# RISE OF THE DIGITAL NOMADS
## TRAVELLING FREELY?

Amy Nevins of Lewis Silkin LLP explains the concept of the digital nomad visa and how employers in the UK can respond to a request from an employee to work abroad.

The COVID-19 pandemic caused many employees to ask if they could work from "home" but in an overseas country. Several years on, it is clear that the desire to work abroad, either on a temporary or permanent basis, is here to stay. This has resulted in an increase in "digital nomads": individuals who live a nomadic life by living in a country other than that in which their employer is based and work remotely.

Employers can often be keen to accommodate requests to work from abroad, particularly in industries where there is a talent shortage. However, there are myriad legal challenges that arise from working overseas, including those relating to employment, tax and social security, benefits, immigration, regulatory issues and data protection.

This article explores the rise of digital nomads and the challenges that this type of working arrangement poses for employers. It also considers the extent to which digital nomad visas can facilitate these arrangements from an employer's perspective (*see box "Background to the digital nomad visa"*).

This article assumes throughout that the employing entity is based in the UK and any request to work overseas has come from an employee, rather than a self-employed contractor. If a self-employed contractor is requesting to work from overseas the considerations will be different. One additional risk is incorrectly classifying an individual as a contractor, when they are in fact an employee. Determining the employment status of an individual can be complicated and the implications of misclassification will vary depending on local law. For example, in some countries there are certain roles that cannot be engaged as self-employed contractors.

This article is written through a UK lens, but employers should ensure that legal advice is also sought from the host country.

### A RIGHT TO WORK

A fundamental consideration for all employers responding to a request to work overseas will be whether the employee has the right to work in the country in which they intend to be based (*see News brief "Hybrid working: can employees work from abroad?", www.practicallaw.com/w-032-3674*).

A UK employer will likely be aware that an employee based in the UK must have the right to work here. In the UK, compliance also requires employers to carry out document checks and retain certain records of right-to-work status. Under UK legislation, these requirements do not extend to having to prove an employee's right to work in an

overseas country if this is part of their working arrangement or working pattern. This may lull a UK employer into a false sense of security regarding its employees' right to work.

In many jurisdictions, even if the employer is not based in that country, the obligation to ensure that an employee has the right to work in that country will be on the employing entity. This obligation will apply regardless of the terms of any corporate overseas working arrangement or policy that states that it is the employee's obligation to ensure that they have the right to work in an overseas country.

It is no longer a given that a UK employee has a right to work in the EEA and Switzerland, following the UK's exit from the EU and with it the loss of the right for freedom of movement between these countries. This fact is often something that is overlooked by both employees and employers due to the historic freedom that UK citizens had with the EEA and Switzerland, and the ease of travel from the UK to these countries. Given that these are countries in which UK-based employees often might have holiday homes, this is a particular risk area in practice.

## Types of visa

Frustratingly, the law around what visa is needed for an employee to work overseas is not universal. Each country has tackled the issue of digital nomads, people on "workcations", tourists and business travellers in different ways.

UK employers may be familiar with the common business visitor exemption under which employees may spend time on behalf of their employer in an overseas country as a business visitor. For example, this provision is sometimes used when an employee is attending a client meeting in another country. However, the definition of "business visitor" is different in every country and can also depend on the employee's nationality. This kind of exemption is often insufficient to accommodate an individual who intends to undertake their usual day-to-day job from an overseas country, irrespective of the amount of time spent in the country or whether the work that they undertake benefits their employer in that overseas jurisdiction.

As a result, employees have to explore other ways in which to obtain the right to work in their desired destination. As their employer is based in the UK, they will not be working for a local entity and so the employee is unlikely to be able to be sponsored by their UK employer. In addition, these working arrangements are not usually treated as a secondment or loan of the employee to a local group company entity.

For this reason, the employee will often need to explore self-sponsorship. This is where the right to work is not granted based on an employer's application or licence, but on an application for authority to work made by the employee directly. It is often not linked to a specific employer but to the way in which the employee intends to work and their personal circumstances.

While the requirement to have the right to work is not new, the rise of remote working and a generation of workers who want more freedom in how they work has seen employers needing to grapple with this issue on a larger scale. With more businesses embracing working from anywhere policies as a key benefit, or even going so far as implementing a location agnostic workforce, governments have identified the gap in legislation around the issue of nomadic workers. To address this, the digital nomad visa was born and it has already evolved over the past few years since it was first popularised (*see "Digital nomad visas" below*).

