

Home (working) & Away

Working at home from abroad—what should employers, employees & their lawyers know?

Juliet Carp identifies some of the legal pitfalls & offers some practical suggestions



IN BRIEF

- ▶ Challenges of homeworking abroad: first stop immigration.
- ▶ What should a diligent employer do? Global mobility compliance.
- ▶ Where do lawyers come in? Recognising limits.

A lot has been written about homeworking and most of it applies equally to people working 'virtually' from abroad. After all, if you are working from home via the internet does it really make a difference if your home happens to be somewhere sunnier or closer to family overseas? The short answer is 'Yes, it does!'. Extra compliance challenges and costs can be very substantial indeed. While it may make sense to address these when making a strategic decision to move into new markets, it rarely makes commercial sense for one individual who would simply prefer to be somewhere different.

Challenges

So, what are these challenges? First stop immigration, because without immigration compliance, both employee and employer (and sometimes family too) may face a host of sanctions ranging from deportation, fines and detention, through future inability to work or to hire other people in the host location.

For some, the immigration hurdle will be easy to jump, particularly if they already hold a host country passport. Let's suppose you're a French national working virtually at home in London because of the pandemic. Your tenancy expires. It makes personal sense to let your London flat go and work from your

parents' home in Paris instead—no rent, no more treading round your flatmates, a good opportunity to catch up with family and friends etc etc. There is no immigration difficulty because you already hold a French passport, you plan to just take your laptop to Paris and carry on. Your employer, however, may not be quite so relaxed.

Sophisticated employees may be lulled into a false sense of security by previous inter-continental business trips. Let's suppose you often attend conferences in California using your 'ESTA'. You've never experienced any immigration difficulty. Why not just stay a little longer and do some real work while you are there?

Or consider the more traditional problem of business visits that extend because projects take longer than expected.

The problem is that 'Business visitors' are often given immigration clearance subject to local rules—and those rules typically prohibit defined kinds of 'work'. Immigration rules may, for example, depend on your nationality, where you go or what you do. They can change rapidly and they are typically inflexible. Few employers would argue with the importance of getting immigration compliance right but they may need to keep a closer eye on evolving local requirements to achieve that.

Now let's suppose immigration compliance is easy, as it often is for EU nationals who choose to work in other jurisdictions within the EU. It's important to take on board that there's nothing special about working in another country with a computer—you *will still be working overseas*.

And this is where the employer headache begins. Freedom to work across the EU from an immigration perspective has never equated to freedom to work across the EU without complicated compliance. Cross-border rules vary widely with context and jurisdiction but typically where you work *physically* and what you *do* will have an impact on the employment, tax and social security laws that apply.

Have you thought, for example, about:

- ▶ Whether, because of your work, or your role in the organisation, extra corporation tax liabilities might arise in the host country where you choose to work?
- ▶ Whether there may be host country registration requirements eg, with labour, tax or social security inspectorates, and whether any specific documents may need to be filed in the host language?
- ▶ Whether you would be eligible to use the local public health service; whether current private health cover will 'work' abroad and whether there is any host country requirement to have some kind of minimum health insurance cover in place?
- ▶ Whether other insurance cover relating to employer's liabilities would be affected?
- ▶ Whether your chosen location is really safe? Consent to risk-taking does not usually absolve an employer from all responsibility for health and safety. How, for example, will those checks be made and how will your employer keep up to date with local rules?

- ▶ Whether your current employer can lawfully employ you in your preferred location at all (some countries don't allow an overseas employer to employ, others set minimum standards, eg a need for premises in the host country or minimum financial requirements)?
- ▶ Even if your employer is permitted to employ you in the host country, would they be better off employing you through a different, perhaps locally-registered, entity? How will they assess the cost and risk impact of the options?
- ▶ Does your employer already have staff based in the host jurisdiction and have others trodden this path before?
- ▶ Will your employer need to engage local payroll services providers and set up different banking arrangements to pay you, and how much will that cost?
- ▶ Will higher employer and employee social security charges apply?
- ▶ What about personal income tax and submission of tax returns? Is there a requirement to submit in more than one location and who will pay for the extra compliance costs? What about double taxation and would timing and early filing of applications make a difference?
- ▶ Could a decision to relocate now have an impact on remuneration that has been earned, eg earlier in the tax year?
- ▶ What if you inherit, die, divorce or have a baby while abroad?
- ▶ What about vesting shares, pension contributions, trusts etc?
- ▶ What if your employer chooses to make you redundant while you are in a different country, and possibly subject to different employment laws (which may in some cases not permit dismissal at all), and which pandemic-related support schemes apply to you, if any, while you are abroad?
- ▶ What about use of IT software or access to personal data from abroad?

