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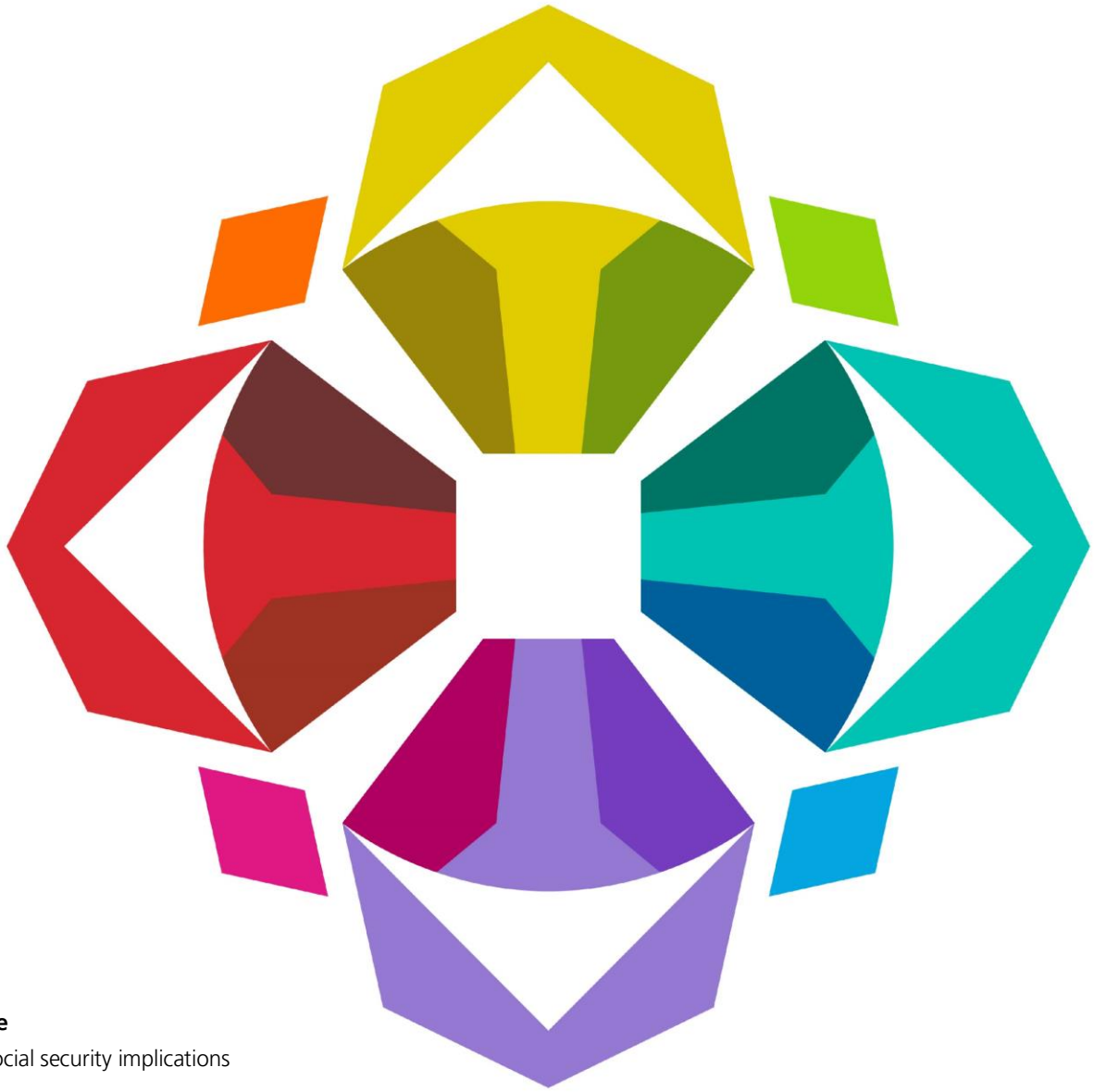
# Remote working overseas



**Inside**

The Covid-19 pandemic caused many employees to ask if they could work from "home" from an overseas country. Several years on, it's clear that the wish to work abroad – either on a temporary basis, or in some cases indefinitely – is part of a permanent sea change in working practices. Technology makes it possible – but this Inbrief explains the potential legal issues and how to avoid the traps.

