STEPHENSON HARWOOD

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Employment – 20:20 vision

Providing clarity and insight on employment law matters

Countdown from lockdown: Where are your employees now?

During lockdown and the months that followed, employees usually based in the UK may have taken the opportunity to work remotely from an overseas location – whether to be near family, friends or simply to have a change of scenery. It's important for employers to take stock of where their employees are currently located, in particular given the "183 day" milestone outlined below.

Tuesday, 6th October 2020 will mark 183 days since the start of the tax year (which runs from the 6th of April in one year to the 5th of April the next). So, why is this significant?

The 183-day time period is crucial for tax residency purposes – if an employee is based outside the UK for less than 183 days this should not affect their tax residency, but if they exceed this time period during the tax year then the tax position becomes more complicated.

With this milestone looming, we advise UK employers to examine where their employees are currently located and we look at the various implications from an employment law, tax and immigration perspective, of employees working remotely from EEA countries.

Employment law implications

Local employment law rights: Employers should be alert to the possibility of employees working remotely from overseas acquiring local employment rights, for example in relation to holiday pay, minimum levels of pay or - importantly in the current climate – rights on termination of employment. Overseas legal rights can be complicated, and you may require local specialist advice as some countries have generous exit arrangements.

The Posted Workers Directive ("PWD") is relevant in the EEA, obliging member states to ensure that workers who are posted from one-member state to another are entitled to certain minimum rights.

Whilst the PWD was intended to focus on formal posting arrangements rather than temporary remote work, it could come into play and specialist advice should be sort where necessary.

- Are you planning on carrying out redundancy processes and will this involve employees who are currently working remotely overseas? If so, consider taking local law advice as whether any mandatory local employment rights will apply to them in the circumstances.
- Does your working from home or agile working policy cover employees working abroad? If not, consider including specific provisions or a standalone policy dealing with working remotely from abroad or limit it to working in the UK.

Temporary arrangements being extended: Arrangements which were intended to be temporary may have been extended for various reasons. For example, did employees travel abroad to work from somewhere else temporarily, but have requested to stay there because they feel it is safer than returning to the UK or because new quarantine measures have impacted their plans?

- When entering into temporary remote working arrangements are these clearly documented and comprehensive? Did the arrangements include return dates? Going forward, employers may want to consider only approving requests for short-term periods and keep these under regular review, to help avoid unintended longer-term arrangements falling into place. Also, the policy should deal with any restrictions on returning or if the employee is subjected to quarantine on their return.
- What will you do if you have employees returning from countries, which are then put on the UK quarantine list and they cannot work from home in the UK?

Health and safety obligations: UK employers have a duty to protect the health and safety of their workforce, which extends to when they are working from home (whether in this country or another). If an employee is working in another jurisdiction, they may also have to comply with any local health and safety requirements, and they may seek employer assistance (financial or otherwise) to ensure that they are able to fulfil these requirements.

- If you have employees working abroad temporarily are you aware of any local health and safety requirements? How are you ensuring that you are complying with employer health and safety duties whilst they are abroad?
- Have you introduced or updated any policies to require employees to disclose which countries they have travelled to and detailing consequences if they breach government guidance (eg breaching quarantine rules)? Have you introduced any guidance about how to deal with employees who intentionally put themselves in situations where they are at higher risk of contracting coronavirus? It's advisable to review agile working policies and sickness policies with Covid-19 in mind and to help future proof against problems that may re-occur on a second wave or future pandemic.

Tax implications

Income tax: Employees who are based outside the UK for less than 183 days in the tax year will remain UK tax resident and employers should continue to deduct income tax from their salaries under PAYE in the normal way. For those employees who exceed the 183-day limit, a more complex test must be applied to determine their tax residency. Those employees who become non-UK tax resident need only pay income tax on the earnings they receive from duties physically performed in the UK.

In addition to the UK rules (set out above) employers should consider the rules of any relevant host countries, as employees may be charged to income tax in multiple jurisdictions. Where this is the case, the UK has a number of "double tax treaties" with other jurisdictions which state that only one country has the right to tax the employee's income (to the exclusion of the other country) or that, where both countries have the right to tax the income, the employee can claim relief from double taxation.

- Are you aware of the amount of time that your employees have spent outside the UK this tax year? For those employees approaching the 183-day limit, consider taking advice on their tax residency and the effect this may have on your obligations to deduct income tax under PAYE.
- Have you considered the rules of any relevant host countries? If employees are required to pay income tax in multiple jurisdictions, consider the terms of any double tax treaties that are in place to determine whether there is still an obligation to deduct UK tax.

National Insurance contributions (NICs): Where UK employers send their employees to work temporarily in other EEA states or in Switzerland, the employees can be kept within the UK NIC regime (and therefore exempt from host state social security contributions) provided that certain conditions are met. Those employers who meet the relevant conditions must apply to HMRC for an "A1 certificate".

The rules on NICs are due to expire on 31 December 2020 (being the end of the Brexit transition period). It is unclear whether the UK and the EU will seek to replicate the scheme and so employers should continue to monitor the position where they have employees based in the EEA or Switzerland.

Immigration law implications

Employers should continue to ensure that employees have the right to work in the relevant jurisdiction where they are currently situated. There are no immigration implications for employees who have returned to their country of nationality or a country where they hold residency (with the right to work). Similarly, British nationals who are currently working in another EEA member state may continue to do so as free movement does not end until 31 December 2020.

- Do you have British nationals working abroad temporarily in an EEA member state who will continue to do so after 31 December 2020? If so, employers must ensure that their employees comply with the relevant law in the EEA member state. Most EEA member states have adopted a similar approach to the UK's EU Settlement Scheme and will require British nationals to apply for a Residence Permit in line with the Withdrawal Agreement, to continue residing and working in the given EEA Member state. The deadline to obtain the permit in most member states is 30 June 2021, however employers should note that some member states may require a worker to register at an earlier date.
- Have you considered the potential issues of non-British/non-EEA nationals currently working remotely in EEA member states? It is essential to identify the definition of "working" within the

relevant EEA member states immigration rules, to ensure that an employee is not working illegally.

Working in the UK as a visitor is prohibited, however the UK Immigration rules allow visitors to undertake limited business activity. Anything outside the scope of the permitted activities will be considered unlawful.

- Have you considered the relevant immigration rules of the relevant EEA member state your employees are currently working remotely from? EEA member states have similar rules to the UK; therefore employers should ensure that if an employee's work is outside the scope of the permitted business activities, they seek to apply for appropriate work visas for their employees if necessary.

Illegal working has consequences for both an employer and the employee. This may include penalties, civil and criminal liability and reputational implications for employers.

Additional immigration considerations:

- Do you have Tier 2 Migrants who are currently working remotely in another EEA member state? If so, is it essential to ensure that they have the right to work in the relevant jurisdiction and as a Tier 2 sponsor, employers must ensure that they can still comply with their Tier 2 sponsor duties. This will include employers maintaining a record of the Migrant's current location and ensuring that they have adequate measures in place to track migrant activity.
- Employers should also keep a record of the Migrant's absences from the UK during this time and consider the implications this may have on the Migrant's application for indefinite leave to remain.

If you have any questions arising from any issues in this alert, please contact the authors below or your usual Stephenson Harwood contact.

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