

EMPLOYMENT

COVID-19 Practical Considerations: Handling Employee Requests to Work Remotely Abroad

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In the context of the COVID-19 pandemic, employers are receiving an increasing number of requests to work remotely from abroad. We will examine some of the key considerations for employers in responding to such requests.

1. EMPLOYMENT TAX AND PAYROLL

- 1.1 Employers need to consider whether the employee's stay in another jurisdiction has the potential to create an income tax or social security liability in that jurisdiction. There is also a potential risk that an employer's presence in that jurisdiction (by virtue of the employee conducting activities there) could create a permanent establishment for tax purposes. The likelihood of this arising will, to a certain extent, depend on the nature of the employee's work.
- 1.2 Ireland may have entered into a Double Taxation Treaty with the relevant jurisdiction, which would have implications for the applicable tax regime. It is imperative that employers seek tax advice in relation to proposals for employees to work remotely from abroad.

2. DATA PROTECTION

- 2.1 The data security standards set out in the Data Protection Act 2018, the General Data Protection Regulation ("GDPR"), and the sanctions provided for under both pieces of legislation would remain applicable to the employer

where an employee requests to work abroad.

- 2.2 Article 44 of the GDPR prohibits personal data being transferred to a country or territory outside of the EEA, unless that country or territory ensures there is an adequate level of protection for the rights and freedom of data subjects in relation to the processing of personal data. This obligation needs to be considered in the context of any request made to work outside the EEA.
- 2.3 In circumstances where employees are working from the UK, the implications for the above assessment in relation to adequacy of protection of data subjects' personal data rights post-Brexit remain uncertain. This could potentially present an issue for employees who request to work remotely from the UK.

3. STATUTORY EMPLOYMENT RIGHTS

- 3.1 From an employment law perspective, Irish employment legislation is for the most part silent as to its territorial application. The test in relation to whether Irish employment law would apply to an

employee centres on the question of where that employee ordinarily works. Relevant factors in that assessment would include the applicable social insurance regime, the location of the employee's residence, where the employee carries out his or her duties, the parties' contractual choice of law, and the applicable tax regime.

- 3.2 At a European level, an employee may initiate a claim against his or her employer in the jurisdiction in which:
 - the employer has its registered office or is domiciled; or
 - (a) where the employee works, the employer has its registered office or is domiciled; or
 - (b) where the employee works.
- 3.3 One of the main risks for employers who have employees working remotely in different jurisdictions is that employees could start to benefit from applicable local mandatory employing protections. Whether such entitlements arise will depend on the relevant

national law, and there is no specific cut-off point under Irish law for employment law purposes, unlike for tax residency purposes.

4. INSURED BENEFITS

4.1 Many insurance policies will stipulate that beneficiaries must be legally resident in Ireland in order to avail of insured benefits and may preclude the employee spending a defined period outside of the jurisdiction. Such limitations are becoming increasingly prevalent in the context of COVID-19, where insurers may stipulate that certain benefits (for example, health insurance or death in service benefit) will not apply if employees are located in jurisdictions in which the rate of infection is higher than Ireland.

4.2 Where employers are faced with a request from an employee to work from another jurisdiction, it is important to advise the employee of the potential impact to insured benefits, some of which may be contractually guaranteed.

5. OTHER CONSIDERATIONS

5.1 **IT Security:** Employers will need to consider whether the employee working from a foreign jurisdiction presents risks with regard to the employer’s ability to securely transfer data to the employee. This applies both in relation to the network security of any internet connection and also to the physical workspace. To the extent that local laws apply, this may also have implications for intellectual property ownership.

5.2 **Immigration:** Employees who are working in Ireland on the basis of an employment permit will have a place of work stipulated on their employment permit. The Department of Business Enterprise and Innovation must be notified of any change to an employee’s place of work.

5.3 **Health and Safety:** An employer’s duty of care pursuant to the Safety Health and Welfare at Work Acts 2005 to 2014 continues to apply in the context of remote work. The employer must ensure, as far as is practicable, that work is carried out in a manner that safeguards employees’ safety and health. If remote working is mandated, and an employee highlights issues or shortcomings with his/her remote workplace, the employer may be obliged to remedy such issues regardless of whether they arise in Ireland or abroad.

6. RECOMMENDATION FOR EMPLOYERS

- 6.1 Where an employer agrees to an employee’s request to work remotely from abroad on a temporary basis, we recommend that a written agreement is put in place between the employer and employee, which should address:
- (a) any potential loss of insured benefits in Ireland;
 - (b) a potential deduction from the employee’s salary if the employer becomes liable for local employment tax or social insurance contributions;
 - (c) i.e. the employment relationship remains subject to Irish law from a contractual perspective; and
 - (d) the maximum time-period that the employee is permitted to remain in the relevant jurisdiction.
- 6.2 Many employers are also updating Remote Working Policies, given the dramatic increase in remote working, both nationally and internationally. Remote Working Policies should explicitly provide that remote working arrangements must be approved in advance.

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