Overseas Remote Work: Ireland

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A Practice Note addressing legal and practical considerations in Ireland regarding overseas remote employment outside of the country or state, of the employer's central workplace, where the employee is employed. It addresses issues and considerations both: (i) when an employee based and employed in Ireland seeks to work remotely overseas outside of Ireland; and (ii) when an employee based and employed outside of Ireland seeks to work remotely overseas in Ireland.

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Flexible working arrangements and structures are increasingly attractive to employers and employees. Employers may consider permitting employees to work remotely overseas. However, in an overseas remote work scenario, an employer must review the home country and host country considerations for the two relevant territories. This Note considers legal and practical issues under the laws of Ireland only, when either:

- The employee is normally employed and based in Ireland and it is proposed the employee intends to work remotely outside of Ireland (home country).
- The employee is normally employed and based outside of Ireland and it is proposed the employee intends to work remotely in Ireland (host country).

This Note assumes the employee remains employed by the employer in the home country, continues to provide services to the employer in the home country, and is not transferred to employment under an entity in the host country or to provide services for or on behalf of an entity in the host country.

Remote work considerations that are not specific to an overseas scenario must also be reviewed by the employer.

Posted Workers or Overseas Remote Worker

This Note concerns overseas remote work arrangements. It is important, where possible, to distinguish between an employee working remotely overseas and a posted worker scenario.

An overseas remote work arrangement involves an employee remaining employed by its employer in the home country, the employee working temporarily overseas from their personal workplace or location, and the employee is not sent or posted to an entity established in the overseas territory.

Under the European Union (EU) Posted Workers Directive (Directive 96/71/EC (as amended)) (PWD), an employee is a posted worker when it is employed by an entity in one member state, remains employed by that entity, and is posted to an entity or establishment in another member state for a temporary period. To be considered a posted worker, the following must be fulfilled:

- There must be an undertaking or establishment that exists in the member state to which the employee has been posted.
- The employee must be posted to the second member state under a contract in place between the two entities.

Broadly, the above means the PWD applies to a cross-border secondment to a group company in the host country or an employee being sent to work on a contract for a client in the host country.

A posted worker is entitled to the same mandatory protections as comparable employees in the host country.

However, importantly, in some territories the local law implementing the PWD goes further than the PWD in terms of the scope of the individuals covered by the legislation and the protections afforded to those individuals. Further, it could be interpreted to potentially cover temporary overseas remote worker scenarios. Ireland is one such territory, see *Posted Workers*.

Overseas Remote Work Defined

Overseas remote work includes any work performed from a location outside of the country or state, of the employer's central workplace, where the employee is employed. The following are variations of the term "remote work," and some may have slightly different meanings in particular countries or regions:

- Work from home.
- Telecommuting.
- Telework.
- Homeworking.
- Mobile work.
- Virtual work.
- Agile work.

In Ireland, all of these terms are used to describe overseas remote work, although remote work or simply, working from home, tend to be most commonly used. These terms cover employees working remotely both within Ireland and outside Ireland.

Preliminary Practical Considerations

In addition to the legal considerations set out in this Note, working remotely from overseas raises quite a number of practical challenges which employers should carefully consider before agreeing to an employee’s request to work overseas. These are often additional challenges to those raised by domestic remote working, including:

- Whether the employer’s home and remote working policies include information on working remotely overseas.
- Ensuring that employees understand that prior approval is required before they can work remotely overseas.
- Whether it is practically possible for the employee to undertake their role remotely outside of Ireland, away from the employer's central workplace, where the employee is employed.
- Ensuring that any agreement with the employee regarding overseas remote working is clear and in writing.

- Ensuring that data protection and security arrangements are in place (see *Information Security, Data Protection, and Data Privacy* below).
- Whether the employee will have an adequate internet connection and equipment to perform their role.
- Whether there will be any practical difficulties in communicating with the employee and providing instructions due to time difference.

An employer should always take expert local advice on any tax, social security, immigration and employment obligations it may have in the host country.

Ireland as the Home Country

Legal Restrictions

Overseas remote working is permitted from Ireland and Irish employees can work remotely outside of Ireland, provided:

- The employee has the necessary immigration and other approvals in place to do so.
- The employer complies with any tax, social security, and employment obligations in the host country.

There are currently no employment laws in Ireland regulating remote work or anything similar that can be interpreted to expand to remote work overseas. Indeed, there is currently no specific employment law in Ireland regulating domestic remote work nor is there currently a statutory right to request a remote working arrangement in Ireland (although applications should be genuinely considered by employers to avoid claims of discrimination).

The Irish government is planning to introduce legislation regulating an employee's right to request remote working and has issued draft legislation in this regard. It is unlikely that this will extend to a right to request remote working overseas.

Code of Practice on the Right to Disconnect (Disconnect Code)
In April 2021, the Workplace Relations Commission (WRC) introduced a Code of Practice on the Right to Disconnect (Disconnect Code), which relates to an employee's right to disengage from work and refrain from engaging in work-related electronic communications outside of normal working hours.

The Disconnect Code could be understood to apply to employees working overseas who are employed by an Irish employer. In particular, where there is a time difference, this will have an impact on both the employee working overseas and employees based in Ireland who work with them. A failure by an employer to follow the Disconnect Code is not in itself an offence but is admissible in proceedings before the WRC and the Irish courts.

Blanket Bans on Employees Working Overseas
An employee has no legal entitlement to work overseas either temporarily or permanently. Given the potential risks and costs involved in agreeing to employees working remotely overseas, some employers have opted to implement blanket policies prohibiting such working.

Other employers have agreed to requests subject to certain conditions, such as setting a limit on the time an employee can work outside of Ireland (for example, one month in any calendar year) to minimise:

- Any tax consequences for the employer.
- The potential for the laws of the host country to apply to the employee.

Blanket bans can potentially be challenged as indirectly discriminatory on the basis of nationality as non-Irish nationals are arguably more likely to want to spend time working outside of Ireland. It is important to consider, therefore, whether such a policy can be objectively justified, especially in situations where the employer has significant resources and where, on closer analysis, facilitating an employee's request would be relatively inexpensive and low risk.

For employers in most sectors, especially those looking to reap the rewards associated with flexible working, the most appropriate solution may be to consider every request on its own merits. Employers should also consider centralising the request process to reduce the risk of managers treating requests differently.

Applicable Laws and Employee Rights

There is no specific law, statute, code, or regulation that provides that the employment laws of Ireland apply only to employees physically working in Ireland and the majority of Irish employment legislation is silent on the issue of extra-territorial application. Instead, it is presumed in the legislation that the employee is ordinarily employed in Ireland (see Maeve Regan and Ailbhe Murphy, *Employment Law* (Bloomsbury Professional, 2nd ed. 2017)).

Section 25 of the Redundancy Payments Acts 1967–2014 (1967 Act) addresses the entitlement to a redundancy payment of employees who work wholly or partly abroad and provides that any period of service while the employee is working outside Ireland is deemed to be service in the employment of that employer within Ireland for the purposes of the 1967 Act.

