

**JUNE 29, 2021**

For more information,
contact:

Jules Quinn

+44 20 7551 2135

jmquinn@kslaw.com

Marie Hoolihan

+44 20 7551 7587

mhoolihan@kslaw.com

Daniel Friel

+44 20 7551 2110

dfriel@kslaw.com

Robert Dedman

+44 20 7551 7552

rdedman@kslaw.com

Kim Roberts

+44 20 7551 2133

kroberts@kslaw.com

King & Spalding

London

LLP

125 Old Broad Street

London EC2N 1AR

Tel: +44 20 7551 7500

Employees Working Abroad

What are the legal issues for employers to consider?

During the pandemic, many employers have been dealing with requests from employees to work abroad. With the move to remote working, employees have asked to work from “home” in an overseas country – either because of family, holiday homes or because it better suits their personal circumstances. The option to combine work and holiday is also an appealing one, with an extended stay abroad providing a much needed change of scenery after a long winter in lockdown. With the future looking more flexible, these cross-border working requests are likely to continue beyond the pandemic. In this month’s alert we consider the potential legal issues under English law for employers in respect of (ordinarily) UK-based employees working abroad, as well as employees who have been working for an overseas employer in the UK.

LOCAL EMPLOYMENT RIGHTS – CAN EMPLOYEES CHERRY PICK?

Employees may acquire local employment law rights if they work abroad, even only temporarily. For example, protections from unfair dismissal, annual leave and family leave. These rights vary from country to country and may entitle the employee to more generous rights than those provided in their employment contract.

The test for acquiring UK employment rights is whether the employee has established a sufficiently strong connection with Great Britain and its employment laws. This is a question of fact and degree, and all of the circumstances must be considered.

In a recent Employment Appeal Tribunal case issued last month involving a global private equity firm, the EAT considered the applicability of UK employment laws to an employee of the US entity (on a US employment contract) who had been working in the UK for approximately 18 months. The claimant had initially been posted to the London office on a six-month rotation as part of an international Associate Program. The claimant’s US visa had expired and she had been allowed to remain in the UK so that she could obtain long-term immigration status here. The claimant continued to be paid in US dollars to her US bank account and was at all



times subject to US tax. She had also become eligible for UK income taxes due to spending more than 183 days in the UK. For regulatory reasons, the claimant could no longer work for US clients and had become integrated into the London office.

The tribunal found that, during the course of the claimant's time in London, she had established a sufficiently strong connection to acquire UK employment rights. The claimant was now working and living in the UK, and her US address was no longer her regular or intended place of abode. The tribunal noted that the claimant did not fall within the reach of UK employment laws immediately upon her move to London but that the relationship had evolved over time. On appeal, the EAT held that the tribunal should have clarified exactly when it believed that the claimant established a sufficient connection. The case has been remitted to the tribunal to make a finding on this point.

Although this case does not relate to overseas working during the pandemic, it is a timely reminder of the risk of an employee acquiring local employment rights while working in other jurisdictions. UK employers should also be aware that, if an employee transfers to them from an associated overseas entity, the UK entity will need to recognise their employment as continuous unless there is a sufficient break in service.

Whether a UK employee working abroad will obtain local employment protections will depend on the country that the employee is working from. Generally, the longer the employee spends overseas, the greater the risk of them acquiring local rights.

INCOME TAX AND SOCIAL SECURITY

It is important for employers and employees to be aware of the tax implications created by remote working arrangements. These include but are not limited to:

- **Length of stay in/out of the UK:** Complying with 'days of residence' requirements and ensuring that the employee's period of working in the other location does not cause them to become a tax resident there (note here in the UK, for example, recent situations where employees have been unable to comply with local tax residence requirements due to COVID related travel bans and quarantine restrictions).
- **Dual payroll reporting:** The employer will need to consider their payroll reporting and tax withholding requirements in the UK/the overseas country where an employee is remote working.
- **Tax costs:** Potential increased UK/non-UK tax and social security costs, for example, from paying taxes in two locations in respect of the same pay.
- **Cost of remote working:** Typical costs incurred in an employee working remotely may include: (i) accommodation/costs of living allowances, (ii) travel costs (iii) health and other insurances (iv) visas and work permit costs, and (v) tax equalisations costs. From a UK tax perspective, for example, certain remote working expenses incurred by employees (subject to certain limits) are either UK tax deductible or tax exempt (for example, electricity, heating, broadband and certain home office equipment). Most are subject to tax compliance obligations. Employee travel expenses to a remote workplace can sometimes be claimed.
- **Social security:** These rules are usually different to tax rules and are determined by local country rules (for example, access to local free health care). Advice should always be sought to minimise issues for the employer and employee.
- **Permanent establishment:** In limited cases, an employee can create permanent establishment issues for an employer when working remotely in a different jurisdiction if they use a 'home' office there for six months or more and/or they have the right to negotiate and conclude contracts there (and exercise those rights).



IMMIGRATION IMPLICATIONS

The immigration and visa requirements for the relevant country should also be ascertained to ensure employees do not require any special permissions to work there. Following Brexit, British citizens no longer automatically have the right to work in the EEA and a work visa may need to be obtained from the host country.

