
THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL

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Employer Considerations for International Remote Work Requests

Nazanin Afshar*

In this article, the author explains what employers should consider when employees request cross-border remote status.

As we emerge from the prolonged COVID-19 pandemic, many employers are grappling with questions regarding whether and to what extent they should require employees to return to the office. Many employees want to continue working remotely at an international location—either on a long-term or permanent basis. An increasing number of employers are considering and granting these requests and transitioning their employees toward cross-border remote status. But is it the right choice for your organization?

Employers' Considerations

When considering whether to grant an employee's request to work remotely, employers must understand the breadth and scope of what they are being asked to do, what their options are, and the pros and cons of those options. From a high-level perspective, some questions employers must consider include:

- Which jurisdiction's employment law applies?
- How are the pay or payroll-related logistics going to be structured and managed?
- Are there any immigration issues that need to be addressed by the company?
- How can we ensure the organization is complying with applicable tax laws?
 - What income taxes are owed?
 - Are we purposely or inadvertently creating a "Permanent Establishment"?

- What expenses, if any, need to be reimbursed and should that be structured?
- What benefits and insurance will we provide and how will those be administered?
- Are there any applicable health and safety rules we need to enforce or abide by?
- Are there any government agencies with which we need to register?
- What are works councils, and does the company need to establish one?
- How do we manage the employees' performance and which, if any, monitoring tools may we use?
- What is the social and political climate in the location where the employee wishes to work?

As a company's global footprint expands, the complexity only increases.

Indeed, since the COVID-19 pandemic, countries around the world have been enacting new legislation or adopting new frameworks governing remote work, hybrid or flexible work schedules, telework or telecommuting, and other similar concepts to keep up with these trends and stay competitive in the global economy. For example, some countries have made it easier for foreigners to stay and work remotely, such as the Extended Stay Visa in the Bahamas and the Remote Workers' Visa in Costa Rica. Other countries¹ have enacted new legislation that governs a variety of topics in this space, including how remote work agreements are to be memorialized, what terms those agreements need to include, how certain employees need to be paid, whether employees are entitled to "disconnect," which governmental and quasi-governmental entities need to be notified of these agreements, what expenses must or can be reimbursed, and so forth.

So, with such a complex web of issues to navigate, why should an organization permit remote work at all?

What Are the Benefits of Permitting Some Form of Remote Work?

From a risk and compliance perspective, permitting employees to work remotely, especially internationally, can seem like more

trouble than it is worth. However, variations on the traditional concept of the workplace are the new normal, and some market research suggests that employees prefer and even demand some flexibility to work remotely at least part of the time. At least one study showed that companies requiring their employees to return to work were more likely to lose top talent and suffer higher rates of attrition.²

There may be practical benefits to permitting some form of remote work as well. For example, remote work can potentially increase workforce participation (including those who might not otherwise be able to work due to family or other constraints), increase productivity, flexibility, and employee satisfaction, and reduce commuting time and exposure to related perils, such as traffic accidents and pollution.

What Are the Different Types of Remote Work and What Do They Mean?

Telework or telecommuting. Remote work. Flexible work arrangements. The definitions of these terms, as well as whether they can be used interchangeably, vary from jurisdiction to jurisdiction. In general, the following definitions apply:

- A flexible work arrangement is a more general term whereby a company can agree to relax rules or otherwise provide flexibility in the workplace to employees. It is not only limited to the place of work and can include, by way of example, casual dress days, flexible scheduling of workdays, work shift start/end times, or other parameters, or optional telecommuting on an ad hoc or set schedule basis.
- Telecommuting is a type of flexible working arrangement whereby the company agrees that individuals may work outside of a company's traditional office or workspace, and instead work at their home or other location. These employees use technology to conduct work and to communicate with their managers and co-workers. This can also be referred to as "remote work" and, if done at home, could also be referred to as "work from home" or "WFH."
- Hybrid work is another type of flexible working arrangement where employees work one part of their schedule

(i.e., one or more days per week) in the company's physical workspace and the other part remotely, either at their home or another location. The employer and employee can agree in advance which days will be in office versus at home, or the employer can permit the employee the freedom to choose.

Although there is some overlap in these definitions, there are instances where it is important to be specific and clear on what the arrangement is so that all involved can determine what rules apply. For example, a January 2021 reform to the Federal Labor Law in Mexico applied to workers who perform paid work at least 40 percent of the time outside the workplace. New remote working legislation in Spain, also enacted in 2021, applied to "regular" remote workers, defined as those who perform at least 30 percent of their total hours remotely over any three-month period. In Colombia, "telework," "work from home," and "remote work" are distinct terms that are regulated by different laws.

Restrictions

In the traditional workplace, monitoring and managing employee performance is not without its difficulties in terms of interpersonal relationships, workplace morale, and other factors. In the context of remote or other non-traditional work relationships, there are other issues to consider—some of which only became apparent in recent years.