Section 2(3) of the Unfair Dismissals Acts 1977-2015 (1977 Act) provides that the Acts do not apply in relation to the dismissal of an employee who, under the relevant contract of employment, ordinarily worked outside Ireland, unless the employee either:

- Was ordinarily resident in Ireland during the term of the contract.
- Was domiciled in Ireland during the term of the contract and the employer was ordinarily resident in Ireland during the term of the contract (in the case of an individual employer, such as an individual who employs a child minder), or had its principal place of business in Ireland during the term of the contract (where the employer is a body corporate or an incorporated body of persons).

"Term of the contract" means the whole of the period from the time of the commencement of work under the contract to the time of the relevant dismissal.

Irish employment laws do not automatically apply to employees working remotely outside of Ireland. However, in circumstances where the employee's contract of employment is governed by Irish law and the employee was hired and worked in Ireland previously, Irish common law will likely continue to apply. If this is the case then the employee may be able to make claims under Irish employment legislation (save where this is expressly excluded by the relevant legislation, as mentioned above). This will be a question of fact in each case.

What Law Applies?
Commonly, the position is that:

- The parties to an agreement are free to agree the law that governs their relationship.
- Depending on the laws of the territory where the employee is working remotely overseas, it is possible that mandatory employment laws of that territory will apply irrespective of the agreed governing law.

Overseas Remote Work Outside of the EU

It is important to confirm whether the territory where the employee shall be working remotely overseas is within or outside the EU. This note covers in detail the rules and provisions that need to be considered when the overseas remote work is within the EU (see *Overseas Remote Work Within the EU: Rome I*).

However, care must be taken when the overseas remote work shall be outside of the EU and the rules applicable to the particular overseas territory must be considered. Where a claim is taken before the Irish Courts, any determination concerning governing law will be subject to EU laws, namely the Rome regulation on the law applicable to contractual obligations, *EC Regulation No 593/2003 (Rome I)*. However, if the position was challenged in the courts of an overseas territory that is outside of the EU, the rules in that territory may apply and be determinative.

Overseas Remote Work Within the EU: Rome I

Parties to an employment contract are free to choose the governing law of the contract, although such a choice may not deprive the employee of the protection of the mandatory rules of law that, in the absence of the choice, would have applied (*Article 8(1), Rome I*)).

In the absence of a choice of law, the contract is governed by:

- The law of the country in which or from which the employee habitually carries out their work in performance of the contract of employment, even if the employee is temporarily employed in another country (*Article 8(2), Rome I*).
- The law of the country where the place of business through which the employee is engaged is situated, if there is no one country where the employee habitually carries out their work (*Article 8(3), Rome I*).
- The law of the country where it appears, from the circumstances as a whole, that the contract is manifestly more closely connected with (*Article 8(4), Rome I*).

Therefore, assuming that the contract of employment is governed by Irish law, before the period of overseas remote work, it continues to be governed by Irish law while the employee is working remotely overseas in the EU.

However, certain mandatory laws of the host country can apply if the employee is deemed to habitually work there or where the contract is deemed to be more closely connected to the host country. 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.

The Place Where the Employee Habitually Works

The European Court of Justice has held that the place where the employee habitually works is the place where, or from where, taking into account all circumstances of the case, the employee performs the essential part of their duties in relation to their employer (*Petrus Wilhelmus Rutten v Cross Medical Ltd (Case C-383/95) EU:C:1997:7*).

As all mandatory rules of the host country law apply from the point the employee is deemed to habitually work in or from the host country, the test as to when work in the host country becomes habitual is crucial.

This test will depend on the host country and may vary from one country to the next. However, factors to consider include:

- Where the employee has their headquarters.
- Where the employee's travel begins and ends.
- The employee’s place of residence.
- Where the employee is paid.
- The currency of payment.
- Where the employee is subject to social insurance.

(Mulox IBC Ltd v Hendrick Geels (Case C-125/92) EU:C:1993:306 and Herbert Weber v Universal Ogden Services Ltd (Case C-37/100) EU:C:2002:122).

In considering whether an employee habitually carries out work in a particular jurisdiction, their habitual place of work will be deemed not to have changed if they are temporarily employed in another country (*Article 8(2), Rome I*). Work carried out in another country should be regarded as temporary if the employee is expected to resume working in the home country after carrying out their tasks abroad (*Recital 36, Rome I*).

Generally, the longer the employee spends working overseas in the host country, the more likely it is that they will be deemed to be habitually working in the host country. However, in circumstances where the employee is working overseas remotely for a one-off relatively short period on the understanding that it is a temporary arrangement (which should be expressly set out in the remote working agreement), it is unlikely that the employee would be deemed to be habitually working in the host country. Either way, this will depend on the facts and the host country jurisdiction and local law advice should be sought.

Recording an Agreement in Writing

Where an employee is required to work outside Ireland for a period of more than one month, the law requires employers to provide the employee with a revised statement of terms and conditions, detailing changes that may arise as a result of the employment overseas, including (but not limited to):

- A change of workplace.
- Any changes to annual leave.
- Any changes to remuneration.
- The period of employment outside Ireland.
- The currency in which the employee is to be remunerated.

(Section 4, Terms of Employment (Information) Acts 1994 - 2014).

Terms of Agreement

It is advisable for the terms of any overseas working arrangement to be recorded in a supplemental written agreement (Overseas Working Agreement) so that the expectations of the employee and employer are clear from the outset and to limit the potential

for any dispute. The Overseas Working Agreement should, where relevant, amend the existing employment contract for the duration of the overseas remote work. The Overseas Working Agreement should include:

- The duration of the arrangement, when (and in what circumstances) the employee will be required to return to Ireland and the arrangements for the return.
- Travel cost arrangements.
- Confirmation that the employee has the right to work in the overseas country.
- Where it is the employee's decision to work for a period in an overseas location, a stipulation that the employee is liable for any additional income taxes or employee social security that may be charged (the employer being authorised to make additional deductions or seek reimbursements, if necessary, for this purpose). Where the employee is working overseas at the request of the employer, the employer would usually agree to be liable for any additional tax or employee social security that may be charged.
- A stipulation that the employee is responsible for any personal tax declarations that may need to be made.
- The employment benefits that apply during the arrangement.
- A provision that the employment contract remains subject to Irish law and jurisdiction (subject to a possible review date for longer-term arrangements, when it may be worth transitioning the employee to a local contract).
- A provision that the employee is continuing to work solely for the Irish business, under the control and direction of the employer, with reporting obligations confirmed.
- The employee's working hours if they are working from a different time zone or confirmation that the employee must maintain Irish working hours.
- A stipulation that any intellectual property created by the employee in the course of their employment will be owned by the employer.
- A clarification that 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.
- Confirmation that the employee has the necessary technology and arrangements in place to enable them to work effectively.
- Confirmation that the employee accepts that they are working remotely at their own risk and that the employer will not be liable for any personal injury, loss or damage that they suffer due to their request being approved.