## Background to the digital nomad visa

The notion of a digital nomad initially conjured up images of an individual hopping from country to country, with nothing but their backpack and a laptop to keep them company as they work from the beach. The original version of the digital nomad visas were visas that were initially implemented by governments during the COVID-19 pandemic. Countries were looking to supplement their local economy, which had in many cases been decimated as a result of the lack of tourism due to the pandemic, and replace it with foreign income being spent locally by digital nomads. For example, one of the first countries to implement the digital nomad visa was Barbados in 2020, whose main contributor to gross domestic product is tourism.

Initially, digital nomad visas were set up to be used by self-employed freelancers. However, over time, these have been varied or expanded to encompass employees too. Now, most people working globally under digital nomad visas are employees who are looking to work remotely for an extended period of time from one overseas location, often with the view to residing in that country permanently, if possible. Perhaps a more fitting description of the visas would now be digital remote worker visas, given that the visa holders are seldom really nomadic in nature.

It is hard to provide a catch-all definition for a digital nomad visa as it can be defined in many ways. However, the best fit is that it is a visa that allows an individual to work in an overseas country for a set period of time without the need for a local employer's sponsorship.

## Employer checks

In the same way that employment in the UK is conditional on an employee being able to prove that they have the right to work here, an employer seeking to authorise overseas working should ensure that an employee can demonstrate their right to work in the foreign country at all times. This should include being able to provide evidence of this status on request, even if this is not legally required in the UK.

While an employer may require an employee to prove that they have the right to work in an overseas country before approving an overseas working request, the employer does not have to assist or fund the process of obtaining any right to work. However, where an employee asserts that they do have the right to work in an overseas country, the onus will be on the employer to ensure that it validates the information the employee has provided. How to achieve this will vary from country to country; it can sometimes be done with the overseas authorities or consulate. Alternatively, for example, the employer can ask the employee for evidence that they are a national of that country and have the right to work there; for example, by viewing their passport and confirming what the right to work requirements are with the overseas immigration authorities.

At the outset of a working abroad arrangement, an employer should also consider any immigration issues that could arise on the employee's return to the UK. Anyone subject to immigration permission, such as any EEA and Swiss nationals, and their family members who have settled or pre-settled status in the UK under the EU Settlement Scheme, will need to understand whether the absence may break the continuity of their residence for acquiring or retaining settled status. All non-British and Irish nationals should consider whether their absence from the UK may affect their existing UK visa status, or their eligibility to apply for other types of status in future where absences are assessed, such as settlement or naturalisation as a British citizen.

Countries may also have other immigration compliance requirements that an employer will need to be mindful of, such as record keeping. Employers will need to seek local advice on any such requirements.

### Working overseas with no right to work

If an employer finds out that an employee has been working overseas without the right to work there, the employer should request that the employee returns to the UK immediately before doing any further work. The employer will need to investigate what happened and the possible liability for the business. The employer would not want to appear able to accommodate an overseas working arrangement for which there is no right to work until the risks of that arrangement can be explored.

If it is not possible for the employee to return to the UK, they should immediately cease work for the employer from the overseas country, either on an agreed period of unpaid leave or, where this cannot be agreed, the employee could be placed on a period of suspension until the situation can be investigated. Any such suspension should usually be paid.

Depending on the knowledge that the business had of the overseas working, disciplinary action against the employee may be necessary. Disciplinary action will often be considered necessary if there is an element of dishonesty; for example, where the employee either did not request, or requested and was denied, permission to work overseas but did so anyway. Employers should be aware that employees can deliberately conceal the VPN address of where they are working or purposefully attempt to hide their overseas working arrangements. It is worth noting that line managers will sometimes be aware of these arrangements even if they have not formally shared them with the HR or legal departments. Managers may also be disciplined if they authorised or knew about instances of overseas working but did not seek the relevant internal approvals or carry out the necessary checks.

Following investigations, an employer may find that it has inadvertently not complied with income tax withholding, social security withholding and other obligations in the overseas country and that remedial action may be needed to try to reduce the business's potential liability.

An employer that fails to ensure that a nomadic employee has the right to work in a third country may face significant fines and penalties. It could even result in the business being banned from operating there. This will be of particular concern where a UK group company has allowed overseas working without the appropriate visa in a country where another group entity has a presence.

