

Getting To Grips With Global Immobility - International Home Workers & Other Considerations For Now And In The Future

As a result of COVID-19/Coronavirus travel restrictions, employees are now working from home under a variety of arrangements around the globe. This article looks at some of the international employment tax, social security and corporate tax considerations of employees' varied working from home arrangements due to the COVID-19 crisis. It also starts to consider wider changes arising as a result of the impact of the virus.

Managing international staff through the COVID-19 crisis has been, and will be, increasingly demanding: in many cases physical assignments have not and will not happen, have been delayed or postponed and redundancies may increase. Here are some important issues to consider:

- If assignees needed to stay in the UK or came back to the UK because of the virus, they will need to consider the impact on their UK residence days under the Statutory Residence Test (SRT) and various concessionary relaxations
- As well as non-UK tax residence issues similarly arising where individuals remained in a country as a result of COVID-19, this could also affect their eligibility for expatriate tax concessions, social security and withholding taxes on earnings. It could trigger unexpected personal tax liabilities and potentially have an impact on the tax status of the employer
- Many staff with international roles have returned home so are working from a single location: those with cross-border 'commuter' jobs may be working remotely from their home jurisdiction. A number of countries have introduced concessions to their usual rules. However, without an official, multi-country relaxation of tax and social security rules, there will be tax impacts for both the employee and employer to manage
- The Organisation for Economic Cooperation and Development (OECD) did release guidance on 3 April, 2020, relating

to Employment tax obligations – the OECD stated that they were 'working with countries to mitigate the unplanned tax implications and potential new burdens arising due to effects of the COVID-19 crisis'. As their comments were made in the section of their guidance that related to employment income, it gave the message that it wished to discourage tax authorities from taxing employment income where there was an 'involuntary and temporary change of the place where employment is performed'. Despite the guidance issued by the OECD they cannot compel tax authorities to issue more broad ranging relaxations of their domestic tax rules and some jurisdictions may feel that they are disadvantaging their fiscal position if they issue wider concessions but other jurisdictions do not

- Of course, all jurisdictions still expect all relevant tax returns and filings to be made and, as of yet, only certain deadlines have been moved.

It is vital for employers to have a strategy for dealing with their international employees and to ensure that all issues are thought through before final action is taken, otherwise unintended consequences and costs will arise.

“Local” Staff Working From Home Overseas

This category applies either to individuals that were in their home countries when travel restrictions commenced, or who repatriated to be with their families before the travel restriction applied.

Needless to say, the first thing an employer needed to do was to check that the individual was safe and able to access health care in their home country should the need arise (e.g., if they are in the EU, will their EHIC (European Health Insurance Card) suffice?). Did private medical insurance cover their new circumstances? Once the employer had been able to establish the position and confirmed the employee's ability to work remotely, then from a tax perspective the employer was generally advised to indicate that the individual could work temporarily

from home until health concerns were alleviated and restrictions to travel back to their normal country of work were lifted.

It is anticipated that, while many individuals may have found it a struggle living under lockdown, there will be a number that realise that they can work just as well remotely, and they may wish to have future conversations about working at home from abroad. In these scenarios, we would recommend considering the costs and implications in detail once the lockdown has finished and before confirming employer acceptance of the position.

Tax And Social Security Implications

So what could be the tax and social security consequences of this temporary working arrangement? The important consideration here is that the arrangement is temporary and of unknown duration. Seeking some tax guidance is sensible, but an employer should be looking for overview and pragmatic guidance, not extensive guidance in every case unless they have a number of people in that location.

Many tax authorities have issued guidance. France, Luxembourg and Belgium have introduced concessions for cross-border workers for income tax purposes. These mean that days working in the individual's home country due to COVID-19 will not count towards day count limits normally used to establish if a tax liability on employment income arises in the home country.

While there has been limited guidance at EU Commission level, the Belgian and German governments for example have announced that for periods during which a worker normally contributing to the social security of another member state has spent in their territory due to Covid-19, these temporary periods will not be taken into account in determining whether there should be a social security liability in their state. It will be interesting to see if all other EU member states follow suit.

The key to many of these measures is that they are based on the understanding that the individuals will return to their normal place of work when restrictive measures cease to apply.

From an employer perspective, when an individual is working from home in another jurisdiction there can, depending on the jurisdiction, be obligations for the company to register as a foreign company to pay withholding tax in that territory. Here, we would say in general terms that this could be a premature step – purely from a practical, pragmatic basis. The individual may have returned to their normal workplace before a registration is complete, new tax measures may be released in due course to relax an obligation, and for this temporary period of international crisis, many territories would not be looking to enforce that a payroll needs to be registered.

If circumstances have meant that a home working arrangement is to go beyond two to three months, this approach may need a re-think.

Not having tax withheld in the country does not mean that income tax will not be due, and employers are advised to communicate to employees that they will be responsible for settling any personal tax obligations arising from their temporary working arrangement overseas.

