

What Employers Need to Know Today About Cross-Border Remote Workers

Introduction

The COVID-19 pandemic made it necessary for employees and employers to learn to work remotely and greatly accelerated a trend toward remote work as a perceived means of achieving work–life balance. Now, even as companies have been welcoming and urging employees back to the workplace, some people want to retain the flexibility to work remotely — and often from abroad. Not all employers are open to this idea, and some jobs simply cannot be performed remotely. Yet some employers have come to feel that a level of flexibility is necessary for talent retention. And, in some sectors (such as software engineering), employers see cross-border work as potentially opening a whole new talent pool from which to recruit key employees.

Some countries have welcomed cross-border work by opening their doors to location-independent workers through digital nomad visas, recognizing that such workers did not threaten their local labor markets but benefitted their economies, some of which were facing hard times due to the pandemic.

ISSUE #1 Considerations and Implications

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

Before a company allows employees to work from abroad, however, the implications for the company and employee must be considered — and there are many. To make things more complex, the rules and regulations vary from country to country and often are gray at best.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

Understanding the requirements and time frames involved is an important first step. We typically recommend an early focus on whether the employee is authorized to work in the relevant country from an immigration point of view and whether there is a risk of creating a “permanent establishment” tax exposure for the employer. These considerations can be showstoppers. However, if these obstacles can be overcome, we can then review the various employment law, social security, income tax, and operational considerations affecting the specific proposed cross-border assignment.

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Work Authorization and Visa Requirements

Many employees and managers are convinced that, as long as they have a right to be physically present in a country, they can freely carry out remote work. The reality is more complex. Although U.S. citizens are eligible to enter many countries without visas for tourism or even as business visitors who are not performing work in the local labor market, in most countries, including the United States, a visa of some kind is required, or there is a lack of clear guidance about whether a visa is required.

Among the countries requiring visas, some have recognized the economic advantage of having remote workers and offer special visas with attractive accoutrements and fairly simple application processes. The visas may come with a variety of services, including high-speed, fiber optic internet; workspaces; accommodations at various budget levels; and access to school for families. These have become known as digital nomad visas. Examples include among many others: [Barbados](#), [Bermuda](#), [Brazil](#), [Spain](#), Portugal and the UAE — places that workers might find attractive for a short-term assignment.

In other countries, however, it may be necessary to obtain a more traditional work visa. Each country has its own requirements and application procedures. Some are quite complex and might take months to complete with the assistance of a local immigration specialist or counsel. The specific timeline is important because an individual's decision to pursue remote work may have to be made well in advance to obtain the required visas and permits. Timing is particularly important when an employee plans to move from one country to another.

Permanent Establishment

There is a risk that an employer will become subject to local business taxation if it has an employee working abroad. This is called a permanent establishment. Although there are tax treaties that may prevent double taxation, a filing may still be required. Failure to recognize the company is subject to taxes and other follow-on obligations, such as registration or payroll taxes, can lead to penalties, not to mention the possibility that failure to follow the regulations and pay the relevant taxes could sully the company's reputation.

Ordinarily, a taxable presence is based on having a place of business that is generating revenue. There are other factors, however, and they vary from country to country. If an employee who is working abroad remotely has the authority to legally bind the employer by signing contracts or is exercising significant executive authority in the foreign country, there is risk of permanent establishment. Along the same lines, sales agents or consultants providing managerial services abroad might lead to a permanent establishment, depending upon how long or how often the employee is in the foreign country.

The permanent establishment analysis can be subtle and may affect the employer's global tax structure in complicated ways. It is, therefore, a good idea to rule out

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permanent establishment exposure, or at least understand the ramifications, before expending significant time and resources designing the details of a cross-border arrangement.

Local Payroll Requirements

Local payroll regulations also vary from country to country and must be specifically explored. Companies employing remote workers may become subject to local payroll taxes. If the employee has a home in the foreign country or exhibits other indicia of being a resident in the country, or if the employer has a permanent establishment in the country for corporate tax purposes, then local payroll or social security taxes are more likely to apply. In some situations, a foreign employer may not be able to register a local payroll, and the employee might be responsible for the relevant contributions. Because U.S. social security has broad coverage, even extraterritorially, employers and employees might be subject to social security payments in both countries. Tax totalization treaties can also come into play to avoid this dual taxation. Indeed, if the company has a [tax equalization program for those working abroad](#), dual social security payments could result in a substantial tax burden.

