L&E GLOBAL
an alliance of employers' counsel worldwide

CLYDE&CO

10TH ANNIVERSARY IN 2021

CROSS-BORDER REMOTE WORK FAQS

UNITED KINGDOM

1. Assume that a foreign national employee of a foreign company wishes to work remotely for a period of time in your country performing services exclusively for the foreign company and not interacting with the local market in your country.

IS WORK AUTHORIZATION REQUIRED? IF SO, PLEASE PROVIDE A BRIEF DESCRIPTION OF THE TYPE OF VISA, PROCEDURE, PROCESSING TIME, ETC.

EU nationals have previously had the right to enter, remain in and work in the UK without a UK visa. This right ended on 31 December 2020 and EU nationals arriving in the UK after this date are subject to the same immigration requirements as non-EU nationals. Any EU nationals living and working in the UK before this date must make an application under the EU Settlement Scheme by 30 June 2021. They should register for Settled Status (if they have been in the UK for 5 continuous years) or Pre-Settled Status (if they have been in the UK for less than 5 years).

As matters stand, from 1 January 2021 in most cases non-UK nationals seeking entry into or permission to remain in the UK for the purpose of employment will need to apply under the new Sponsored Skilled Workers ("SSW") framework of the Points Based System ("PBS"), which replaces the Tier 2 (General) route.

Applications under SSW can only be sponsored by Home Office approved UK-based employers on behalf of the person they wish to employ. Employers must ensure that the role for which they are recruiting is sufficiently skilled and meets the minimum salary threshold requirement, and that anyone coming to the UK speaks English to the required standard. All applicants must also meet the new Good Character requirements which means, for example, that they do not have a custodial sentence of at least 12 months.

The previously applicable Tier 2 (General) route could lead to Indefinite Leave to Remain ("ILR") after five years' lawful residence in the UK, and the SSW will also be a route to ILR. Alternatively, UK employers can use the Tier 2 Intra Company Transfer ("ICT") route for temporary transfers of those already employed by a group company outside the UK. Tier 2 ICT visas do not lead to Indefinite Leave to Remain.

IS THERE RISK OF "PERMANENT ESTABLISHMENT" CONSEQUENCES FOR THE FOREIGN COMPANY BY VIRTUE OF THE REMOTE WORKER'S ACTIVITIES? IF SO, WHAT ARE THE MAIN FACTORS DETERMINING THE EXPOSURE.

There is a risk that the employee's activities or presence in the UK will create a permanent establishment for their employer in the UK.

Under UK law, a foreign company can become subject to UK corporation tax if:

(i) it has a fixed place of business (such as a place of management, branch, or office) through which the business of the company is carried on, or
(ii) an agent acting on behalf of the company habitually exercises authority to do business on behalf of the company.

This definition is like the OECD model treaty Article 5 definition of permanent establishment. As the definition of "permanent establishment" in UK domestic law is based on that in the OECD model treaty, HMRC states that where the wording of the UK domestic legislation is the same as that of the OECD model treaty, the OECD commentary on that wording will apply.

According to that commentary, whether a home office constitutes a location at the disposal of the enterprise will depend on the facts and circumstances of each case. In many cases, the carrying on of business activities at the home of an individual (e.g. an employee) will be so intermittent or incidental that the home will not be considered a location at the disposal of the enterprise. Where, however, a home office is used on a continuous basis for carrying on business activities for an enterprise and it is clear from the facts and circumstances that the enterprise has required the individual to use that location to carry on the enterprise's business (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise.

A remote worker could also create a permanent establishment in the UK if the worker is deemed to be a dependent agent who regularly conducts business in the UK on the company's behalf, and particularly if the worker concludes contracts with customers in the UK.

There is an exemption for activities that are preparatory or auxiliary in nature. However, sales or other customer-facing activities and management of the business would almost certainly not fall within this exemption. The benchmark to gauge the activities are those of the trade as a whole entity. So if, for example, the UK employee collects market research information and the non-resident company's main trade is concerned with market research, then the activities in the UK would not be preparatory or auxiliary and there could be a permanent establishment in the UK. This exemption has recently been tightened to exclude activities that are part of a fragmented business operation. These are activities that constitute complementary functions that are part of a cohesive business operation and the overall activity is not just of a preparatory or auxiliary character or the company has a permanent establishment in the territory because of carrying on those functions.

