



International Remote Working: What Employers Need to Know Before Saying “Yes”

Insights

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Because of the prolonged COVID-related travel restrictions, an increasing number of employers are receiving requests from their employees to work remotely, sometimes from another state or even another country. It is not just a question of whether an employee’s work can be performed remotely. Before saying “yes,” an employer must consider the legal and tax implications of such an arrangement. This article outlines issues employers should consider when an employee is expected to temporarily work from another state or a foreign country.

Risks for Employers

The potential application of local law is a significant risk of agreeing to let an employee work from out of the state or out of the country. As a general rule, the laws of the state or country where the employee actually performs services apply to the employment relationship. The longer the employee works from another state or country, the more likely the local law will apply.

The employment laws in many countries are more employee-friendly than in the U.S. and can significantly curtail the employer’s freedom to terminate an employment relationship. For example, an employer may be subject to lengthy termination notice requirements and hefty severance payments. In some jurisdictions, such as China, Mexico, and the UK, an employer cannot terminate an employee without statutory just cause if the employee has been with the organization for a certain period. Wrongful dismissal penalties and even court-ordered reinstatement are possible.

Most jurisdiction outside of the U.S. have minimum paid time off requirements. Many European countries require at least 20 days, whereas, in Asia, the PTO requirements are often tied to an employee’s years of service with a company. The definition of overtime-exempt employees can also vary greatly as many countries impose strict time-off requirements on employees that would be safely considered “exempt” in the U.S.

If the laws of a foreign jurisdiction apply, an employer would be expected to contribute to the employee’s social benefits and insurance accounts in accordance with local legislation at the employee’s location. In addition to complying with foreign payroll tax legislation, an employer must also think about whether having one or more employees stationed abroad on a long-term basis makes their organization’s income taxable in that location under the applicable “permanent establishment” rules.

Immigration

Immigration law is different in each country but generally speaking, tourist or short-term business visas do not allow the visa holders to perform work in that jurisdiction on an ongoing basis on behalf of a foreign employer. Therefore, an employer considering a foreign remote working arrangement must ensure that the employees obtain the appropriate visas and work and resident permits before they start working in a foreign country. If an employee is a non-U.S. national holding an H1B or L visa, the employer should also confirm the potential impact the remote working arrangement may have on the employee's U.S. immigration status, as the validity of such visas may be affected depending on the duration of the employee's stay abroad and several other factors.

Should Employers Permit Remote Working from a Foreign Country?

Although having cross-border or cross-state remote working arrangements can be challenging, whether to allow it is ultimately a business decision that each employer must make. A number of factors may influence the employer's decision, such as the company culture, the organization's risk tolerance, and an employee's individual circumstances (e.g., the employee has a spouse working abroad or an elderly family member to take care of.)

If an employer decides to allow a remote working from abroad, it should follow the following steps:

1. *Confirm the employee's citizenship and immigration status* to understand what kind of arrangements need to be made for the employee to work legally in the foreign country and be able to return to the U.S.
2. *Confirm whether the employer's workers' compensation and group health insurance would cover an employee outside of the U.S. if the employee were to be abroad for several months or longer.* If, as is often the case, the domestic policies do not cover employees' foreign activities, the employer needs to find alternative solutions, such as obtaining local and travel insurance.
3. *Check the language of the employer-sponsored benefit plan to ensure continued contributions in the U.S. are possible.* Employers may be willing to continue to pay the employee and contribute to her benefits plans in the U.S. while she works abroad, but certain plans may not permit that.
4. *Prepare a letter agreement to clarify the parties' expectations.* Although the parties generally cannot opt out of the application of foreign employment and tax laws, there are certain measures an employer can take to mitigate the risks of having employees temporarily working from another state or country. For example, an agreement can be put in place to outline the details, including:
 1. The time limit of the remote working arrangement. The employer will have an easier time showing the temporary nature of an arrangement if the period is limited to a very short term.
 2. Which country's holidays the employee is eligible for, how their working hours are managed.
 3. Any changes to the employee's job duties, compensations, and benefits.
 4. Who will cover the insurance cost and travel expenses.

Employers may also want to include specific language to require U.S. law and the home office's policies to continuously apply. Some even have employees agree to waive their rights under local employment law and indemnify the employer for potential damages arising out of the arrangement. Although such provisions may deter the employees from bringing a claim, they are unlikely to be enforceable if challenged before a foreign court.

Employers should keep these risks in mind when deciding whether to allow cross-state or cross-border remote work. If the remote working arrangement is expected to last for longer than a very limited period, the employer should consult with counsel to comply with local laws.

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