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Working from home abroad - considerations for Irish employers

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Introduction

The increase in homeworking due to the Covid-19 pandemic is causing many Irish employees to ask if they can work from "home" from an overseas country – be that on a temporary basis, or in some cases indefinitely. This Inbrief explains the potential legal issues and how to avoid the traps.

Irish employers should consider a variety of issues, including tax, social security, immigration and employment law implications, before agreeing to an employee's request to work from home when "home" is not in Ireland. We consider each of these areas before explaining what practical steps you can take to minimise the risks.

Tax and social security implications

If an employee is only working overseas temporarily, the Irish employer should continue to deduct income tax under the PAYE system. Matters start to become more complicated where a stay becomes extended, or even indefinite. Employers should always bear in mind the figure of 183 days in a country in a 12 -month period – this is generally the tipping point for tax residency, often together with employer obligations to operate withholding tax.

It is important to consider whether the employee's stay in the host country - regardless of duration - creates risks of income tax or social security liability in that country, or even the risk that you (as the employer) are regarded as having created a "permanent establishment" there for corporation tax purposes (by virtue of the employee's activities in that host country). In order to understand the position, it will be necessary to establish the rules in place in the relevant host country. We briefly outline the issues below.

Income tax may be payable in host country

The starting point is that the host country has primary taxing rights over the employment income that the employee earns while physically working in that country. However, if there is a double tax treaty (DTT) between Ireland and the host country, the employee may be exempt from income tax and the Irish company from corporate tax there if certain conditions are satisfied.

Ireland has a DTT with 74 countries, 73 of which are in effect. In practice, this means that a short stay abroad in many locations is not going to result in the employee becoming liable for income tax in the host country.

Remember, though, that employees who have already spent other periods in the host country in the same 12-month period (e.g. visiting family) may reach the 183-day threshold sooner than you think. Also, the full details of the conditions can differ from DTT to DTT, particularly the period over which the 183-day test must be satisfied.

In addition, the employer and/or employee may still have obligations in the host country even if the DTT applies. For example, the Irish employer may need to register with local authorities as an employer and/or report on the income that is being paid to the employee. It is therefore important to understand the local position.

If the employee does become subject to tax in the host country but remains tax resident in Ireland, they will remain subject to income tax in Ireland on their worldwide income but should be able to obtain credit for some or all the tax they pay in the host country. They will, however, need to complete the appropriate tax declarations/returns, which could be a complex process. You will need to decide the extent to which you are willing (or not) to help the employee with this.

Social security position depends on agreements in place

Social security is very often linked to the place where the work is physically carried out. There may, however, be exceptions to this rule - for instance, a bilateral social security agreement providing special rules between two countries.

Ireland and the UK have negotiated a social security agreement, which contains exemptions for cross-border workers. This means that Irish citizens living in Ireland maintain the right to benefit from social insurance contributions made when working in the UK and to access social insurance payments if living in the UK, and vice versa.

For cross-border employment within the European Economic Area (EEA) and Switzerland, the position is set out in EU Regulations 883/2004 and 987/2009. These provide that a person normally employed in Ireland, who is sent by their employer to another member state, can continue to be subject to the social insurance provisions of Ireland provided that the anticipated duration of that work does not exceed 24 months. Such employees are often referred to as "posted workers". This means that a posted worker remains covered under the Irish social security scheme and will continue to make Pay Related Social Insurance (PRSI) contributions in Ireland.

If an employee is not a posted worker but they live outside Ireland in another EEA member state (including Switzerland), you should exercise caution. If they work remotely from home for at least 25% of their working time, they may not be subject to the social security regime of Ireland but to that of the state of residence.

Outside the EEA, Switzerland and the UK, the position will depend on whether there is a reciprocal agreement between the host country and Ireland. In countries where there is a reciprocal agreement, it is possible for an employee to remain within the PRSI system in Ireland and not pay local social security contributions for up to five years (depending on the country), if the employee has a valid certificate of coverage.