How long can a remote-working employee remain in country before local payroll requirements come into effect? There is rarely a straightforward answer to this question. It becomes a matter of risk assessment.

Local Employment Law

The employer may become responsible for adhering to local employment laws. Again, there is rarely a bright line in determining when that responsibility begins. If an employee can demonstrate work was performed abroad, and there are sufficient links to the foreign country, that country's employment laws may apply. It is often recommended that a letter of understanding be drafted with the remote worker that affirms the home country (United States or state) continues to apply to the employment during the remote work period. That choice of law, however, can be overridden in important respects in many countries if the employee can show the habitual or usual place of work was in the local jurisdiction. If the length of stay is short, the risk that local employment law applies is generally lower. In some situations, it may be necessary or advisable to enter into a local employment contract.

It is important to remember that foreign employment laws, where applicable, may provide substantially more protection to employees than in a typical "at will" situation. Local employees can be entitled to benefits such as statutory holidays and vacation; overtime; maximum work hours regulations; and protections against unfair dismissal, including damages, statutory severance, or specific notice periods prior to termination. Moreover, U.S. employment laws such as [Title VII of the Civil Rights Act and the Americans with Disabilities Act](#), the [Age Discrimination in Employment Act \(ADEA\)](#), and the [Equal Pay Act](#) may be applied to remote-working U.S. citizens extraterritorially.

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Local Income Tax

Employees may become subject to local income tax based upon indicia such as physical presence, ownership of assets, and length of stay. If an employee works remotely for 183 days or more during the tax year, that generally will lead to local tax liability, but less time with other indicia could still lead to liability. In addition, the local tax may apply to the employee's worldwide earnings and not just their local earnings. U.S. citizens, permanent residents and resident aliens must continue to file income tax in the United States even when working abroad. It is possible, however, to be eligible for the [Foreign Earned Income Exclusion](#).

Like immigration regulations, tax implications are complex. Before undertaking a remote assignment, the employer and employee must be aware of the various tax implications. They will have to assess how the employer and employee will handle any multi-jurisdictional tax filings. Who will pay for them? Will there be any grossing-up? Because of its complexity, the tax analysis should be completed by a qualified tax expert — and the employer and employee will also have to decide who will pay for those services.

Workplace Injury

U.S. workers' compensation may not cover injuries sustained abroad (outside of normal business travel), creating the possibility of a tort suit in the United States or the local country. The employer will have to consider whether it has insurance coverage for, or is willing to accept, such a risk. Some countries may allow employees to make a claim against the employer if they have been subjected to an unsafe working environment, or if while working abroad, they have raised such concerns and been dismissed.

Out-of-Country Benefit Coverage

The U.S. company's benefits may not apply to employees working remotely abroad — a matter that should be clarified and explained to the employee before the cross-border remote work begins. Depending upon the length of stay and terms of the relevant visa, employees may need to purchase the country's national health insurance or private health or travel insurance. Private health insurance (whether purchased in the United States or from a company abroad) may provide full insurance coverage, including medications, checkups, mental health care, emergency care, and even dental insurance. But there may be deductibles, co-pays, and preexisting conditions exclusions. Your company's health plan may provide reciprocal plans abroad. Travel insurance is less expensive than health insurance, but it is not the same. It is basically coverage for emergencies and accidents and meant for short-term travel.

Communications

When a worker is remote, it is important to consider how communications through different time zones will be optimized. The company may need to prioritize using asynchronous communication tools — communication tools that anticipate there will be delayed responses. A company not used to dealing with time zone issues might

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consider purchasing or upgrading tools that display calendars and work hours, facilitate project management, provide bulletin boards, allow for screen sharing and recording, and accommodate daily meetings even when the communication is not in real time.