Depending on the duration and nature of the overseas work, the documents may need to be reviewed by a local lawyer in the host country to ensure it complies with any mandatory local laws.

In circumstances where the employee's employment contract is governed by Irish law, it is common for the Overseas Working Agreement to also be governed by Irish law. While it is possible to include a clause stating that the laws of Ireland apply exclusively to the employment overseas, this does not stop the employee from enjoying the mandatory protections of local law where these apply.

Alternatively, it is possible to state that the laws of the host country govern the employment contract while the employee is working overseas but it is not possible to exclude the laws of Ireland in circumstances where the employee is found to be habitually carrying out their work in Ireland or where the Overseas Working Agreement is found to be more closely connected to Ireland.

For further detail on choice of law and the application of mandatory rules of law, see *What Law Applies?*.

Managing, Monitoring, and Terminating the Employee

An employee working overseas under an Irish employment contract remains subject to their contractual obligations to, and direction of, their employer. A manager in Ireland can manage an employee who is working outside of Ireland.

The Overseas Working Agreement should confirm that the employee remains subject to the control and direction of the employer and specify who the employee will report to while working overseas. The Overseas Working Agreement should also clearly set out the employer's expectations of the employee while working abroad, including, for example, working hours (in particular where there is a time difference) and attendance on virtual meetings. Managers should be provided with training on managing employees in another jurisdiction.

GDPR Compliance

Any monitoring involving the processing of employee personal data must be legitimate, necessary, and proportionate and must comply with the General Data Protection Regulation 2016/679 (GDPR) as it relates to data subjects located within the European Union.

Employees are entitled to a reasonable expectation of privacy in the workplace whether this is the physical or virtual workplace. Employers must have a lawful basis for monitoring under Article 6 of the GDPR and where the monitoring includes processing employee special category personal data, the employer also needs to satisfy one of the conditions under Article 9 of the GDPR. The employee privacy notice should make employees aware of any monitoring that may take place and the reasons for this monitoring.

While monitoring for the purposes of security and data integrity can often be easier for employers to justify than productivity monitoring, very intrusive levels of monitoring are likely to be difficult to justify under the GDPR and more likely to create employee relations issues.

New or Potentially Intrusive Monitoring

Intrusive monitoring has particular challenges in the remote working environment as employers risk capturing non-employee data including employees' children and family members with unintended consequences and risks for the employer in advertently processing this third-party personal data.

The key questions for employers to consider are:

- What is the purpose of the monitoring?
- What will be done with the information gathered from the monitoring?
- Are there other less intrusive ways to achieve the same outcome?

When the monitoring being proposed is new or very intrusive (for example, technology capable of making visual or audio recordings that might capture other members of an employee's household or personal communications) it is recommended that the employer carries out a data privacy impact assessment (DPIA) before implementing the monitoring (in some circumstances this will be mandatory). This is required to:

- Justify the monitoring,
- Consider the impact on employees.
- Assess and reduce any risks.
- Detail why other less intrusive means would not achieve the same purpose as the monitoring.

If the DPIA identifies there are residual high risks that cannot be reduced by the employer, the employer would likely have to consult with the Irish Data Protection Commission on the proposal. For example, if it is impossible not to capture incidental images of an employee's family in the background of constant video recording.

Even where a DPIA is not mandatory, employers should consider conducting them to help the employer review their proposed monitoring objectively and reduce risks to employees. A DPIA also evidences that an employer has sought to be reasonable and accountable before implementing the monitoring should a complaint be made by an employee to a regulator.

The Overseas Working Agreement entered into with the employee should make it clear if any additional monitoring is to take place as a result of the overseas arrangement.

Where an employer wishes to put in place monitoring systems for overseas employees, a review of its data protection notices and policies should be undertaken to check whether such monitoring is permissible or whether it is necessary to update them and inform employees of the monitoring. Employers must also consider whether the mandatory laws of the jurisdiction in which the employee is working allow for such monitoring.

Human Resources and Disciplinary Procedures

It is possible for an employer to invoke its human resources procedures, such as its disciplinary procedure, in respect of employees who are working overseas and for a manager in Ireland to conduct the disciplinary process (provided they have the authority of the employing entity to do so). Depending on the duration and nature of the work overseas, local law advice may be necessary in the jurisdiction in which the employee is working to ensure that the employer's procedures comply with any applicable mandatory laws there and to avoid the process being found to be unfair in that jurisdiction.

Any meetings held under the disciplinary procedure can be held virtually (subject to any local law limitations). Employers should ensure that the employee has the necessary equipment and software to engage in the process and it should be confirmed to all participants in the disciplinary meeting that it is not permissible to record the meetings (doing so sets the expectations of the employer, and places the employer in a better position to argue that any covert recording should not be admissible before the Workplace Relations Commission (WRC) in any further claim).

Employees in Ireland do not currently have an entitlement to work remotely overseas, so the Overseas Working Agreement should stipulate that the arrangement is temporary and reserve the right for the employer to terminate the arrangement at any time for any reason. If the employee refuses to return to Ireland and such refusal is unreasonable, the employer's disciplinary procedure can be invoked. It is advisable for the Overseas Working Agreement to clearly set out the consequences of the employee refusing to return to Ireland when requested to do so, for example, disciplinary action or dismissal.

Terminating Employees Working Overseas Remotely

Depending on the duration and nature of the overseas work, the mandatory employment laws of the host country may apply to a termination of employment, for example, unfair dismissal rights or redundancy payments. To mitigate the risk of contravening the host country's mandatory employment laws, local law advice should be sought when terminating the employment of overseas employees.

If a redundancy situation arises in relation to the role of employees working overseas remotely, careful consideration must be given to the redundancy process; in particular, employers must diligently review the selection pool, which may need to include employees working in Ireland and other jurisdictions to minimise the risk of discrimination or unfair selection claims. Again, local legal advice should be sought.

From a practical perspective, the parties should stipulate in the Overseas Working Agreement how the employee will return any company property and confidential information in their possession should the employment terminate while the employee is overseas and who will bear the cost of this. The Overseas Working Agreement should also stipulate any clawback provisions in relation to any costs incurred by the employer in facilitating the overseas remote working arrangements (for example, the cost of external tax advice, work equipment and so on). There may be limitations under the host country's immigration laws regarding the clawback of certain aspects of the relocation package so local law advice should be sought.

Impact on Employment Benefits in Ireland

Any changes to the employee's salary as a result of working abroad (for example, a change in salary amount, currency or method of payment) is a matter of negotiation between the parties and should be documented in the Overseas Working Agreement. There is no legal obligation for employers to agree any changes to the employee's salary where the employee is seeking to work overseas remotely, provided that the employee's salary does not breach any local law requirements, such as national minimum wage requirements in the host country.

An employee's ability to participate in company benefits such as a pension, private healthcare, income protection and life assurance may be adversely impacted when working remotely overseas. Such policies may stipulate that beneficiaries must be legally resident in Ireland to avail of the benefit or may preclude an employee from spending a defined period of time outside Ireland. This should be discussed directly with the employee and the Overseas Working Agreement should address the potential loss of such benefits.