If a foreign company does have a permanent establishment, then the profits of the business attributable to that permanent establishment are chargeable to UK corporation tax. The profits attributable to the permanent establishment are the profits it would have made if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions, dealing wholly independently with the non-resident company.

AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES WOULD THE REMOTE WORKER BECOME SUBJECT TO LOCAL SOCIAL SECURITY AND OTHER PAYROLL REQUIREMENTS? CAN SUCH REQUIREMENTS BE FULFILLED BY A FOREIGN COMPANY, AND IF SO BY WHAT MECHANISMS?

An overseas employer could be liable for National Insurance contributions if they are resident, present or have a place of business in Great Britain. Generally, an employer is said to be resident or present if the registered office of the company is in the UK, even if no actual business is carried on there.

Place of business is not defined in social security legislation but some factors that commonly indicate a place of business include fixed premises, headed letter paper, a lease or rent agreement, delivery of supplies to the company in the UK or a UK bank account. Whether an employer satisfies the tests will be a matter of fact. It is therefore possible that an employee's home could constitute a place of business.

The remote worker could be liable for National Insurance contributions if they are resident or present or ordinarily resident in Great Britain. An individual will normally be treated as resident for these purposes if they spend 183 days or more in this country in the tax year (6 April–5 April). 'Ordinary residence' is equivalent to 'habitual' and 'normal' residence, disregarding absences, whether long or short, which are merely temporary. The maintenance of a home indicates residence in Great Britain.

If the foreign company becomes liable to National Insurance contributions, it can choose to appoint a local agent to discharge its responsibilities.

AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES DOES THE REMOTE WORKER BECOME SUBJECT TO LOCAL EMPLOYMENT LAW REQUIREMENTS SUCH AS IS WAGE-HOUR, LOCAL HOLIDAYS, ANNUAL LEAVE, MATERNITY LEAVE, DISABILITY LEAVE, PROTECTION AGAINST UNFAIR DISMISSAL, ETC.

If the employee is physically present and working in the UK for any length of time except for a fleeting visit (the test is that the employee is "ordinarily working in Great Britain"), it should be assumed that all UK standards will need to be met. As such, the employee will benefit from minimum wage, statutory holiday entitlement, health and safety, discrimination and dismissal protections. The fact that the employer does not have a formal presence in the UK is irrelevant to the employee's employment rights. The employee's presence in the UK while working for their foreign employer will likely be enough to establish territorial jurisdiction for the employee to make employment claims in the UK employment tribunals.

An employment tribunal is the forum which hears most employment related claims such as discrimination, working time, minimum wage and dismissal protection. Working in the UK is also likely to be sufficient to establish jurisdiction for the employee to bring a claim in the UK Courts. The UK courts (including the county court and high court) provide the forum in which an employee may bring a personal injury claim or a large claim (over £25,000) for breach of contract. Working in the UK may possibly enable the employee to argue that English law applies to their contract of employment.

ARE THERE SPECIAL REQUIREMENTS GOVERNING REMOTE WORK IN YOUR COUNTRY WHICH WOULD COVER THE REMOTE FOREIGN WORKER?

No, unlike most other EU Member States, there are no specific employment related rules which apply to foreign workers such as those posted from another EU Member State. So, for example, foreign workers who work remotely in the UK (such as from their home) would be entitled to the same health and safety protections as UK citizens working from home in the UK.

WHAT IS THE EMPLOYEE'S EXPOSURE TO LOCAL INCOME TAX, AND UNDER WHAT CIRCUMSTANCES IS THE FOREIGN EMPLOYER REQUIRED TO ARRANGE FOR WITHHOLDING OF INCOME TAX?

An employee who is resident in the UK in the relevant tax year will be liable to UK tax on their worldwide earnings. An employee will be resident if they are physically present in the UK for 183 days or more in a tax year. Even if they are physically present in the UK for fewer than 183 days in a tax year, it is still possible to be resident in the UK. This could be because the employee has a home in the UK or because the employee works full-time in the UK.

However, if the employee is not resident in the UK for tax purposes, there could still be a liability to UK tax on general earnings for duties performed in the UK, unless the duties are "merely incidental" to duties performed overseas. HMRC applies a strict definition so only very few activities, such as arranging meetings, giving staff feed-back and reading generic business emails are likely to be incidental.

The Pay As You Earn scheme (PAYE) is the UK mechanism for employers deducting and collecting tax from the pay of employees. The obligation to operate the PAYE system arises if the employer has a sufficient tax presence in the UK. An overseas employer does not necessarily have a tax presence in the UK simply because there are employees in the UK. However, a branch, agency or representative office in the UK, or something similar, will usually be regarded as establishing a tax presence for these purposes.