Cybersecurity

Employers take measures to protect the security of their electronic data and communications. But are those sufficient to protect confidential information in jurisdictions where there may be particular security threats? Employers will also have to update their security policies to account for issues with remote work abroad and make sure to educate the remote workers about how to protect the company's data. It is best for remote workers to use a virtual private network with multifactor authentication. The company's IT team in the United States should continue to oversee the remote worker's computer and provide updates and security patches. Employers will also have to determine if they are covered by and adhering to local data privacy laws, including the EU's [General Data Protection Regulations](#) regarding the processing of personal data, and train their remote employees as well as their state-side IT about adherence. Minimizing personal data processing and using encryption are some first steps to consider.

Business Insurance

Companies must review their various business insurance policies to determine whether work performed abroad by a remote worker will be covered. Depending upon the position of the remote worker, a company may have to update insurance and premiums or purchase new policies for general liability, professional liability, employment practices liability, product liability, commercial property, worker's compensation, directors and officers insurance, or kidnap and ransom, among others.

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

Before agreeing to have an employee work remotely from abroad, a company must determine whether it is necessary, possible, and practicable to obtain work authorization for the employee in the foreign country and whether the risks to the company outlined above in terms of taxation, insurance coverage, local employment laws, and cybersecurity are acceptable and justified.

ISSUE #2 Adopting a Remote from Abroad Policy

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

Employers that decide they will support employees working remotely when the impetus for doing so comes from the employee and is not a business necessity should develop a

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remote-from-abroad policy that specifies who would be eligible and how responsibilities and costs will be handled.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

The policy must note that initial and continuing approval of a remote-from-abroad assignment is at the sole discretion of the employer.

What should be included in a remote from abroad policy?

The employer will need to decide which employees would be eligible to work from abroad.

- What job positions can feasibly be performed off site or in a different time zone?
- What qualifications will make an employee eligible for consideration for a remote assignment?
 - Will there be a requirement that the individual has worked for the company in the United States for a certain length of time before being considered for a remote-from-abroad assignment?
 - Will seniority come into play if more than one employee in a group would like to work from abroad?
 - What factors from an employee's reviews will be considered?
 - Should the employee have scored at a certain level on reviews?
 - Will being on a performance improvement plan eliminate the employee from consideration?
 - Has the employee demonstrated self-motivation and the ability to work autonomously?
 - Has the employee demonstrated the ability to make good use of communication and collaboration software?
 - Does the employee have written communication skills that will be necessary to work asynchronously?
 - Has the employee demonstrated adaptability?
- Will some countries be excluded from consideration because of travel advisories issued by the Department of State and the Centers for Disease Control and Prevention regarding the proposed country of travel the employer shares with the employee?

Ultimately, in making a relocation analysis, employers will have to decide and should develop a policy about who will bear the costs involved and how benefits will operate.

- Will the employer or the employee be responsible for obtaining the proper visa(s), and who will bear the cost of legal advice and application fees?
- Who will bear the cost of the move abroad, including travel and housing?
- Who will pay for necessary tax analyses and employee tax filings?
- If health or other benefits need to be purchased, who will research the options and pay for the insurance?

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- Will the employee or the employer bear the cost of legal analysis regarding local regulatory compliance?
- How will the employee be paid and in what currency?
- How will benefit plans (e.g., insurance and retirement) operate while the employee is abroad?
- Will the employee be entitled to the same holiday, vacation, and leave policies as U.S.-based employees?
- Are there other costs that need to be considered?
- Is additional business insurance required that the company would have to procure?
- Must new software be acquired?
- Is the employer taking on additional tax liability?
- Will the employer need to contract with a consultant to handle local compliance obligations?

Jackson Lewis P.C. is a member of L&E Global, an alliance of employers' counsel worldwide. For specific information about the rules and regulations in a variety of countries, please see the following: <https://leglobal.law/cross-border-remote-work-faqs/>.

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

The decision to allow employees to work remotely from abroad should not be made lightly or on an ad hoc basis. The best practice is to adopt a policy that sets out a plan for determining who will be eligible to work abroad, bear the burden of the various costs involved, and handle the necessary compliance as well as how being abroad will affect the employee's salary, benefits, and taxes.