Where the benefits are contractual in nature (for example, a company bonus) it is open to the parties to agree that the employee's continuity of service and accrual for benefit purposes will not be impacted by the employee spending time outside of Ireland. This may not be possible with regards to pension or insured benefit entitlements, where the underlying policy or rules may not allow for this.

The host country may have different statutory leave entitlements to Ireland in respect of annual leave, maternity leave, paternity leave, sick leave and so on, so the employee's entitlement to these in the host country should be checked before they start working remotely there.

Costs of Travel

There is no legal obligation for employers to pay travel costs for employees working overseas. Usual practice is for the employer to pay travel costs if the employer has requested the employee travel overseas while the costs are normally borne by the employee if they have requested to work remotely overseas. It is recommended that travel costs are dealt with in the Overseas Working Agreement.

Work Equipment and Setting Up Workstation

There is no legal obligation for an employer to provide equipment or an equipment allowance to employees who work remotely (whether domestically or overseas), except in circumstances where it has been identified as a requirement under a health and safety risk assessment *(*see *Health and Safety)*, or where the equipment is required as a reasonable accommodation under Irish equality legislation (for example, where an employee is visually impaired and requires some special equipment, such as a special screen or monitor, to work remotely).

However, where an employee is required by the employer to work remotely, the employee should be provided with the equipment required to carry out the role remotely. Where the employer does supply equipment, it must be in good condition and suitable for the work activity.

In the event of an employee working overseas, there may be obligations in the host country regarding the provision of equipment or an equipment allowance for remote work that the employer may need to comply with.

Employers should consider whether their insurance policies cover the equipment being used abroad, and whether the employee should take out their own insurance to cover damage or theft.

The arrangement in relation to equipment can be subject to contractual agreement between the employer and employee, although there may be laws in the host country that would override this agreement.

Health and Safety

Under the Safety, Health and Welfare at Work Act 2005 employers 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 remotely, including abroad. A health and safety risk assessment of the employee's workspace must be conducted (this can be done virtually) and these health and safety obligations cannot be passed onto the employee by way of, for example, a self-certification approach.

Employees are also under a general statutory duty in Ireland to protect their own safety, health and welfare at work and the safety, health and welfare of others who may be impacted by their work. Employees should be advised and reminded of these obligations and of the obligation to comply with all health and safety rules while working overseas remotely.

It is possible, and recommended, to include a clause in the Overseas Working Agreement that the employee accepts that they are working remotely at their own risk and that the employer will not be liable for any personal injury, loss, or damage that they suffer due to their approval of the employee's request to do so. However, the inclusion of such a provision would not override the employer's statutory health and safety obligations and an employer could still be found liable for any such injury.

Depending on the duration and nature of the work overseas, the employer may also be subject to local health and safety obligations towards the employee in the host country.

Insurance

For employees working remotely overseas, their participation in company benefits is limited to the policies' provisions. Their ability to participate in such benefits, for example, private healthcare, depends on whether the policy caters for those residing outside of Ireland.

There may be a requirement in the host country for employees to have health insurance coverage while working there (particularly where the employee requires an immigration permission) and this is a matter of host country law. There is no legal requirement in Ireland for an employer to provide employees with health insurance although some employees may have a contractual entitlement to health insurance benefits.

It is recommended that the employee is protected by health insurance coverage while working abroad and where their current policy does not cover them, the employer may look to arrange alternative health insurance, or the employee may elect to get independent health insurance. If this insurance is in the host country, it will be subject to the host country's laws.

If the employee has requested working abroad, the employee usually arranges their own health coverage; if the employee is required to work abroad by the employer and the employee has a contractual entitlement to health insurance, the employer must secure alternative coverage at a similar level to that enjoyed by the employee in Ireland. The position in relation to health insurance can be set out in the Overseas Working Agreement.

Irish employers normally have employer's liability insurance (although this is not legally required) which covers compensation pay-outs arising from occupational injuries. However, it is likely that such a policy would have territorial limits and would not cover prolonged periods working overseas. Employers with employees working abroad may be required under host country laws to have employer's liability insurance or other policies in place in the host country and local law advice should be sought.

Regulatory Issues

For regulated organisations, there are additional considerations when deciding whether employees can be permitted to work remotely overseas as some regulators may prohibit employees from doing so. If an employer is regulated, it should check with its regulator in advance to establish whether allowing an employee to work abroad will create any issues.

Eligibility will vary across sectors and may depend on the individual circumstances of each case (for example, 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 Ireland and that practising solicitors must have a physical presence in the country. In comparison, the Central Bank of Ireland must approve the appointment of a person performing pre-approval controlled functions who intends to reside outside Ireland while carrying out their functions for an Irish-regulated entity.

Immigration

If an employee holds an immigration permission to work in Ireland, there could be implications for the employee's immigration status where the employee spends time working overseas.

If the employee is employed on an employment permit in Ireland, the general rule is that the employee should work in Ireland for at least 183 days in a full calendar year to be considered employed in Ireland (this is in line with the requirements of the Revenue Commissioners of Ireland (Revenue) for tax residence). Frequent absences or an extended absence which constitute part of the permit holder's employment are not considered grounds for revocation of the employment permit.

However, as employment permits state the location or locations in which the work will be carried out, the relevant government department with responsibility for employment permits in Ireland should be notified of any change to the place of work and any other changes to the employee's role or remuneration. This notification may result in the employee being required to submit an application for a new employment permit. If the location or one of the locations stated in the employment permit application is outside Ireland, this may be grounds for refusal as the employment permit regime is not intended to apply to individuals working outside Ireland.

Depending on the type of immigration permission, any time spent outside of Ireland may also have implications for the employee's ability to renew their immigration permission or on their future eligibility for immigration permissions such as permanent residency, citizenship, and so on.

In addition, the employee may require immigration permission from the host country to work in the host country.

Income Tax and Social Security

Implications for the Employer

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

Employers should also 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 the employer is regarded as having created a "permanent establishment" there for corporation tax purposes (by virtue of the employee's activities in that host country). To understand the position, it will be necessary to establish the rules in place in the relevant host country. See *Permanent Establishment Risk*.

Income Tax 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. If there is a double tax treaty (DTT) between Ireland and the host country, the employee may be exempt from income tax if certain conditions are satisfied.

Ireland has signed DTTs with 76 countries, 73 of which are in effect. In practice, this means that a short stay abroad in many locations would be unlikely to result in the employee becoming liable for income tax in the host country.

The details of the conditions can differ depending on the DTT, particularly the period over which the 183-day test must be satisfied, so employees who have spent other periods in the host country in the same 12-month period (for example, visiting family) may reach the 183-day threshold sooner than expected.

In addition, the employer or employee can 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 or report on the income that is being paid to the employee, or both. It is therefore important to understand the local position.

Implications for the Employee

If the employee does become subject to tax in the host country but remains tax-resident in Ireland, they remain subject to income tax in Ireland on their worldwide income but may be able to obtain credit for some or all the tax they pay in the host country. To apply, employees must complete the appropriate tax declarations and returns, which can be a complex process, so employers must decide the extent to which they are willing to help the employee with this.

