EU privacy legislation intended to change the use and flow of personal data worldwide. As GDPR inspires similar laws across the world, online education providers will encounter new regulation of cross-border data flows, data localization requirements, and enhanced obligations on data controllers.

Finally, universities must also consider other countries' tax requirements. In addition to applicable U.S. requirements, many countries seek to tax institutions directly. Even U.S. institutions that are not-for-profit may have to pay sales tax or value added tax (VAT) when collecting tuition or fees from international students in online programs. An arguably more significant tax concern is whether providing online education to students in another country inadvertently creates a taxable presence or "permanent establishment" (PE) of the U.S. university in that country. A PE would expose the institution to corporate income tax on certain revenues attributable to that country. The test of whether or not online activity creates a PE in a particular country depends on local law and whether a tax treaty with the U.S. is in effect. U.S. institutions frequently enter into collaborative degree programs aimed at international students (who are not eligible for federal student financial aid under Title IV of the Higher Education Act) with an online delivery component where the non-U.S. institution collects tuition and then shares some tuition revenue with the U.S. school. Foreign tax withholding requirements often apply to such payments coming from the non-U.S. institution, which countries often view as taxable service payments. Finally, there may be restrictions on individuals who are in-country making payments to an entity outside the country, and such restrictions may pose hurdles for online students in certain countries, such as China.

Separately, foreign schools that participate in the Title IV programs should be mindful of various U.S. requirements when offering programs to U.S. students. See our advisory here. With respect to a foreign school that participates in the Title IV programs, an education program offered by that school through any use of a telecommunications course is not an eligible program for Title IV purposes. However, in the context of COVID-19, ED recently clarified that a foreign school is permitted to provide online education to students who are enrolled at a U.S. institution and are receiving Title IV aid through the U.S. institution where the students are participating in a study abroad program at the foreign school pursuant to a written agreement between the U.S. institution and the foreign school. Foreign schools offering online programs in the U.S. may also need to be licensed in certain states, and in some cases accredited by a U.S. accreditor. And foreign schools are not eligible to participate in the NC-SARA reciprocity regime.

In recognition of the importance of cross-border learning, the HL team offers an award-winning resource, Education GOES International, which is a guide to offering online education programs around the globe. Further information may be found here.

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