In other countries, where no agreement exists, and subject to local rules, an employer may need to deduct employee PRSI and pay it for the first 52 weeks of the arrangement. There may also be a liability to pay social security contributions in the host country and, again, local advice should be sought. In any event, as arrangements become extended or even indefinite it will always be important for the employer to keep income tax and social security arrangements under review. A point may be reached at which, either by legal compulsion or in some cases as the result of a positive choice, it is sensible to transition the employee permanently into the host country system.

Risk of creating a permanent establishment

In some situations, there will be a risk that the employee's activities or presence in the host country will create a permanent establishment for the employer in that country. This would be the case if, for example, the employee has a sales or business development role and is habitually exercising an authority to conclude contracts in the name of the employer while in the host country. Local rules may also provide for a more expansive definition of a permanent establishment.

Careful consideration should be given to this issue. If a permanent establishment is created, the profits attributable to that establishment would be subject to corporate tax in that country. It would also mean that the income tax exemption in the DTT would not apply. While this may be less of a problem if you already have established operations in the host country, it could be a real headache if you do not.

Assuming the working-from-home arrangement is only short term, it would be difficult for the tax authorities to argue that a permanent establishment had been created. The longer the arrangement continues, however, the greater the risk - particularly if the employee routinely negotiates the principal terms of contracts with customers which are simply "rubber-stamped" without amendment by employees working in Ireland.

Immigration implications

If an employee wishes to work from any host country, you will need to consider what restrictions may be in place. For example, if they want to work in the US but do not have permission to stay there indefinitely, they should not undertake any work without permission - even for a limited period and even if the employing entity is not a US entity.

Immigration permission may not be required for short business visits, although this will sometimes depend on the employee's nationality and the immigration regime of the host country. Depending on the employee's activities, it may be possible to characterise their stay as a business visit - for example, if their activities are limited to those typically undertaken during business trips (e.g. meetings, training, attending a conference). However, restricting an employee's activities in this way is unlikely to be practical for many employees and, in general, the longer an employee stays in the host country, the more difficult it will be to characterise their stay as a business visit. In most countries, productive work itself is prohibited as a business visitor, but limited exceptions may apply.

Irish citizens have an automatic right to work in the EEA and Switzerland.

Ireland has a unique relationship with the UK. The Common Travel Area (CTA) between Ireland and the UK (including Jersey, Guernsey and the Isle of Man) has existed since 1922. The CTA is not, and never has been, reliant on Ireland's or the UK's membership of the EU. It is based on legislation and bilateral agreements between Ireland and the UK. If an Irish or British citizen wants to live or work in a part of the CTA, they are not required to take any action to protect their status or rights associated with the CTA.

In response to Brexit, the governments of Ireland and the UK signed a Memorandum of Understanding, reaffirming their commitment to maintaining the CTA in all circumstances. The Irish legislature also enacted the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020. Primarily designed to reduce the possibility of serious disturbance in the Irish economy in the event of Brexit, this includes provisions to maintain the integrity and operation of the CTA and to ensure that the rights associated with the CTA continue.

Irish citizens and British citizens will therefore continue to have the same reciprocal rights associated with the CTA, including the right to work, study and vote, and to access social insurance payments and health services. Irish and British citizens will be able to continue to travel freely within the CTA without seeking immigration permission from the authorities. The CTA has been unaffected by Brexit negotiations and there has been no change to the Irish or UK approach to immigration and travel that falls within the CTA rules. Consequently, British citizens will not be required to seek immigration permission from the Irish immigration authorities to travel to Ireland and there are no routine immigration controls on journeys within the CTA.

Intellectual property implications

Unless there is agreement to the contrary, under Irish employment law, intellectual property (IP) created by employees in the course of their employment is owned by the employer. The location of an employee should not impact the ownership of IP.