## Tax and social security implications

If an employee is only working overseas temporarily, from a UK perspective, the UK employer should continue to deduct income tax under the PAYE system in accordance with the employee's PAYE code. In addition, the employer should continue to deduct employee national insurance contributions (NICs) and pay employer NICs. However, the employer and employee may need to apply to HMRC for a certificate confirming that social security is only due in the UK.

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 income tax withholding in the overseas country (see further below). Even before this threshold is reached, there are traps for the unwary. From a UK perspective, if it is anticipated that the employee will be working overseas for at least a complete UK tax year, they may apply to HMRC for a No Tax PAYE code which, if issued, will authorise the employer to pay the employee without PAYE deductions.

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. 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 the UK and the host country, the employee may be exempt from income tax there if certain conditions are satisfied including:

- The employee is not a tax resident in the host country under the DTT. If the employee is tax resident in the UK and in the host country under each country's domestic law, their residence status is determined in accordance with the DTT by reference to their personal circumstances.
- The number of days the employee is present in the host country over a 12-month period (however briefly and irrespective of the reason) must not exceed 183 days.

The UK has a DTT with most countries, including all 27 EU countries and most other major world economies. In practice, this means that a short stay abroad in many locations is not going to result in the employee becoming liable for host country income tax.

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 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 UK tax resident, they will remain subject to UK income tax 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, 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

The social security position is complex. The general rule is that employee and employer social security obligations arise in the country in which the employee is physically carrying out their duties. There are, however, exceptions.

Where UK employees are working in the EU (other than Ireland), there are exceptions for both multi-state workers (employees who are working in two or more countries) and "detached workers" (UK employees who are temporarily seconded to work in the EU) or those who are temporarily working abroad for personal reasons with the agreement of their employer.

Broadly speaking, if a UK employee is sent to work in an EU country, UK employee and employer NICs can continue to be paid, and no social security will arise in the EU country, provided that:

- the stay will not exceed two years; and
- the employee has not been sent to replace another detached worker.

Depending on the circumstances and subject to local advice, it is likely to be necessary to obtain a certificate of coverage from HMRC confirming the position.

The UK has negotiated social security agreements with Ireland and Switzerland, which also contain exemptions both for multi-state workers and detached workers. The detached worker exception under the Irish and Swiss agreements could potentially be for longer than two years.

The UK is currently in the process of negotiating a reciprocal agreement with Norway, Iceland and Lichtenstein. Pending conclusion of that new agreement, detached workers in these countries are dealt with in accordance with existing reciprocal agreements (in the case of Norway and Iceland) and under UK legislation (in the case of Lichtenstein).

Outside the EU and Switzerland, the position will depend on whether there is a reciprocal agreement between the host country and the UK. In countries where there is a reciprocal agreement, such as the USA, Korea and Japan, it is possible for an employee to remain within the UK system 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, such as China, India and Australia, the UK employer must continue to deduct employee UK NICs and pay employer NICs 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.

Irrespective of the country, 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. Under most DTTs a permanent establishment will be created if: (i) there is a place of business in the host country at the employer's disposal through which the employer's business is carried on or; (ii) if 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. Under some DTTs a permanent establishment could also be created if the company is providing services in the host country through for example an individual who is present in that country for a certain period of time.

Careful consideration should be given to this issue in circumstances where the employer does not already have a permanent establishment in the host country. If a permanent establishment is created by the employee's presence or activities, 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 - we are aware of a number of employers which permit employees to work overseas but only where there is an existing establishment to which they can be transferred in order to address this issue - 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 for example the employee is in a senior strategic management role or in a business development role and is routinely negotiating the principal terms of contracts with customers which are simply "rubber-stamped" without amendment by employees working in the UK.