Social Security Position

Social security is very often linked to the place where work is physically carried out but there may 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 containing 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.

EEA and Posted Workers

This a complex area and tax advice should be sought in any particular circumstance but the general principle is that for cross-border employment within the European Economic Area (EEA) (that is, the European Union member states, plus Norway, Iceland, and Liechtenstein) 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.

These employees are often referred to as "posted workers" (see *Posted Workers or Overseas Remote Worker*). 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, provided the appropriate paperwork is put in place before departure.

Rest of the World

Outside the EEA, Switzerland and the UK, the position depends 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 they have 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. Employers may also be liable 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 is important for employers to keep income tax and social security arrangements under constant 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 to the host country system.

Information Security, Data Protection, and Data Privacy

Employers must consider whether, as part of the work being carried out by the employee, there is any transfer of personal data to a third country (that is, a country outside the EEA or that has not received an adequacy decision from the European Commission). If there is a transfer then the employing entity (as the data controller) must ensure that this transfer complies with Chapter V of the GDPR.

The European Data Protection Board has published guidelines on what constitutes a transfer under Chapter V. One example in these guidelines is where an employee is working remotely from a third country and has access to personal data held by their EEA employer on systems and servers stored within the EEA (for example, they use their laptop to access their employer’s EEA located server). The guidelines confirm that this is not a transfer for the purposes of Chapter V. However, the guidelines make it clear that the data controller:

- Remains accountable for the data flow and any risks that may arise.
- Must still comply with its other obligations under the GDPR in respect of that data flow.

If the arrangement involves the Irish data controller transferring personal data to another processor or controller organisation in the third country so that the employee can carry out their role (for example, personal data is transferred to another organisation’s server in the third country) then this is a transfer under Chapter V and the obligations under Chapter V would apply. This could include establishing standard contractual clauses between the data exporter and data importer.

If an employee's role involves processing personal data, this can give rise to data protection issues. Employers must ensure that they are not breaching any data protection laws or contracts with customers and third parties by the employee processing this personal data in another country. Local advice should also be sought on whether any local data protection regimes apply to the processing.

Technical and organisational measures may need to be implemented to protect data while it is being processed by an employee in another country as part of their role. This can include ensuring devices have the necessary updates, such as operating system updates (for example, iOS or Android) and software and antivirus updates, or ensuring any locally stored data is adequately backed up in a secure manner.

To minimise risks, employers should therefore:

- Train employees to take appropriate security measures when accessing personal data from another country.
- Include employee obligations in respect of data protection risks and reporting of data breaches in the Overseas Working Agreement or relevant policy.
- Provide employees with regular data protection and information security training.
- Consider any increased data security risks that might apply in the particular country that the employee will be working from and take appropriate safeguard measures against them.

Intellectual Property

Unless there is an 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 does not impact the ownership of IP.

As a safeguard, employers 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 that contains a similar provision to that which would normally be present in a contract of employment (or include similar provisions in the employment contract itself).

The situation becomes less clear 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. However, the employee, or even a third party looking to claim ownership of the IP, may argue that it should be governed by the jurisdiction of the host country and any applicable legislation.

Legally, 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 at issue. For certainty and greater 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 where the employee is working, and that Irish law and jurisdiction for the employee applies.

Adopting a belt and braces approach, the employer might consider seeking local advice on any overriding laws in the country where the employee is situated asking, for example, is there any legislation preventing transfer of ownership of IP developed in that country to a foreign country? Is there a right for an employee to be compensated for developing IP which overrides an employment contract or foreign law?

Confidential information

No matter where an employee is working from, the importance of protecting sensitive and valuable information remains (for example, 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 example, 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 in a practical sense. If the employee's phone or laptop are stolen, it is more difficult for employers to provide replacement items if they are working in a jurisdiction where the employer has no base.

Permanent Establishment Risk

In some situations, there is 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 the 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 are 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 the employer already has established operations in the host country, it could be a real headache if they do not.

Assuming the working overseas arrangement is only short-term, it may 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 overseas employee routinely negotiates the principal terms of contracts with customers, which are simply rubber-stamped without amendment by employees working in Ireland.

Ireland as the Host County

Posted Workers

As stated at the outset of this Note, the PWD is not designed to cover the situation of an employee working from home temporarily in another EEA country, and it would not be directly applicable unless the employer opts for a formal secondment to a local group company in Ireland or asks the employee to work on a contract for a local client in Ireland.

However, Ireland's implementation of the PWD is such that its application is not certain and it could potentially capture the situation of an employee working remotely in Ireland for an overseas employer as it applies to a person, irrespective of their nationality or place of residence, who either:

- Has entered into a contract of employment that provides for their being employed in Ireland.
- Works in Ireland under a contract of employment.

(Section 20, Protection of Employees (Part-Time Work) Act 2001 (PTW Act)).

The PWD was transposed into Irish law by simply extending all Irish employment protection legislation to eligible posted workers. Therefore, if the legislation is found to apply to an employee working overseas remotely in Ireland, the employee would receive the full benefit of all Irish employment legislation as would apply to an Irish national or an employee permanently based in Ireland (section 20, PTW Act) (see Maeve Regan and Ailbhe Murphy, Employment Law (Bloomsbury Professional, 2nd ed. 2017).

Further, employers that are found or deemed to be posting workers to Ireland from within the EU are required to furnish certain information (including the identity of the employer, the number of workers, the duration of the posting and so on) to the WRC no later than the date on which the work begins. However, it is unlikely that this requirement would apply where the employee is working in Ireland remotely for an overseas employer and paying tax and PRSI in the home country. Clarification should be sought from the WRC as to whether this notification must be made depending on the particular circumstances.

Before permitting an employee to work overseas remotely in Ireland, it is recommended that Irish legal advice should be sought to establish whether it is a posted worker scenario.

Please note, the rest of the Note regarding Ireland as the Host Country assumes the overseas remote worker is not a posted worker, unless stated otherwise.

Legal Restrictions

It is permissible for employees who normally live and are employed by an employer based in another jurisdiction to work in Ireland remotely, provided the employee has the necessary immigration and other approvals to do so and the employer complies with any tax, social security, and employment obligations in Ireland.

There are certain mandatory employment laws that may apply to employees working in Ireland remotely (see *Applicable Laws and Employee Rights* below).

The Disconnect Code introduced by the WRC (see *Code of Practice on the Right to Disconnect (Disconnect Code)*) could extend to overseas remote workers working in Ireland and its provisions would likely be particularly relevant where there is a time difference to the home country. A failure by an employer to follow the Disconnect Code is not in itself an offence but is admissible in proceedings before the WRC and the Irish courts.

Applicable Law and Employee Rights

Any determination in the Irish courts concerning governing law will be subject to EU laws, namely Rome I.

