

## Hybrid working: Working overseas - plain sailing?

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For a significant proportion of the working population, the lockdown restrictions implemented to address Covid-19 have changed the way in which work is conducted. The technology may have been in place for some years but the move to mass remote working during lockdown has created a shift in employees' expectations and employers' understanding of how we work, with some employees reluctant to return to a full-time commute/office working experience.

Many employers have implemented hybrid working arrangements - some more formally than others - and are now engaging with interesting and challenging decisions about the management of a hybrid workforce. These include how to balance office and home working and ensure a good mix of people (in terms of their seniority, role, team and need to collaborate) attend the office at the same time, while avoiding 'ghost-town' office days of very low attendance.

A natural extension of this new flexible approach is a desire by some employees to work remotely from abroad. The technology and internal infrastructure now exist to allow many people to work from wherever there is access to the internet. However, in reality, there are a number of significant barriers to free movement and working wherever an employee wants. These are not insurmountable and a number of the key areas to consider are addressed below.

The nub is that any request to work from abroad is likely to require careful consideration by the employer. It is important to distinguish between different types of request. At one end of the scale, there are so-called 'working from holiday' requests, in which an employee seeks to extend their time away on holiday by a week or two and work for a period of time while overseas. An employer may be able to have a more relaxed approach in some of these cases as the issues outlined below are less likely to arise. Many employers already allow their employees to do work while they are on annual leave, many without giving thought to any implications of this.

At the other end of the scale, there are requests to work longer term or permanently from another country - or 'digital nomads' may even ask to work while travelling from country to

country. In practice, these requests are likely to be more complex for an employer to address and it will need to consider them on a case-by-case basis.

## **‘Working from holiday’**

Serviced office space provider IWG has recently suggested that almost three in five office staff (57%) who have a hybrid working arrangement are planning to extend their holidays over the next year to work from abroad. Similar surveys also suggest that this is on the rise and it may be that employers without a formal policy discover that an employee is extending their time away and dialling in from Spain using their ‘work from home’ days. That said, an increasing number of employers are offering this as a benefit so that employees can make the most of their travel time with relatively little impact on business continuity. Indeed, in some roles it may actually assist business continuity by reducing the extent of any handover in certain situations.

There are still important points for an employer to consider. For example, some countries will not allow any form of work to be conducted when someone has entered the country as a tourist. Rather than having a situation in which employees work overseas without their employer’s express permission, a well-prepared policy is going to be a sensible approach.

### **Working from holiday policy**

Any employer considering a policy may wish to include provisions that:

- require an employee to inform the employer of the country (or countries) in which they intend to be working so that it can check whether that country poses any particular risks;
- set a limit on the number of days that may be used as working from holiday days;
- require authorisation from a manager (or the person normally responsible for approving leave);
- set out the process for requesting working from holiday days (with scope for managers to check whether any in-office work may be required on any given day);
- clarify what will happen if technology or other events prevent an employee from working during that time;
- refer to or confirm relevant provisions of the employer’s communications policy, including use of public wifi, data security and loss of property; and
- explain a request may be declined based on matters such as the type of work the employee does or the country they propose to work from.

## Longer-term working from abroad

The key areas for an employer to consider when it receives a request to work from abroad for a longer period are tax and social security payments, immigration, employment law jurisdiction and data privacy and protection.

The position on each of these will vary from country to country and the employer should seek legal and tax guidance from advisers both locally and in the UK. The issues on which the advice is being sought may not be straightforward and are likely to depend on what work the individual is performing and for how long. Accordingly, employers considering requests may wish to consider using advisers that are part of a network which can identify relevant advisers in host countries.

### Tax and social security

A UK employer may be able to employ staff overseas but will need to monitor the length of the stay and local position in the relevant host country, and in longer-term arrangements may need to operate (and pay for) local payroll services to deal with local tax and social security deductions. A UK employer will need to determine whether the employee will remain a UK tax resident, usually with reference to whether they have been based in the UK for more than 182 days in a tax year or by reference to the statutory residence test. However, even if an employee is a UK tax resident, they may still be resident in the host country under its domestic legislation. The employer will therefore need to consider the host country's position and the impact of any dual tax treaty between the UK and the host country to understand the employee's tax position.