## 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 Hong Kong 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 Hong Kong entity.

Advance immigration permission may not be required for 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 and training). 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.

In certain countries, if the employee's work can be said to be "incidental" to the purpose of their overall stay, it will not pose an issue from an immigration perspective. This could be the case where an employee works remotely from their holiday destination for a short period in order to extend their break. Where this exemption applies, it is helpful to consider whether the employee is planning to work from the company's office in the overseas location (as opposed to their own accommodation) as this could weaken the argument that their work is incidental to the purpose of their trip. Aside from this, whether the employee attends the office could also impact on the employer's insurance cover if the employee has an accident while abroad.

Following the end of the Brexit implementation period, British citizens no longer automatically have the right to work in the EEA and Switzerland as was the case previously (unless they are also a citizen of an EEA country or Switzerland). A Schengen visa is unlikely to be helpful in this case as it only permits certain limited business activities and not "work". Accordingly, British employees wishing to work from the EEA or Switzerland will need to apply for the correct immigration permission from the country to which they are travelling. This will typically need to be applied for outside of the host country, before the employee travels.

Many employers have introduced policies permitting employees to work from an overseas location for a short period (such as up to one month) as long as they can show they have the right to work there – most obviously, because they are a national of that country. While this will generally be fairly low risk, it is important to remember that immigration law compliance may require additional steps to be taken – for example, in the UK employers are expected to carry out document checks and retain certain records of employees' right to work status.

You may also need to consider any immigration issues that could arise on the employee's return to the UK. For example, EEA and Swiss nationals and their family members who have settled or pre-settled status in the UK under the EU Settlement Scheme will also need to understand whether the absence may break the continuity of their residence for acquiring or retaining settled status. All non-British/Irish nationals should consider whether their absence from the UK may affect their visa, 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.

## Intellectual property, confidential information and restrictive covenants

The location of an employee should not impact the ownership of any intellectual property (IP) that they create, provided their employment contract has appropriate provisions covering this. So if they are, for example, developing a patentable product or registerable design, provided their employment contract stipulates that all IP rights in any material developed in the normal course of their role are owned by the employer, the place from which they develop the product or material should not have an impact.

The UK legislation generally provides that any IP created by an employee, in the usual course of their employment, belongs to the employer. So, if the employment contract states that the employment contract is governed by English law and is subject to the jurisdiction of the English and Welsh courts, the employer can rely on the UK legislation if the IP provisions are not so explicit in the contract.

The situation becomes trickier when there is no employment contract in place, or if the contract does not state the jurisdiction and local law that will apply. In these circumstances, the employer may have difficulty if there is a dispute over the ownership of the IP in material the employee has created while working abroad. The employer may be able to argue that the dispute should be governed by English law and determined in England and Wales, enabling it to rely on the employer-friendly legislation mentioned above. This may be the case if the employer is a UK company and the product/ material was for the UK market. The employee, or even a third party looking to claim ownership of the IP, may however argue that it should be governed by the legislation and jurisdiction of the host country.

It all depends on the circumstances, such as the role of the employee, the material they have created and how 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. 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.

### Restrictive covenants

Employers who are concerned about the competitive threat an employee may pose following the termination of their employment will also need to consider how the overseas working affects the enforceability of any non-compete, non-solicit and non-deal provisions in their contract. An employee who remains employed on their UK employment contract can still in principle be sued under that contract in the UK courts, and an injunction awarded which has extra-territorial effect (provided the contract does not contain any outdated limitations on the geographical area to which it applies). There may however be additional complexities in terms of effecting service on that individual, and potentially also with the individual arguing that the employer can only take enforcement action against them in the country in which it has been agreed they may work. For these reasons, and particularly where overseas work is extended or indefinite, it may be advisable for the employer to consider transitioning the employee on to a local employment contract containing covenants which meet relevant local legal requirements (which in many European countries will include payment during the term of the restraint).