If the employee is not a British national, a prolonged absence from the UK may jeopardise their ability to work in the UK or eligibility to apply for Indefinite Leave to Remain or British citizenship in future. If the employee is sponsored by you, there may be added complexities or requirements to notify the Home Office of any changes in the sponsored employee's circumstances.

REGULATORY ISSUES

Employers providing regulated services will also need to consider any applicable regulatory requirements in the UK or the overseas country the employee is working from. Does the employee need regulatory approval or are they required to register themselves with an overseas regulator to carry out their role? Does the firm itself need a licence or to register? These can be complex questions and local advice may be required.

For financial service firms, the FCA has made it clear that employees working from home should be subject to the same standard of surveillance as staff working in the office. Firms will need to consider whether they have sufficient oversight of employees working abroad and whether the firm is appropriately satisfying its regulatory obligations (including the requirements on information security and recording of voice calls to prevent market abuse). While the senior managers regime can and does extend to overseas roles, if a UK senior manager with executive responsibility is working abroad on a prolonged basis the regulator will want to understand what impact this is likely to have both on the firm's control environment, and on the individual's ability to discharge their own regulatory responsibilities. This will be particularly important in relation to the executive's obligation to maintain appropriate oversight and control of the area of the firm for which they are responsible, and regulators have traditionally needed convincing of a senior manager's ability to meet those obligations when based permanently overseas. If a senior manager's role or responsibilities change as a result of working abroad, this should be reflected in their statement of responsibilities and, if applicable, the firm's responsibilities map.

DATA PROTECTION AND SECURITY

When employees work outside of their home location, data security risks must be considered and mitigated. Procedures on accessing works systems only via secure VPNs apply equally outside of the home working location, and adherence to them should be reinforced via training and awareness. In addition, accessing data hosted in the home location from abroad and sending data to and from the home location to overseas work locations, may amount to data transfers which are outside of the normal course of business and may not be covered by existing data maps, data records and intra group data transfer agreements. When employees work outside of their home location, the data flows and inherent risks relevant to that location should be assessed and mitigated. In addition, any new data flows should be documented in processing records and relevant agreements.

HEALTH AND SAFETY

UK employers have a general duty to take steps that are "reasonably practicable" to ensure the health, safety and welfare of their employees. This duty extends to employees working from home, regardless of the location. Employees working abroad should ideally complete a homeworking risk assessment so that risks can be identified and minimised. With so many employees working remotely, employers should update their health and safety policies to deal with remote working. Employers should also consider whether any local health and safety laws apply.



PRACTICAL STEPS FOR EMPLOYERS

Over the past year, we have seen a major cultural shift when it comes to the location from which work is done. Many employees no longer have one base or one office and some employers have taken the view that, for some roles, it really does not matter where an employee is based. However, employers should be alive to the above issues and minimise these risks as much as possible. No employer wants to incur the unexpected wrath of an overseas regulator or tax authority for being too accommodating. On the other hand, an overly cautious “blanket no” approach could create resentment from employees.

The following are some practical steps to help employers avoid the traps:

- Ensure employees know that they need approval before working abroad so that the above issues can be considered, with appropriate steps taken to mitigate any identified risks.
- Review your policies for remote working and health and safety to consider if they should include additional sections to deal with working abroad.
- Consider developing a short policy for dealing with requests to work abroad which sets out factors relevant to the employer’s decision. Some employers are developing an application form which shows that the employee has considered the above issues.
- Each request should be considered on a case by case basis on its merits. However, requests should be treated consistently and fairly. An inconsistent approach without justification may lead to complaints of discrimination.
- Consider the implications of different time zones and what might be tolerable for both employer and employee. Are any adjustments to working hours required?
- Where remote working arrangements are agreed, these should be recovered in a side letter. The letter should record any changes to terms and conditions, state the duration of the arrangement and confirm which laws will apply.
- Review the employee’s benefits (for example, pensions or private medical insurance). If it will not be possible for certain benefits to continue, consider the contractual implications and whether any changes will be needed during the period of remote work.
- Maintain a record of employees who are working overseas, including relevant dates. Diarise key tax milestones, review their payroll/expenses entitlements and approve their remote activities.
- If tax is a key concern, employers and employees may wish to limit remote working duration to avoid potential tax costs. Alternatively, employers could consider requesting an indemnity in respect of any tax liabilities incurred by the employer as a result of agreeing to the request. The side letter could include wording to allow the company to make deductions from the employee’s pay for this purpose.
- Check whether the terms of your employer’s liability insurance covers working abroad.
- Ensure IT systems and remote access VPNs can deal with the increased data security risks. Consider practical issues such as whether the employee can still access technical assistance abroad in the event of an IT issue.
- Seek local advice where appropriate, particularly for long term arrangements, which have greater potential risks for employers.



ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 22 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments and is only relevant to English law. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
ATLANTA	CHICAGO	GENEVA	MOSCOW	RIYADH	TOKYO
AUSTIN	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
BRUSSELS	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	