The general position is that the parties to a contract of employment are free to choose the governing law of the contract (*Article 8(1), Rome I*)

This choice of law may not, however, have the result of depriving the employee of the protection of mandatory rules of law that, in the absence of choice, would have applied (*Article 8(1), Rome I*). In the absence of a choice of law, the contract will be governed by:

- The law of the country in which or from which the employee habitually carries out their work, even if the employee is temporarily employed in another country (*Article 8(2), Rome I*).
- The law of the country where the place of business through which the employee was engaged is situated, if there is no one country where the employee habitually carries out their work (*Article 8(3), Rome I*).
- Where it appears from the circumstances as a whole that the contract is manifestly more closely connected to another country, the law of that country (*Article 8(4), Rome I*).

What Law Applies?

Assuming that the contract of employment is governed by the home country's law before the overseas work in Ireland, the employment contract will therefore continue to be governed by this law while the employee is working remotely in Ireland. However, certain mandatory Irish laws may apply if the employee is deemed to habitually work in Ireland or where the contract is deemed to be more closely connected to Ireland.

There is no fixed time after which the employee will be deemed to be habitually working in Ireland such that the mandatory protections of Irish law will apply and this will be a question of fact in each case (see *The Place Where the Employee Habitually Works* below).

The mandatory protections of Irish employment law that someone working in Ireland might benefit from include, but are not limited to:

- A minimum hourly rate of pay.
- Restrictions on working hours.
- Paid annual leave.
- Minimum notice on termination.
- Protection against discrimination.
- Family leave entitlements.
- Health and safety protections.
- An entitlement to a written statement of the terms and conditions of their employment.
- Unfair dismissal protections (subject to the employee having the requisite service).

While an employee is entitled to join a trade union in Ireland, the employer cannot be required to recognise a trade union under Irish law. Employees in certain sectors (such as construction or security) have collective agreements regulating their terms and conditions of employment, which could apply to overseas remote employees working in Ireland but employed by an overseas employer.

The Place Where the Employee Habitually Works

The European Court of Justice has held that the place where the employee habitually works is the place where, or from where, taking into account all circumstances of the case, the employee performs the essential part of their duties in relation to their employer (*Petrus Wilhelmus Rutten v Cross Medical Ltd (Case C-383/95) EU:C:1997:7*).

As all mandatory rules of Irish law will apply as soon as the employee is deemed to habitually work in or from Ireland, the test as to when work in Ireland becomes habitual is crucial.

In Ireland, there is no prescribed formula or point at which work will become habitual. Factors that will be taken into account include establishing where the employee has their headquarters or where their travel begins and ends, the employee's place of residence, where they are paid, the currency of payment and where the employee is subject to social insurance (*Case C-125/92 Mulox IBC Ltd v Hendrick Geels* and *Case C-37/100 Herbert Weber v Universal Ogden Services Ltd*).

In considering whether an employee habitually carries out work in a particular jurisdiction, their habitual place of work will not be deemed to have changed if they are temporarily employed in another country (*Article 8(2), Rome I*). Work carried out

in another country should be regarded as temporary if the employee is expected to resume working in the home country after carrying out their tasks abroad (*Recital 36, Rome I*).

Generally, the longer the employee spends working overseas in Ireland, the more likely it is that they will be deemed to be habitually working in Ireland such that mandatory Irish employment laws will apply. However, in circumstances where the employee is working overseas in Ireland for a one-off relatively short period, on the understanding that it is a temporary arrangement (which should be expressly set out in the remote working agreement), it is unlikely that the employee would be deemed to be habitually working in Ireland. Either way, this will depend on the facts in any given situation.

Recording an Agreement in Writing

An employer's obligations to record a remote working agreement in writing (Working in Ireland Agreement) is a matter of home country law and home country law advice should be sought. It is likely that overseas employers would include terms similar to those set out for Irish employees working remotely overseas (see *Recording an Agreement in Writing* above). Further, it is likely that any Working in Ireland Agreement shall, where relevant, amend the existing employment contract for the duration of the overseas remote work in Ireland.

In relation to choice of law and the application of mandatory rules of law, see *Applicable Laws and Employee Rights*, *What Law Applies?* and *The Place Where the Employee Habitually Works* above.

Depending on the duration and nature of the overseas work in Ireland, the Working in Ireland Agreement may need to be reviewed by an Irish lawyer to ensure it complies with mandatory local laws. In addition, legislation in Ireland sets out certain particulars that must be provided to an employee within prescribed periods of them commencing employment in Ireland, for example, the names of the employer and employee, the place of work address, the job title and so on. These particulars may need to be included in the Working in Ireland Agreement.

Equal Treatment Risks

Overseas employees working remotely in Ireland may seek to cherry-pick the laws of the country (home country or Irish laws) that give them the more favourable treatment, and they may be entitled to do so in circumstances where they are employed on a home country employment contract but working in Ireland such that the mandatory employment laws in Ireland apply. The employee would likely be entitled to rely on whichever law provides them with the greater protection.

It is theoretically possible that if the employer has an entity or establishment in Ireland and the employees of the Irish entity are treated differently to the employees of the overseas entity who are working remotely in Ireland, either could argue that they are being treated less favourably on grounds of nationality, which is a protected ground under Irish equality legislation. However, the Irish and other entity could seek to rely on the terms and conditions applicable within their own jurisdictions (and differences in the work) as justification for the difference in treatment, and not the protected ground. This risk is very low for workers who engage in occasional remote work in Ireland, and if that changed (such that they were working habitually in Ireland) it might be prudent to move them onto an Irish employment contract which provided for the same benefits as those provided to Irish employees. In these circumstances the employee working overseas in Ireland is less likely to be in a position to claim home country benefits.

Managing, Monitoring, and Terminating the Employee

Managing

An overseas employee working remotely in Ireland under a home country employment contract (as amended by the Working in Ireland Agreement, where applicable) remains subject to their contractual obligations to, and direction of, their employer and it is possible for a manager based outside of Ireland to manage this employee.

Although the contents of the Working in Ireland Agreement will ultimately be a matter dictated by home country legislation (or the absence of this), from a practical perspective, it is recommended that the Working in Ireland Agreement confirms that the employee will remain subject to the control and direction of the home country employer and specifies who the employee will report to while working overseas in Ireland. The Working in Ireland Agreement should also clearly set out the employer's expectations for the employee while working in Ireland.

Monitoring

For information on monitoring an employee working overseas in Ireland, the same principles apply as set out when Ireland is the home country **(**see *Managing, Monitoring, and Terminating the Employee* above**).**

Additionally, from an Irish employment law perspective, if the possibility of being monitored is not transparent and its purpose is not clear to the employee from the outset, it can be very difficult for an employer to later rely on any evidence gathered through monitoring in a disciplinary process against an employee located in Ireland.

Termination of Employment

If the employment contract (as amended by the Working in Ireland Agreement, where applicable) is governed by the laws of the home country, the home country's human resources procedures, including its disciplinary procedure will continue to apply to the employee while the employee is working in Ireland and this would be a matter of home country law. Further, whether the employer can insist on the employee returning to the home country is also a matter of home country law.