## 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 live and work abroad, even for short periods, they 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 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.

## Be careful about transferring data

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 by transferring the data to the employee and that they have technical and organisational measures in place to protect the data and keep it secure. This may involve, for example, reviewing the electronic equipment being used by the employee to ensure that it meets the required standards.

## Local health and safety protections may apply

UK employers have a duty to protect the health, safety and welfare of their employees, which includes providing a safe working environment when they are working from home. If an employee works from home abroad, you should also ensure that it 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.

Employees will also need to comply with applicable public health guidance (e.g. quarantine periods), both in the host country and on their return to the UK.

## Regulatory implications

For regulated firms there are additional considerations when deciding whether employees may be permitted to work from home overseas. These can vary across sectors and may depend on the individual circumstances of each case (e.g. the nature and seniority of the role being performed).

For financial services firms key practical considerations will be whether the employee can carry out their role effectively and compliantly from overseas, and whether the firm can appropriately:

- monitor, supervise and oversee the relevant employee;
- comply with its internal policies and procedures; and
- continue to satisfy its regulatory obligations.

Further, as part of their conditions for authorisation, financial services firms are required to:

- be capable of being effectively supervised by their regulator(s), which includes consideration of the way in which the firm's business is organised (e.g. structure and geographical spread);
- have appropriate non-financial resources (including sufficient human resources in terms of quantity, quality and availability); and
- be managed in such a way as to ensure that their affairs will be conducted in a sound and prudent manner.

As well as these high-level requirements, financial services firms will have in place policies and procedures implementing a range of more detailed requirements ranging from overarching systems and controls to business specific requirements. During the recent pandemic, the FCA highlighted the importance of requirements in the following areas:

- **Market trading and reporting**: the need for all relevant communications, including voice calls, to be recorded when working outside the office and that all steps should continue to be taken to prevent market abuse.
- **Information security**: the need to ensure that adequate controls are in place to manage cyber threats

Against this backdrop it is perhaps unsurprising that financial services firms tend to be particularly resistant to requests related to overseas remote working arrangements.

UK solicitors working overseas can raise similar issues. For example, law firms must ensure that they can demonstrate how their professional and regulatory obligations are being met, particularly as regards supervision. Following the end of the Brexit implementation period, under the UK-EU Trade and Cooperation Agreement, UK solicitors may be entitled to provide services in certain EU member states on a temporary basis using their home country qualification but individual solicitors and those employing them will always need to check the position in the relevant EU member state to ensure they are complying with applicable national law. In addition, law firms should ensure they have appropriate professional indemnity insurance in place to cover advice being given from outside of the UK.

## Employers of record

The shift in working practices has created a major upsurge of interest in and usage of so-called "employers of record", also sometimes known as Professional Employer Organisations (or PEOs). 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 an employer of record or similar can be a way of minimising or mitigating the risks faced by the employer.

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 in a local labour court or tribunal in the event of a breach. 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. In employment relationships where ownership of IP created by the employee is important, or the employer has particular concerns about being able to protect its confidential information or impose post-termination non-compete restrictions, the employer will need to consider whether this can be achieved effectively in circumstances where it is no longer employing directly the individual working for it. Employers should also be cognisant of the fact that many countries operate strict licensing regimes for employment businesses, or have laws restricting the "lending of labour", and failure to comply with these requirements can have adverse consequences for the end user employer as well as the operator: is the employer of record fully compliant with these requirements?

## 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 should consider developing a policy to ensure that these situations are dealt with consistently and fairly.

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.
- For any arrangement of an extended duration (or even short duration, depending on your appetite for risk) 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 in line with your usual policies.
- 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. While the detail will depend on the circumstances typical provisions include:
  - 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 UK 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 UK business.
  - Any IP created by the employee 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 employee takes responsibility for ensuring they have 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 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 the UK.

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