## DIGITAL NOMAD VISAS

According to analysis by the World Tourism Organisation in 2023, almost half of all global destinations now offer digital nomad visas for at least one year (*www.unwto.org/news/almost-half-of-all-global-destinations-now-offer-digital-nomad-visas*). Europe is the region with the highest number of countries granting digital nomad visas (*www.projectuntethered.com/digital-nomad-statistics/*).

Some countries have a formal programme for digital nomads or have announced that one will soon be in place. An estimated 58 countries now offer a digital nomad visa. These include Estonia, Brazil, Dubai, Portugal, Croatia, Montenegro, Spain, Cyprus, Argentina, Italy, Greece and Latvia.

It is primarily an employee's responsibility to obtain any digital nomad visas that they require in sufficient time before their overseas work begins.

### Obtaining a digital nomad visa

The criteria, cost and process for obtaining a digital nomad visa are different for each country that offers them. That said, over 35 million people currently place themselves in the digital nomad employment category, with 52% of these coming from the US, which is thought to be the largest group of digital nomads by nationality. These types of visas are clearly being readily awarded to individuals (*www.twoticketsanywhere.com/digital-nomad-statistics/*).

Although the criteria for digital nomad visas differ between jurisdictions, there are some key issues that are widely relevant for employees to consider at the outset:

- The point in time at which the employee needs to apply for the digital nomad visa; for example, there may be a timeframe before travel when the applications should be made or the employee may be able to apply for it after they arrive in the overseas country. If it is the latter, an employer may still insist on the application being made and approved before an employee is allowed to work overseas.
- The length of time it takes to obtain the digital nomad visa.
- Whether the digital nomad visa is available only to self-employed contractors or whether it can be extended to employees or workers.
- Whether there are any requirements for minimum levels of professional skills or experience to qualify for the digital nomad visa and, if so, what they are.
- Whether there is an explicit exclusion or cap on how much professional activity can be undertaken in respect of the local market.
- Whether the employee's role needs to be undertaken exclusively in a digital way.
- Whether there is a minimum salary threshold in order for a digital nomad visa to be granted.
- Whether the employee's dependents are also able to rely on the digital nomad visa to reside or work in the overseas country.
- Whether the employee needs to have health insurance in place before a digital nomad visa is granted.

Employers should also consider what happens when an employee's visa and their overseas

 

working arrangement come to an end. Often, this means that the employee must then return "home" to the UK. However, in some cases, employees will seek to extend their overseas working arrangement, especially in cases where the digital nomad visa can be renewed. However, just because the visa may be renewed, does not mean that the other considerations around overseas working can be that easily resolved.

### Countries where a digital nomad visa is not available

While many countries have a digital nomad visa available, there are still many countries where this option is not available, including the UK and the US. Employees will therefore need to rely on any other visas or visa exemptions that are available in the relevant country.

Some countries, such as the UK and France, have achieved this by relaxing their visitor visa framework so that employees can initially enter the country with the intention to work from the jurisdiction on a visitor visa without needing any additional documents. However, this is usually time-limited and there is not a long-term solution for an employee who wants to work and live overseas for an extended period.

If an employee is unable to obtain the right to work in the country in which they intend to work in, even if only for a short duration, an employer should refuse the employee's request.

## TAX AND SOCIAL SECURITY CONSIDERATIONS

Employers should consider whether any remote working overseas arrangement risks creating a permanent establishment of, and so a potential corporation tax liability for, the UK business in the overseas country. This will be a bigger risk for longer duration arrangements and for certain roles within a business, such as a senior strategic management, sales or business development role. This risk is also relevant to contractors working overseas, a point that is often overlooked in practice.

Under most double tax treaties, a permanent establishment will be created if either:

- There is a place of business in the host country at the employer's disposal through which the employer's business is wholly or partly carried on.
- The employee has the authority to conclude, and is routinely concluding, contracts relating to the operation of the business in the name of the employer.

It is worth noting that for some countries, such as India, there are additional issues to be considered when assessing whether a permanent establishment is created. If a permanent establishment is created, corporate tax may be payable and the income tax exemption in any double tax treaty would not apply.

From a UK perspective, an employer of an employee who worked in the UK and has relocated, either temporarily or permanently, overseas will have an income tax withholding obligation on the employee's earnings in the same way that it does for all of its UK employees through the PAYE system.