Whether a human resources process can be carried out virtually is a matter of home country law, though it is permissible under Irish law. From a practical viewpoint, employers should ensure that employees have the necessary equipment and software to engage in the process and it should be confirmed to all participants attending these meetings that it is not permissible to record them.

Importantly, however, depending on the duration and nature of the work in Ireland, Irish mandatory employment laws may apply to the termination of the employment, particularly if the employee remains in Ireland for one year which, save for some exceptions, is the qualifying period for unfair dismissal protection in Ireland.

Therefore there may be a risk for overseas employers when terminating the employment of their remote workers in Ireland by applying only the rules and procedures of the home country without considering the rules and procedures that apply in Ireland. For example, if the employee refuses to return to the home country and the employer terminates the employee's employment as a result, or where the employee resigns from the employment on the basis that the request is unreasonable or a breach of contract, the employee could bring an unfair dismissal claim against the employer in Ireland.

In this situation, Irish legal advice should be sought in relation to the process prior to terminating the employment of the employee.

In any event, it is recommended that when agreeing to allow an employee to work overseas, the Working in Ireland Agreement stipulates that the arrangement is temporary and reserves the right for the employer to terminate the arrangement at any time for any reason. It would also be prudent to set out in the Working in Ireland Agreement the consequences for the employee if they refuse to return to the home country when requested to do so by the employer, for example, disciplinary action or dismissal. However, it is a matter of home country law as to whether this is permissible.

Redundancy

Where a redundancy situation arises in relation to the role of an employee working overseas remotely in Ireland, the redundancy process and any considerations regarding redundancy selection should be a matter of the home country law. However, there are provisions in Irish redundancy legislation regarding employees who have also worked overseas, and depending on the factual circumstances, the mandatory provisions of Irish employment law may also apply. If the employee has one year's service in Ireland, a redundancy process must be carried out to avoid an unfair dismissal claim in Ireland. It is recommended that Irish legal advice be sought in these circumstances.

Obligations on Termination

From a practical perspective, the parties should stipulate in the Working in Ireland Agreement how the employee will return any company property and confidential information in their possession, and who will bear the cost of this, if the employment contract is terminated while the employee is working overseas in Ireland. The Working in Ireland Agreement should also stipulate any clawback provisions in relation to any costs incurred by the employer in facilitating the overseas remote working arrangements (for example, the cost of external tax advice, work equipment and so on), albeit that this would be a matter of home country law. If the employee is working in Ireland under an employment permit the employer is prohibited from seeking to recover any expenses relating to the employment permit application or any travelling expenses (Section 23 of the Employment Permits Acts 2003 to 2020).

Work Equipment and Setting Up Workstation

The obligation to provide equipment or an equipment allowance for overseas remote work in Ireland will be a matter of home country law and, subject to home country law, the arrangements should be clearly set out in the Working in Ireland Agreement. However, depending on the duration and nature of the work in Ireland, Irish mandatory employment laws may apply to the employment (see *Work Equipment and Setting Up Workstation* above).

Costs of Travel

The employer's obligations in respect of travel costs and whether these obligations can be subject to agreement between the employer and employee will be a matter of home country law.

Regulatory Issues

From an employment law perspective, there is no obligation for an overseas employer to register as an employer in Ireland or to register employees in circumstances where the employee is working overseas remotely in Ireland and no immigration approval is required. An overseas employer who has an employee working in Ireland may however be required to register with the Revenue as an employer and may also be required to notify the WRC of certain information regarding the employee where the employee comes within the Irish posted workers legislation (see *Posted Workers* above).

The employer is not required to localise in Ireland the employee working overseas remotely (where localisation means moving the employee to an Irish employment contract, governed by Irish law). If the employee is planning to stay in Ireland for an extended period or permanently, the employer should consider transferring them to an Irish employment contract to ensure that any Irish mandatory employment law requirements are complied with.

In some cases, it might be possible and 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 in Ireland 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.

For organisations in regulated industries, there are likely to be additional considerations as the regulators in the home country may prohibit employees from working outside of the jurisdiction and this should be checked in the home country.

Depending on the role the employee will be carrying out in Ireland it may also be necessary for the employee to:

- Apply to have their professional qualification recognised in Ireland.
- Register with a regulator in Ireland.
- Obtain a licence to carry out their profession in Ireland.

Immigration

Immigration Permissions

Nationals of the EEA, Switzerland and the United Kingdom can work in Ireland without obtaining immigration permission. All other nationalities need immigration permission if they plan to work in Ireland for more than 14 consecutive calendar days.

If an individual is going to Ireland to work for more than 90 calendar days, immigration permission usually takes the form of an employment permit. For an employee to obtain an employment permit, their employer must be:

- Registered as an employer with the Revenue.
- Registered as a legal entity with the Companies Registration Office (CRO).

Likewise, where an employment permit is being sought on the basis of a contract for services arrangements, the contracting party receiving the services must be registered as an employer with the Revenue and as a legal entity with the CRO. All employment permits therefore require the employer to have a presence in Ireland or a contract for services with a company that has a presence in Ireland.

Note, a 50% rule is applied to employment permit applications. This means that a prospective employer (or contractor, where applicable) must demonstrate that the granting of the permit would not result in more than 50% of its employees in Ireland being non-EEA nationals. The 50% rule may be waived in certain circumstances.

Additional Visa Requirements

In addition to an employment permit, some nationalities (those from "visa required" countries) need to apply for a long stay employment visa to travel to and enter Ireland. Nationalities from non-visa required countries do not need to apply for a long stay employment visa to travel to and enter Ireland. They may travel and enter Ireland as soon as their employment permit is granted.

A visa required national going to Ireland to work for less than 90 calendar days is required to apply for a visa before they travel. They can apply for different types of visas depending on the purpose of their trip. For example, if they are coming to Ireland on a short business trip, they can obtain a short stay business visa which will allow them to come to Ireland for up to 90 calendar days. However, they are only permitted to work for 14 consecutive calendar days during that period.

Non-visa required nationals do not always have the same pre-travel requirements. They can often travel freely to Ireland but will be required to make their intention known at border control. If they are permitted to enter Ireland, an immigration officer places a landing stamp in their passport which gives them permission to stay in Ireland for a maximum of three months. For

example, if a non-visa required national is coming to Ireland to work for 14 calendar days or less, they must request temporary permission to work when they arrive at border control.

However, if the non-visa required national is intending to come to Ireland to work for 15 calendar days or more, they are required to apply for an immigration permission to work before they travel.

All individuals (irrespective of whether they are visa required or not) can, as an alternative, apply for an Atypical Working Scheme Permission under the Atypical Working Scheme, which allows them to work in Ireland for up to 90 calendar days. The scheme was developed to facilitate specialised, highly skilled employment of a short-term nature that is not supported by the current employment permit regime. The Atypical Working Scheme permission requires there to be host company in Ireland.

Finally, a non-EEA national who is lawfully resident and legally employed in another EU member state may be allowed to work on a temporary basis for that employer in Ireland without the need to obtain an employment permit. In those cases, they may apply for an employment visa, called a *Van der Elst* visa. This allows the employee to come to Ireland for up to 12 months to provide services on behalf of their employer so long as certain conditions are met.