From a corporate tax perspective, and this applies to the home worker categories below as well, this is more likely to be an issue where the business has key decision makers working in other jurisdictions, and it could be preferable if someone other than that employee is signing off on legal agreements. While potentially a challenge in the current environment, employers would certainly wish to seek specialist advice if the employee is pursuing business opportunities in their home country.

Equally, businesses would be advised to take specialist guidance if there are individuals whose role normally requires them to travel to attend board meetings and take key corporate decisions overseas who are now not able to travel to fulfil these commitments in the overseas territory. The Irish tax authorities have announced they will disregard, for corporation tax purposes, an individual's presence in Ireland due to COVID-19 travel restrictions, for a company for which that individual is an employee or director. Again, do review similar relaxations issued by other tax authorities.

OECD guidance issued in April, also addressed the tax implications of the COVID-19 emergency on cross-border workers with regard to the question of Permanent Establishment (PE) of organisations/Corporate tax residency. They indicated that they would not expect the temporary nature of employees being 'displaced' to other jurisdictions and the absence of this being driven by commercial intent, to mean that organisations would trigger new PE's overseas or change their corporate tax residency. They commended the Irish tax authorities for being clear in their guidance on this.

International Assignees "Brought" Home

This category covers individuals somewhere on the spectrum between the company wishing to bring them back to their home country due to a duty of care, and the company accommodating the employee's request to return home to be with partners/family.

The UK tax authorities have issued guidance that for tax residency purposes, it is possible to disregard days of presence in the UK if you "are asked by your employer to return to the UK temporarily as a result of the virus". If an employee is to rely on this for their days of presence not to be counted, one can expect that HM Revenue & Customs (HMRC) could ask to see evidence that the company requested the employee's return to the UK. The same concession applies if an employee is quarantined, following guidance to self-isolate, unable to travel due to official government advice, or unable to leave the UK due to international border closures.

It is important to note that in a UK tax year there is a limit of 60 days that can be disregarded due to exceptional circumstances. The work days spent in the UK will also still be counted for the purpose of the 30 work-day limit that applies for the working overseas test. This is the main part of the non-residency rules that individuals seconded overseas rely on.

The changes to the SRT and Covid related presence being ignored through to 1 June, will greatly assist in this above respect. It will however, still be necessary to review the individual's time in the UK to ensure they will not re-establish their UK tax residency.

The other limitation of HMRC's guidance is that it does not mean that the individual will not be liable to UK income tax for the period they are in the UK, as the concession does not apply to days of presence in the UK for the purpose of a double taxation agreement.

The OECD April guidance also touched on individual residency status. Their guidance covered the position where an individual became stranded in a location or temporarily returned to their 'previous home country'. Here they commended the UK, Australian and Irish tax authorities, which had all issued clarification that a period of COVID-19 presence in their territories could be considered as due to exceptional or extraordinary circumstances, and that for a prescribed period would not be counted towards whether they had established tax residency. The insinuation being that it would be helpful if other tax authorities issued similar guidance/adopted similar approaches.

Regardless of the residency position, from a UK perspective, employers should consider whether they should cease to apply No Tax (NT) codes and put individuals back on pay-as-you-earn (PAYE) for the period they are in the UK. Unfortunately, the answer will depend on the facts and circumstances of each case.

Within the US for example, do question whether there is a need to assess if US withholdings should be applied where individuals are working back in the US, switching them from hypothetical tax to actual tax if they are tax equalised. This then leads to the additional complexity of whether the individual could be re-triggering a State tax liability.

The UK and the US are by no means alone in terms of having to consider the tax implications for outbound employees temporarily returning home.

There have been some suggestions tabled to the UK tax authorities that they should go even further in the relaxations, such as mirroring the Australian Taxation Office's (ATO's) concessions. The ATO guidance to overseas resident individuals who are in Australia temporarily due to COVID-19, is that they will not become Australian tax resident providing they usually live overseas and intend to return there as soon as they are able to. Moreover, the ATO have stated that working in Australia for less than three months due to COVID-19 will not result in an individual's being assessed for Australian tax. The guidance is currently silent on superannuation contributions so these could still be due.

Other matters to consider include:

- If businesses are sending people home, companies may want to consider additional home leave allowances covered under tax policies for travel, and possibly tax equalise or gross-up the additional tax caused
- Additionally, costs to evacuate employees and house them while unable to work in their assignment country could be a taxable benefit in kind. Company policies should be reviewed to determine if these costs are tax protected. Similarly, have Cost of Living Allowances been withdrawn whilst working from home?
- What happens to ongoing liabilities and obligations (e.g. housing & car provision) in the host location during the period working from the home country? Can they be stopped? Will employers be subject to gross ups of tax for added benefits in both home & host country?
- We are seeing cases where employees working from home, or in neighbouring country arrangements, are inadvertently causing tax obligations and withholding requirements in other locations that were not expected. Is the company responsible for withholding and reporting in those jurisdictions? Is there a Permanent Establishment risk to the company in that other country?