The more you think about it, the longer the list of things to sort out is likely to get. The challenges are not, however, insurmountable and there are many experienced professionals who can help steer employers (and employees) through the difficulties. As you might expect, experienced professional help with complex, multi-jurisdictional issues typically comes at a price and, as a rule of thumb, it will not be worth an employer's while to pay for it where there is no good commercial reason for an individual to be working from a particular location in the first place. Even where relocation is instigated by the employer, some cost-benefit analysis will normally be completed before firm decisions to agree to relocation are made.

These detailed compliance concerns and practical challenges are not things that ordinary employees are likely to be aware of. They may feel the employer is being 'mean' in not letting them work from their preferred location. Some may also simply find themselves 'stuck' where they are, through no fault or design of their own, while they self-isolate or wait for transport to resume.

Others may simply not inform their employer when they work abroad. Often referred to by global mobility specialists as 'stealthpats' a range of techniques have been adopted for identifying them. Sometimes the employer does, in fact, know of the overseas relocation, it is just that line managers who are aware do not understand the importance of drawing the move to the attention of internal payroll, HR and other compliance teams. The costs of addressing 'stealthpat' compliance at a later stage can be eye-watering.

So, what should a diligent employer do?

First, recognise that global mobility compliance is not just for international organisations, and that it requires specialist skills. Global mobility is an issue that all HR teams and employment lawyers need to be familiar with, regardless of the size and nature of their business. Even more so, given the scale of home-working through the pandemic. A wide range of employees who may never have even thought of asking to work abroad are now assuming that this is a realistic option. However, neither employers nor lawyers have to be expert at every aspect (nobody is).

Anticipation and education can help. For example, clear business visitor policies and procedures requiring upfront approval, tracking and documentation of overseas business visits and working arrangements can be very helpful. As, of course, can training. The simple expedience of including a 'you must work in home country unless otherwise agreed' clause in employment contracts and making requirements for cooperation with record-keeping, compliance, policies etc explicit can make a huge difference, not least because employees are more likely to ask before relocating and less likely to object to the cooperation requested. When drafting, lawyers should be mindful that blanket references to remaining in the 'UK' may prove unhelpful. Specific reference to England, Wales, Scotland and NI may be better. Consideration might be given to whether home location and/or places where work is done should be restricted, also the potential impact on employees who may live in a different jurisdiction from their place of work.

While it must be best practice to discuss 'home jurisdiction' options when drafting new employment contracts, in practice most existing employment contracts don't currently deal with this issue expressly at all.

For those employers seeking to put employees on furlough, sabbatical, garden leave or similar arrangements care should be taken to clarify whether any work will be done and *where* the employee must remain. Many employers had the foresight to anticipate that it might be harder to serve notices of termination etc on homeworking employees and made appropriate virtual arrangements. This is not enough, though. The employer may also need to deal with physical whereabouts when employees are not actively working. Given most employees will be given a letter or other formal communication when new arrangements are agreed there will usually be natural opportunities to be directive.

'Frequently asked questions' documents and other less formal documents might also be used to raise awareness more generally. For examples, questions like 'Can I move or travel abroad while on [sabbatical/garden leave/furlough]?' might be answered 'Not without prior written consent from X', and an explanation might be offered, eg 'Please refer to Y and be aware that Z.'

Where do lawyers come in?

So where do lawyers come in? Well, first we must recognise our limits. Businesses managing global mobility require competent expatriate tax and international social security advice. Specialist expat tax and social security advice is not readily available in UK law firms and, in the UK, is typically offered by mid-sized and larger accountancy firms. Employment, immigration and other lawyers must work closely with those, and other, non-legal specialists, both within and without the UK, to ensure that documentation and practical advice fits. Implementation of advice from tax and other mobility specialists will often require careful questioning, drafting and risk assessment skills that lawyers are uniquely placed to offer.

Getting these things right is a team effort, and complex, but a useful first step must be to raise internal awareness of the challenges to be addressed, and to explain to employees why compliance matters to them personally. Modest changes to template contracts and business visitor policies may make a significant difference to outcomes. **NLJ**

Juliet Carp, Consultant Solicitor, Keystone Law (www.kestonelaw.com). Juliet is author of *Drafting Employment Documents for Expatriates*, published by LexisNexis and now in its second edition (<https://bit.ly/3jOXiXK>).