The employer must also ascertain whether it has any registration, compliance or withholding obligations under the laws of the host country.

If the employee ceases to be a UK resident but continues to be employed by the UK employer, the employer should apply to HMRC for:

- permission to apply the 'no tax deducted' tax code (known as an NT code) (if no substantial duties are performed in the UK); or
- a direction from HMRC to determine the portion of earnings that is subject to PAYE (where substantial duties are performed in the UK).

On social security, the general rule is that social security payments arise in the country in which the employee is physically carrying out duties. However, again, the UK employer's obligations will vary depending on where the employee is working, why and for how long.

### Risk of creating a permanent establishment

Employers will need to be particularly wary of an overseas worker's activities creating a corporation tax liability in the host country. The thresholds are different in each country and the risk will also depend on the employee's role. For example, sales roles, roles involving negotiating and concluding contracts and senior managerial roles may create a greater risk of a taxable establishment being deemed to arise.

## Employment law jurisdiction

Employers will need to be wary of the employee obtaining employment rights in the host country. Even if the UK business remains as the employer and the UK contract ostensibly continues to operate, certain host countries may have rights that apply to the employee. The employee may also be deemed to acquire certain mandatory protections, for example, under the Rome Convention's rules. These rights could include minimum pay and minimum time off and could affect the employer's ability to terminate employment lawfully. Consequently, local employment law advice should be sought before dismissing an employee if they are working remotely abroad.

## Immigration and the right to work

Employers should obtain confirmation that the employee has the right to work in the host country and not simply rely on the employee's view that they do. The ease with which UK nationals could work in the EU is no more and visas may be required to work in EU member states as well as other countries. As outlined above, some countries do not allow any form of work without a visa, and this should be considered for even very short periods of overseas working.

Employers will also need to consider whether any time spent working outside the UK might affect the employee's right to work in the UK (for example if it could result in them losing their pre-settled status).

## Data privacy and protection

If the employee's role involves processing personal data, the employer will need to consider which data protection regimes apply. It will need to ensure that the employee is in a position to comply with any applicable data protection requirements, including giving thought to (among other things) any increased security risks, special category data, employee monitoring and data transfers.

## Other points to consider

These are some finer details that employers should consider when staff ask to work remotely from abroad long term, along with examples of points to think about:

- **Pensions:** can contributions be made in the same manner as in the UK?
- **Other employment benefits:** does the host country require an employer to provide insurance for healthcare, for example?
- **Insurance:** will policies cover an employee based overseas?
- **Health and safety:** does the host country have different or specific requirements compared to the UK?
- **Intellectual property:** is local advice required on whether the clauses in the UK contract will continue to protect the employer's interests?
- **Regulatory issues:** will UK regulators be satisfied with the arrangements?
- **Post-termination restrictions:** will the change in location affect the geographical limits of a restriction, and/or impact on the employer's ability to enforce the clause?
- **Discrimination:** employers will need to be mindful of the Equality Act 2010 and the scope for complaints about the handling of requests. Requests will need to be treated

consistently and as fairly as possible, with any acceptance or rejection based on assessing the relevant factors, including those outlined in this article.

## The future

There is an increased appetite to address some of the complexities involved in hybrid and distance working, with the Office for Tax Simplification (OTS) currently undertaking a review. Among the matters it intends to consider will be employees of UK companies working overseas (who are not on formal expatriate assignments) and foreign nationals carrying out distance working from the UK. However, as can be seen above, taxation is just one of many factors that an employer will need to consider.

Many new companies are established on the very premise of agility, formed out of a collective of entrepreneurs whose main difference is that they happen to be born or resident in different countries. Employers who are looking to reflect or create a very agile workforce can create appropriate contract clauses and corresponding policies for managing working from different countries, but this requires considerable commitment to reduce compliance risks. Some companies turn to 'employers of record' services, which offer the ability to employ staff overseas without the company having to confront many of the payroll, tax and other compliance issues. Such services are, however, costly and may not guard the company against all of the risks (such as permanent establishment and business protection).

It is clear from the OTS consultation that there is a desire to reflect a changing working world. However, progress can be slow and this involves collaboration with other countries. In the meantime, companies looking to embrace this form of working should be able to reduce the risks by taking a considered approach.

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