One example of this is workplace monitoring, including keeping track of employees' calls or messages, activity-tracking software, and audio or video monitoring or recording. As remote work has become more prevalent, so has the use of technology as a tool for employers to observe their employees' productivity. In some jurisdictions, such technologies if used improperly can run afoul of existing laws, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. And employers can run risks if they try to apply a one-size-fits-all approach to all employees regardless of where those employees are located, or if those policies go beyond employees' reasonable expectations. For example, in early 2023, a Dutch court ordered an American company to pay approximately €75,000 after the company terminated

the employee, a Dutch citizen, for refusing to keep his camera on all day in violation of his fundamental right to a private life.³

Another issue is the employee's right to disconnect, which refers to legislation that allows workers to establish a boundary between work and home life and not receive or answer any work-related emails, calls, or messages outside of normal working hours. France was the first European country to introduce legislation on this topic back in 2017. Since then, several other countries in Europe (including Belgium, Ireland, Italy, and Portugal) and in the Western hemisphere (including Argentina, Chile, Ecuador, and Mexico) have enacted similar laws and policies.

Logistics

An employer's obligation to reimburse remote workers' expenses not only depends on the laws of the country or state in which you are located but also may depend on the country or state that the remote employee is living and working in. This is especially true if the country or state is different than your location. Generally, the laws of the country or state where the employee performs services will apply to the employment relationship. The longer the employee works from another country or state, the more likely the local law will apply.

As with other topics mentioned in this article, knowing the location of the employees is incredibly important because the laws can vary greatly.

For example, some countries, such as Australia, Canada, India, and the United Kingdom, impose no legal obligation on employers to reimburse employees for expenses that the employees incur while working remotely.

By contrast, many other countries, such as Brazil, China, Italy, and Spain, impose a general requirement that employers must reimburse employees for any business expenses, which include equipment employees need in order to work remotely, such as computers and desks. There are a few countries, such as Colombia, the Czech Republic, France, and Mexico, that require employers to reimburse employees for all remote work expenses, including a proportionate share of the employees' utilities costs.

Or consider Japan, New Zealand, or South Africa, where there is no explicit statute requiring employers to reimburse employees

for remote work expenses, but reimbursements are highly recommended to avoid claims of discrimination or claims based on negative changes in working conditions.

Conclusion

As the world of COVID-19 changed all of our lives, the world of work continues to evolve, and it is evolving at a pace far quicker than laws around the world can keep up with. Employers would do well to understand that while technology, philosophy, convenience, and economics all point to the changing work environment that allows employees to “work from anywhere,” care must still be taken to ensure legal compliance. The concerns laid out above should not be an afterthought. Before permitting employees to work remotely at an international location—either on a long-term or permanent basis—a careful review of compliance obligations should be undertaken.

What Can Employers Do to Be Ready When Remote Work Requests Come In? An 11-Step Response Strategy

1. *Be ready.* Have a checklist of questions to ask in the event an employee makes such a request.
2. *Budget sufficient time.* Do not rush into any decisions and be sure to give yourself and/or company management adequate time to review the issues, to work with stakeholders and counsel on a plan of action, and to implement any necessary steps prior to granting the employee’s request.
3. *Information finding.* Take time to understand the organization’s legal obligations in the different states, countries, or other areas where the employee works or requests to work. It is incredibly important to identify the locations so you can identify the specific laws in each of those places as it pertains to employment, immigration, taxes, data privacy, and all of the other considerations noted in this article.

4. *Determine the company's financial commitment and risk appetite.* Familiarize yourself or your organization's leadership with these concepts and discuss what the organization is willing to do in general.
5. *Negotiate terms with the employee.* Work with the employee to understand what they are looking for and document communications to keep a record of what has been discussed, including what concepts or terms have been considered and rejected.
6. *Formalize agreements.* In virtually all jurisdictions outside the United States, an employment arrangement must or should be memorialized in an agreement signed by the employee and an authorized agent of the employer. Make sure these agreements contain all necessary terms, especially including any terms pertaining to flexible work arrangements, performance metrics or expectations, compensation and benefits, and so forth.
7. *Establish support structure (e.g., incorporation, local service providers, etc.).* Get to know the jurisdiction you will be operating in and what you will need to have employees there, including whether your company needs to register or incorporate locally, whether you should engage a local employer of record, local payroll company or tax advisor, and any other support systems. Work with counsel to ensure you have not missed anything.
8. *Have policies in place.* Your home country handbook is probably not sufficient to cover all contingencies, especially if you are expanding your operations overseas. If you need policy documents, internal work regulations, or similar documents to establish and maintain control over your organization's operations in other locations, work with your counsel to determine what you need and how best to implement it.
9. *Report to government agencies where required.* In some locations, the employer is required to pay for social insurance on its employees' behalf. In other locations, the employer must register with the local

workers' compensation and workplace safety agencies. Be sure to identify and comply with all such requirements, particularly where non-compliance can result in fines or penalties, public censure, or other negative consequences.

10. *Periodic compliance check and audit.* Employee handbooks should be reviewed and/or updated every year to ensure compliance with legislative and other changes. The same concept applies to your organization's global operations and the parameters thereof.
11. *Set reminders to review the arrangement on key dates.* Incorporate a reservation of rights into your policies or employment agreements that will enable you to review your situation and make changes as needed.

Notes

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1. The growing list of jurisdictions with new remote working legislation since 2019 includes Angola, Argentina, Belgium, Brazil, Chile, Colombia, Denmark, Greece, Italy, Luxembourg, Mauritius, Mexico, Norway, Peru, Philippines, Portugal, Russia, Slovakia, Spain, Sweden, Taiwan, Turkey, and Ukraine.

2. "Returning for Good" Report by Unispace, 2023.

3. Nazanin Afshar & Sophia Ellis, "U.S. Company's Mandatory Video Surveillance Violated Dutch Remote Workers' Fundamental Right to a Private Life," Feb. 10, 2023.