WOULD THE REMOTE WORKER BE ENTITLED TO BRING A CLAIM FOR WORKPLACE INJURY IN YOUR COUNTRY?

Potentially yes, depending on the circumstances. In the UK, employers have a duty to take reasonable care of the health and safety of their employees and to take reasonable steps to provide a safe workplace and a safe system of work. These duties also extend to employees who are working remotely, including those from abroad. The employer should carry out a risk assessment in relation to an employee who will be working remotely in the UK in order to identify risks and hazards. This should include any risks associated with working remotely. Public health advice must also be adhered to.

An employer who breaches health and safety requirements commits a criminal offence and may face a fine. Employees who suffer personal injury as a result of their employer's breach of the duty of care may bring a claim for compensation in the UK courts. In addition, employees who raise concerns about their working environment are also protected under UK law and are entitled to make a claim in the UK employment tribunal if they suffer a detriment, and/or are unfairly dismissed as a result of raising a health and safety concern.

WOULD THE REMOTE WORKER BE COVERED UNDER THE LOCAL NATIONAL HEALTHCARE SYSTEM OR INSURANCE?

The Immigration Health Surcharge (IHS) is a fee levied on the majority of UK visa applications. An annual charge of GBP 624 or in some cases GBP 470 per year, the IHS provides non-visitor migrants access to the National Health Service and medical treatment free at the point of use. The HIS is payable even for those holding Private Healthcare Insurance.

IS A FOREIGN EMPLOYER SUBJECT TO DATA PRIVACY AND SECURITY REQUIREMENTS REGARDING PROTECTION OF EMPLOYEE PERSONAL INFORMATION FOR A FOREIGN EMPLOYEE WORKING REMOTELY IN YOUR COUNTRY?

Yes. Various data protection issues may arise when an employee works remotely from overseas and where personal data is transferred between the employer and employee.

Organisations that have an establishment in the UK will need to comply with UK data protection law. The GDPR has been implement into UK data protection law as the Data Protection Act 2018 (DPA) but it needs to be read with the GDPR. In practice, there is little change in the core data protection principles, rights and obligations found in the GDPR.

For an EU based employer it will have to comply with the GDPR and any local implementation. In addition, if it has a UK establishment, it will also have to comply with the DPA.

Non-EU employers will have to comply with any of their own data privacy rules and if they have a UK establishment, they will also have to comply with the DPA. If they do not have a UK establishment they will still have to comply if the processing involves monitoring their employees' behaviour within the UK.

Employers should ensure appropriate safeguards are in place in respect of the transfer of any personal data and should ensure compliance with the GDPR and DPA where this applies.

Employees working remotely may also give rise to data security issues, such as increased risk of hacking. Organisations should consider their security measures to deal with these risks.

HAS THERE BEEN ANY LITIGATION OR SPECIFIC LAW OR REGULATION REGARDING THE FOREIGN REMOTE WORKER IN YOUR COUNTRY?

There may be regulatory or other compliance requirements to comply with in relation to certain occupations or types of work, e.g. financial services or insurance.

2. Would any of the above answers change if the remote worker (a) is a citizen of your country, or (b) engages in activity interacting with the local market.

Citizenship is not a relevant consideration for UK tax. The two principal UK concepts that determine liability of an individual to taxation are residence and domicile. If an individual is resident in the UK, but not domiciled within the UK, they may be able to use the so-called remittance basis of taxation that restricts their liability on foreign income to income brought in or "remitted" to the UK.

From the employer's perspective, if the employee is engaging with the UK market, this clearly increases the risk of creating a permanent establishment for the overseas company.

Robert Hill
Partner, **Clyde & Co**
robert.hill@clydeco.com
+44 20 7876 6214

Nick Elwell-Sutton
Partner, **Clyde & Co**
nick.elwell-sutton@clydeco.com
+44 20 7876 4940

Clyde & Co LLP
The St. Botolph Building
138 Houndsditch, London, EC3A 7AR
+44 0 20 7876 5000
www.clydeco.com

CONTACT US

For more information about L&E Global, or an initial consultation, please contact one of our member firms or our corporate office. We look forward to speaking with you.

L&E Global
Avenue Louise 221
B-1050, Brussels
Belgium
+32 2 64 32 633
www.leglobal.org

May 2021