However, the position becomes more complicated when a stay is for a longer duration or is indefinite. This can therefore be a particularly tricky issue for digital nomads who will generally be working overseas indefinitely (albeit not necessarily always in the same overseas location). Another key complication is if the employee is expected to occasionally return to the UK for business purposes. In these situations, any possibility of stopping the UK income tax withholding obligation altogether, such as by obtaining an NT tax code from HM Revenue & Customs (HMRC) because the employee spends at least a complete tax year outside of the UK, will be thwarted due to the employee working in the UK. As a result, in many cases, the UK income tax withholding obligation continues, although it should be possible for the employer to obtain a direction from HMRC to only operate PAYE on the employer's best estimate of the employee's UK earnings.

Despite this, a UK employer may also have an income tax withholding liability in the overseas country. The UK employer's obligation to withhold income tax is often informed by whether a permanent establishment has been created. For this reason, the actual work that the employee will be undertaking will be a key consideration.

Whether an employee has a personal income tax liability overseas will be a separate issue to the question of the employer's income tax withholding obligation. For example, a UK employee who is spending time working in Spain may find that their employer has to continue to withhold UK income tax due to the fact they will be travelling to work from the UK once a month, as required by the employer. The UK employer may not have an income tax withholding obligation because it does not have a permanent establishment there. However, if the employee spends more than 183 days in Spain, they could become a tax resident of Spain and therefore could face personal income tax liabilities and obligations there.

If an employee does have personal income tax liabilities overseas, they may face a situation whereby they have paid income tax in the UK and then also need to pay it in another country. The employee will therefore want to understand if there is a double tax treaty between their employer's country and the country in which they live and work that would allow them to reclaim any tax that is overpaid. The UK has such a treaty with all 27 EU member states and most other major world economies.

Subject to certain conditions being met, this may mean that the employee will not be liable for income tax in the country in which they are based, but this is an issue for the employee to assess and discuss with their own personal income tax advisers, and at their own cost.

How employers should treat social security is complex. Generally, social security obligations arise in the country in which the employee physically carries out their duties. However, there are some limited exceptions of which employers should be wary. For example, the UK has a reciprocal agreement with some countries, meaning that an employee can remain in the UK social security system despite temporarily working overseas.

Some of these exceptions are time-limited, meaning that the social security withholding obligation on an employer may be able to be dormant for a short period but if the employee is intending to be a digital nomad permanently, the UK employer's obligation to withhold social security overseas may arise in the future. It is worth noting that there are several countries with which the UK does not have a social security agreement, such as India, China and Australia. For these countries there is a continuing liability to pay UK social security for generally the first 52 weeks that the employee is working abroad, as well as possible overseas social security liabilities from day one. This means that the employer

will be paying two sets of social security costs with no recourse for recouping this cost. As social security rates differ throughout the world, the long-term costs of an overseas working arrangement, as well as the cost of running an international payroll, should be considered carefully.

## EMPLOYMENT CONSIDERATIONS

If the governing law of the employment contract remains that of England and Wales, employers will need to consider whether any additional mandatory employment protections apply in the country in which the employee will live. This differs vastly between countries. Even for short-term remote working arrangements, employees may be entitled to certain rights that their UK employer would need to comply with, such as minimum pay, working conditions, annual holidays, family leave rights and termination rights. For example, in Italy remote workers whose contracts do not state Italian law as the governing law of the contract benefit from the constitutional rights that local employees have.

Additional rights may be imposed on the employee if the overseas working is classified as a posting of the employee under the relevant countries' legislation implementing the Posted Workers Directive (*96/71/EC*), something that could require compliance with minimum levels of pay.

Employers should also consider:

- Whether the employee's overseas working poses any regulatory issues, both at home and overseas. For example, anyone who works in the financial services sector may have regulatory obligations in the overseas country under a different regulatory regime, depending on their intended activities.
- Whether there are any overseas health and safety obligations with which the employer will need to comply. For example, in Spain it is often recommended that local health and safety assessments are undertaken by a regulated professional because the potential liability for failing to comply with this obligation is so high. Fines for failure to comply can be as much as €30,000, but can be even higher in the case of a labour accident or an industrial-related disease.

### Working from overseas policy

There is an increase in employers introducing policies setting out whether working from overseas is permitted and, if so, for how long. This type of policy is certainly recommended for employers to have and should address the following points:

- Set out a clear application process that allows sufficient time for the employer to properly consider the request. Four weeks, save for cases of emergency, is generally recommended.
- Make clear who the application should be sent to, that is, which department or manager has ultimate responsibility for the process in the employer's business. This is often HR, with the support of the legal and finance functions.
- Set out what risk assessment process will be undertaken when considering a request.
- Confirm the process for approving or rejecting the request, ensuring that approval is conditional where necessary; for example, it may be conditional on a digital nomad visa being provided or an A1 certificate being obtained.