As a safeguard, employers will often include a provision in the employee's contract of employment which states that all IP rights in any material created in the course of their employment is owned by the employer. In addition or as an alternative, an employer may require new employees to sign an IP assignment agreement or non-disclosure agreement which contains a similar provision to that which would normally be present in a contract of employment.

The situation can become tricky if there is no agreement in place, the employee is working from abroad and there is a dispute as to whether IP was created in the course of an employee's employment. The employer may be able to argue that the dispute should be governed by Irish law, enabling it to rely on the employer-friendly common law position. The employee, or even a third party looking to claim ownership of the IP, may however argue that it should be governed by the jurisdiction of the host country and any applicable legislation.

It all depends on the circumstances, such as the role of the employee, the material they have created and how and when they have developed the IP in issue. For certainty and protection against problems arising, it is advisable for employers to clearly set out in employment contracts that all IP in any material created during the course of the employee's employment is owned by the employer, regardless of from where the employee is working.

Confidential information

One aspect of intellectual property that often gets overlooked is confidential information. Wherever an employee is working from, the importance of protecting information important to a company remains (e.g. customer data or trade secrets). In fact, greater practical measures are often needed when an employee is working from somewhere other than their private home or the company's office.

For instance, if the employee is working abroad from a second home, or from a hotel poolside or other public place, they should continuously ensure that their laptop and work are fully password-protected and secured. Employers should consider security measures such as laptop privacy screens, minimising (or totally preventing) working in public locations and requiring loose papers to be kept locked away when not in use or to be shredded when being destroyed. This is important not just for the protection of confidential information but practically. If the employee has their phone/ laptop stolen, it will not be as easy for the employer to get replacement items to them if they are working in a jurisdiction where the employer has no office or base.

Employment law and data privacy implications

In addition to the tax, social security and immigration implications explained above, there are various other employment law and data privacy considerations.

Mandatory employment protections may apply

If employees are considered to habitually work abroad, even for short periods, or if it appears that an employee's contract is more closely connected with that host country, employees can become subject to the jurisdiction of that other country and start to benefit from the applicable local mandatory employment protections. These may include minimum rates of pay, paid annual holidays, rest breaks and – perhaps most importantly in the event of a dispute - rights on termination. What protections, if any, an employee acquires will depend on the country in question as well as the duration of their stay.

If an employee is planning to stay in the host country for an extended period, the employer should consider transferring them onto a local employment contract. This approach will ensure that the employer is complying with any local requirements and that important provisions such as those relating to confidentiality and post -termination restrictions are fit for purpose.

Data protection

If an employee's role involves processing personal data, this could give rise to data protection issues. The employer needs to be comfortable that it is not breaching any data protection laws or contracts with customers and third parties by transferring the data to the employee.

The General Data Protection Regulation prohibits personal data outside of the EEA unless that territory ensures there is an adequate level of protection. Accordingly, additional technical and organisational measures may need to be implemented to protect the data and keep it secure. This may partly involve, for example, making sure that any device has the necessary updates, such as operating system updates (e.g. iOS or Android) and software/antivirus updates, or ensuring any locally stored data is adequately backed up in a secure manner

Local health and safety protections may apply

Employers in Ireland have a duty to ensure, as far as is practicable, employees' safety, health and welfare at work. This includes providing a safe working environment when they are working from home, even if that is abroad. You should also ensure that the arrangement is compliant with any local health and safety requirements. For example, in the Netherlands, employers must provide employees with the equipment needed to ensure a safe working environment, which in some cases might involve purchasing or contributing to the cost of relevant equipment.

Insured benefits

An employee's ability to participate in company benefits such as pensions, private healthcare, income protection and life assurance may be adversely impacted by a move abroad. Such policies may stipulate that beneficiaries must be legally resident in Ireland to avail of the insured benefit or may preclude an employee from spending a defined period of time outside of Ireland. Covid-19 has cast a spotlight on such limitations, which are becoming increasingly prevalent.

Regulatory implications

For regulated organisations, there are additional considerations when deciding whether employees may be permitted to work from home overseas. Regulators may prohibit employees from doing so. If you are regulated, you should therefore check in advance with your regulator whether allowing someone to work from abroad creates any issues.