Otherwise, it is not currently possible for an employer to obtain immigration permission for an employee to work remotely in Ireland and there are no known proposals to amend immigration law to address this scenario.

Income Tax and Social Security

Implications for the Employer

If an overseas employee is working in Ireland temporarily, their employer should continue to deduct income tax under their local system. Where a stay becomes extended, or even indefinite, matters become more complicated. Overseas employers should be vigilant of the figure of 183 days in a country in a 12-month period; this is generally the tipping point for tax residency, often coupled with employer obligations to operate withholding tax.

Income Tax in Ireland

As a starting point, Ireland has primary taxing rights over employment income that overseas employees earn while physically working in Ireland, but if there is a DTT (a double tax treaty) between the host country and Ireland, the employee may be exempt from income tax if certain conditions are satisfied.

Ireland has signed DTTs with 76 countries, 73 of which are in effect. In practice, this means that a short stay in Ireland (of less than 60 work days) may not result in the employee becoming liable for income tax in Ireland (so long as the employee is not on the payroll of an Irish entity).

Visits to Ireland of more than 60 work days but less than 183 calendar days trigger a requirement for the company to register for Irish payroll taxes. An exemption can be obtained by submitting an application that meets certain conditions for a PAYE Dispensation to the Revenue within 30 days of the employee’s arrival in Ireland.

Employees who have spent time in Ireland in the same 12-month period (for example, visiting family) may reach the 183-day threshold sooner than expected. Also, the full details of the conditions can differ depending on the DTT, particularly the period over which the 183-day test must be satisfied.

Implications for the Employee

If an employee becomes subject to tax in Ireland but remains tax-resident in their home country, they remain subject to income tax in their home country on their worldwide income but may be able to obtain credit for some or all the tax they pay in Ireland.

Applying for this, and navigating the various tax forms, can be a complex process so overseas employers must decide the extent to which they are willing to help employees with this.

Social Security Position

Social security is often linked to the place where work is physically carried out although there may be exceptions to this rule, for example, a bilateral social security agreement providing special rules between two countries.

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

This a complex area and tax advice should be sought in any particular circumstance, but the general principle is that for cross-border employment within the EEA and Switzerland, the position is set out in EU Regulations 883/2004 and 987/2009. These provide that a person normally employed overseas, who is posted by their employer to Ireland, can continue to be subject to the social insurance provisions of their home country provided that the anticipated duration of that work does not exceed 24 months(these employees often being referred to as "posted workers").

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

In any event, as arrangements become extended or even indefinite, employers must keep income tax and social security arrangements under continual 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 Irish system.

Permanent Establishment Risk

The mere presence of an overseas employee working in Ireland is not sufficient to create an Irish permanent establishment.

An Irish permanent establishment will only be created if either:

- The foreign entity has a fixed place of business in Ireland through which it is carrying on its business; or
- The employee is acting on behalf of the entity and has and regularly exercises an authority to conclude contracts in the name of the overseas entity while in Ireland.

The Revenue issued guidance, which was valid until 31 January 2022 clarifying that the presence of an individual in Ireland (and where relevant, in another jurisdiction) should be disregarded for corporate income tax purposes if the individual is an employee, director, service provider or agent of a company, and the individual's presence in Ireland resulted from travel restrictions related to COVID-19.

The individual and the company should maintain a record of the facts and circumstances of the bona fide presence in Ireland (or outside Ireland) for production to the Revenue if evidence that this presence resulted from COVID-related travel restrictions is requested.

If an employee is in Ireland for a short period of time, the risk of creating a permanent establishment is low since the arrangements lack the degree of permanence required. To limit the risk further, the employee should refrain from negotiating the main terms of any contracts with customers while in Ireland and should not hold themself out as having the authority to do so.

If a permanent establishment is created, the profits attributable to that permanent establishment are taxable in Ireland.

Health and Safety

The employer's obligations in respect of employee health and safety and whether these obligations can be subject to agreement between the employer and employee will be a matter of home country law and home country law advice should be sought. These obligations may differ from those in Ireland and could be more stringent, depending on the home country jurisdiction.

Depending on the duration and nature of the work in Ireland, the employee might be able to invoke certain mandatory rules of Irish health and safety legislation. See *Health and Safety* above.

Insurance

There is no requirement to have local or international health insurance when working in Ireland, unless the employee requires immigration permission to work in Ireland; most immigration permissions require employees to have health insurance cover while working in Ireland.

The question of whether the employee has access to the employer's health insurance scheme while working from Ireland will be subject to policy conditions in the home country. It is advisable for an employee to have health insurance cover while working in Ireland and where any current policy does not cover them, the employer may look to arrange alternative health insurance, or the employee may elect to obtain independent health insurance. Whether the employer is obliged to provide health insurance will depend on the home country laws and the provisions of the employment contract.

Irish law does not require employers to have employer's liability insurance in place but most employers do cover the cost of compensation for their employee's workplace injuries. The employer's home country insurance is unlikely to cover employees working outside of the jurisdiction and so a local insurance policy in Ireland may need to be obtained.

Information Security, Data Protection, and Data Privacy

As the employee will be based in the EU (that is working remotely in Ireland), the processing of the employee's personal data by the employer will be subject to the GDPR, even where the employee's employer is located outside of the EU.

The employer will need to assess if any other data protection regime applies to the processing of the employee's personal data or to any processing of personal data that may be carried out by the employee while they are working in Ireland.

If an employee's role involves processing personal data, this could give rise to data protection issues. The employer must ensure that it is not breaching any data protection laws that it may be subject to where the company is located, or any contracts with customers and third parties, by the employee processing this personal data in Ireland.

Additional technical and organisational measures may be needed to protect data while it is being processed by an employee in Ireland. This may involve, for example, ensuring that any device has the necessary updates, such as operating system updates (for example, iOS or Android) and software and antivirus updates, or ensuring any locally stored data is adequately backed up in a secure manner.

To minimise risks, employers should therefore:

- Train employees to take appropriate security measures when accessing personal data in another country.

- Include employee obligations in respect of data protection risks and reporting of data breaches in the Working in Ireland Agreement or relevant policy.
- Provide employees with regular data protection and information security training.
- Consider any increased data security risks that might apply in Ireland and take appropriate safeguard measures against them.

Intellectual Property

There is nothing in Irish law which would prevent an employer in another country owning the IP developed by one of its employees working remotely in Ireland; it would be a matter for that employer to ensure that its own employment contract and that country's laws protected it sufficiently.

In respect of the former, the employer should check that the IP provisions, and operative law clause are sufficiently robust before permission to work remotely from abroad is granted.

In respect of the latter the employer should make itself aware of any conflicting local laws. For example, it should query whether local employment or IP legislation differentiates between employee-created IP in the workplace and elsewhere.

See *Intellectual Property* above for the basic rules when protecting confidential information, which also apply to overseas workers in Ireland.

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