- Whether the overseas working arrangement has an impact on any template clauses in the contract of employment relating to intellectual property, confidential information or restrictive covenants. For example, there could be questions as to whether the "restricted area" that is typically referred to in any restrictive covenants would still be valid if the employee is working in another location.
- Whether there are any data protection considerations because of the overseas working. While an employee continuing to work for their employer, but remotely overseas, will not usually result in a transfer of data, the employer will still need to consider the security of data while the employee is overseas and whether data policies or systems should be updated to reflect overseas working.
- Whether the usual benefits provided by the employer, such as private medical insurance and life assurance, will be affected by the overseas working. These schemes can often have jurisdictional limits.
- Whether the employer's insurance covers an employee working overseas, in particular noting that this is not the same situation as a business traveller. This type of insurance often requires that staff have the right to work in the country in which they are located and that the employer has complied with the relevant health and safety legislation.

## EMPLOYMENT MODELS

Broadly, the main employment model options for an employer facing an overseas working request are:

- Direct employment.
- Using an employer of record (EOR).
- Contractor arrangement.
- Leasing arrangement from a local group entity.

Given the complexities set out above of employing the individual directly while they are overseas, some employers will look to use alternative employment models, including the use of EORs. EORs are professional third-party organisations that can be engaged by an employer to employ an individual while they are working abroad. The EOR will account for tax and social security contributions and charge the employer for providing this service.

While the use of an EOR may seem like a fix-all solution, employers should be aware that EORs are often not able to legally act as the sponsor for an employee for immigration purposes on the basis that they are not the entity to which the employee provides their economic benefit, nor do they have any control over the employee. As such, the

 

immigration issues around visas and the right to work will remain.

The use of EORs in some countries requires strict compliance with labour leasing laws. EORs may not be familiar with these laws, which could then expose the end user, that is, the employer, to unknown liabilities, including dual employment liability if the employee is found to be an employee of the end user employer.

The use of contractors is often seen as the solution in order to avoid the overseas employer obligations, such as income tax withholding. However, the issue of misclassification can be complicated, as each country considers this differently and has different restrictions. These arrangements should be properly explored before being entered into. Further, the risk of the UK entity creating a permanent establishment in the overseas country remains even if a contractor is engaged.

Engaging an employee with a local overseas group entity and leasing them back to the UK entity can be an option in some countries, but the majority of countries highly regulate this type of employment arrangement, imposing significant criminal and civil sanctions if this is undertaken incorrectly. This will also trigger other compliance-related issues, such as compliance with transfer pricing principles on any recharge of costs from one entity to another.

## RESPONDING TO A REQUEST TO WORK OVERSEAS

The process for an employer to consider an employee's overseas working request will depend on whether or not the employer has an overseas working request policy (*see box "Working from overseas policy"*). Of course, if an employer has a policy, this should be followed.

When reviewing a request, the employer should carry out a risk assessment to inform its decision making. The risk assessment should consider the issues set out above. Failure to consider these issues risks exposing the employer to liability for income tax withholding, social security withholding, health and safety breaches, and breaching employment law requirements.

This is particularly the case for regulated businesses that could inadvertently be accommodating unlawful overseas working arrangements. Employers should be sceptical of companies that offer quick risk assessments on overseas working where they provide tax and legal advice but are not regulated or experts in the areas on which they claim to advise.

If an employer agrees to a request to work overseas, it should ensure that a contract variation letter is provided to the employee setting out the terms of the overseas working arrangement and the employee's obligations during this time. This letter should be signed by the employee and allow for the employer to revoke its approval and the terms allowing for the overseas working if it reasonably becomes apparent that the arrangement cannot be accommodated. These circumstances could include the discovery of a tax liability, the employee ceasing to have the right to work in the country, the country becomes unsafe, or that the employee is underperforming in their role.

## A GOLDEN BULLET?

In short, the digital nomad visa, despite being an innovative development from many countries' immigration laws, is not a magic solution. While the digital nomad visa can resolve the immigration requirements, there are many other considerations and risks that an employer must explore before it accepts an overseas working arrangement.

Most overseas working proposals are theoretically achievable, but the issue is how much time and cost the employer wants to spend on making these arrangements work.

*Amy Nevins is a managing associate at Lewis Silkin LLP.*

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