Eligibility will vary across sectors and may depend on the individual circumstances of each case (e.g. the nature and seniority of the role being performed). By way of example, the Law Society of Ireland has a long-standing position that its practising certificates do not permit practice outside of Ireland and that practising solicitors must have a physical presence in the country. In comparison, the Central Bank of Ireland will need to approve the appointment of a person performing pre-approval controlled functions (PCF) who intends to reside outside of Ireland while carrying out their functions for an Irish-regulated entity.

How to minimise the risks

Undoubtedly, the pandemic has brought about a major culture shift when it comes to the location from which work is done. Employers are increasingly opting to be flexible and seeking to accommodate requests to work from home overseas. Nonetheless, you will also want to minimise the risks as much as possible.

Depending on how many requests you expect to receive, you might even consider developing a short policy to ensure that requests are dealt with consistently and fairly and that potential issues are flagged early to requesting employees. You are likely to receive more requests of this kind in future, as employees look to take advantage of increased remote-

working opportunities by asking if they can work abroad for a short, medium or long-term period on a regular basis.

The key practical steps for minimising the risks are as follows:

> Only accept requests if the employee's role can be effectively performed remotely and carried out lawfully from the country in question.

> The shorter the period the employee is working abroad, the smaller the risks are likely to be. Consider only approving requests for a short, time-limited duration where the employee's expected return date is clearly documented.

> Always take expert local advice on any tax, social security, immigration and employment obligations you may have in the host country. The employee may also need their own advice.

> Be aware that the employee's ability to participate in company benefits such as pensions, private healthcare, income protection and life assurance may be adversely impacted by a move abroad. You should address this upfront with them.

> Much will depend on the identity of the host country and the employee's nationality.

> Check what data processing the employee will be doing and that this can be carried out lawfully.

> Check relevant insurance policies, such as those covering employees if they have a work-related accident or any company property that is provided to employees (e.g. laptops and phones). Determine whether these are adequate or if you need to take out more extensive cover.

> Agree the terms of any overseas working arrangement and record them in writing. Ideally, these should clarify that:

> The employee will be liable for any additional income taxes or employee social security which may be charged because of their decision to work for a period in an overseas location (with the employer being authorised to make additional deductions or seek reimbursements, if necessary, for this purpose).

> The employee will be responsible for any personal tax declarations that may need to be made.

> The employment contract remains subject to Irish law and jurisdiction (subject to a possible review date for longer-term arrangements at which you might consider transitioning them to a local contract).

> The employee is continuing to work solely for the Irish business.

> The employee's working hours if they are working from a different time zone.

> Any IP created by the employee in the course of their employment will be owned by the employer.

> The employee does not have the authority to enter into contracts with local customers while in the host country and should not hold themselves out as having such authority.

> The parties ensure the employee has the necessary technology and arrangements in place to enable them to work effectively.

> The employee accepts that they are working from home at their own risk and that the employer will not be liable for any personal loss they suffer due to their request being approved.

> The employee must comply with all applicable public health guidance, both in the country to which they travel and Ireland.

In some cases, it might be appropriate to engage the services of a Professional Employer Organisation (PEO) or an Employer of Record (EOR). This is a third-party organisation, akin to an employment business, which takes on the formal responsibility of employing the employee while overseas and accounting for tax, social security and other applicable local filing requirements. Using a PEO or EOR can be a way of minimising or mitigating the risks faced by the employer, and these types of arrangement are becoming increasingly common.

Employers considering this option should, however, carefully scrutinise the proposed engagement terms to understand exactly what protection is being offered and assess what gaps might still exist in the event of a dispute. For example, an employee might still be able to sue you directly in the event of a breach of employment legislation. Employers will also need to consider whether the arrangement allows them enough control over someone they regard as "their" employee: the absence of such control may make the arrangement less attractive for some organisations.

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