Employees Starting A New Role In Their Home Country

Employees whose overseas secondments have been delayed would simply be kept on home country withholdings. However, the

situation is more difficult where new hires from overseas have had to start their new role in their home country before they can relocate. The position here could depend on whether there is a business entity in their home country. With the potential exception of the US, individuals cannot generally be liable to income tax and social security on earnings in the other jurisdiction until they have relocated and started work there.

If the business does have an entity in the employee's home territory, employers would be advised to try and arrange for their pay to be delivered from that territory (then cross-charge the costs between the entities), or have their pay shadowed through the payroll in their home country. If there is not a business entity in that territory then it would be advisable to seek some practical guidance from your tax advisers as to what would be appropriate from an employment tax perspective. If the individual will have a key decision maker role in the organisation, then guidance should be sought on the corporate tax aspects as well.

Job Retention Scheme And Furloughed Workers

The UK government guidance "Financial support for businesses during coronavirus (COVID-19)" originally released on 23 March, 2020, contained some initial grey areas. Employers sought clarification on whether the scheme was accessible for inbound secondees who do not pay UK national insurance contributions, outbound secondees who are on NT codes, inbound employees on modified PAYE schemes that the company is settling the tax burden for, and so on, so please do review our Global Tax Update for latest news.

It will be important to follow any guidance issued, and employers will need to lodge a claim via an online HMRC portal.

Other governments have released details of similar schemes, and it is notable that the demands of the crisis mean that countries have not been able to do this in an internationally coordinated manner. Based on the UK guidance and subsequent clarification, an individual that is on a UK PAYE scheme is eligible to be included in the CJRS. If that employee (and the employer) are paying social security contributions in France, for example, as the individual resides and habitually works more than 25% of their time in France, it appears that they may also be eligible for inclusion under the French *activité partielle* scheme.

Unlike the UK scheme, where the individual cannot work while they are furloughed, the French scheme covers a scenario of reduced working hours. It would be prudent, when a business is considering furloughing a cross-border worker, that it reviews the entitlement to both their home country and host country schemes. One assumes that an

employer is not intended to claim under the scheme of more than one jurisdiction. As there are employment law considerations, legal advice is recommended in this area.

Despite the impending summer months and the traditional school recess and holidays, some may start to consider whether employees are likely to shortly move back to their normal places of work

Next Steps For Employers

Whilst employers could perhaps have taken a flexible approach to matters for the first couple of months of the crisis, now that international home working relationships are moving beyond the 2-3 months mark, a more detailed look at the tax and social security implications is really required. Borders will gradually open and lockdowns will be relaxed. Despite the impending summer months and the traditional school recess and holidays, some may start to consider whether employees are likely to shortly move back to their normal places of work. We would therefore suggest the following action:

1. Gauging when your employees will be returning to their 'usual' place of work – Certainly the status of the COVID-19 emergency varies depending on geography, but in Europe many countries are now loosening lock down measures. Looking at the UK, EasyJet plan to resume flights gradually from mid-June. Ryanair has said it will look to operate 40% of its normal schedule from early July, while IAG (owner of British Airways) has set

a similar target. Where tax concessions have been granted they have related to a period of COVID-19 illness/illness related quarantine or where travel restrictions have applied. Although an emotive matter, it will be important to assess whether the employees not looking to move back to where they were working over the next month are doing so due to personal preference or COVID-19 related restrictions.

If, for example, you have an employee who does not wish to move back to the UK until the end of August so as to return with their family in time for their children to start the next academic year, regardless of potential flight quarantine rules, this would likely be seen by the tax authorities as due to personal preference.

2. 'Encouraging' employees to return to their usual country of work – Clearly this comes with the caveat of when it is safe to do so, but generally from when flight schedules allow for movement. From a tax administration perspective, you would be better served by your employees being back in their usual countries of work, even if working from home, than them remaining and working in another country. Employment law considerations need to be considered, but indicating that assignee allowances would be withdrawn (for international assignees) if they do not return, or that they would be responsible for all tax and associated costs (for local employees who moved overseas due to the emergency), may be steps that you could consider.

Importantly do not allow employees work from home overseas to become a new norm without first considering the tax and social security costs (as well as potential VISA, employment law issues etc.), and administrative costs. Not to mention the precedent it could set.

3. Establishing the tax and social security position for international assignees who have returned to their home countries – Whilst the OECD guidance encourages tax authorities to relax their rules in this regard, there is no guarantee that this will happen, and even where countries such as the UK (tax residency rules only) and US (tax residency and DTA day counts) have issued concessions, these have been for time restricted periods. There may still be scope to consider that the individuals remain exempt from tax in the home jurisdiction due to the terms of the DTA with the host jurisdiction. However, given that in the majority of cases the employee could be switched from the host country payroll back to the home country payroll if tax rules dictate, it would be best not to assume the individuals remain exempt from tax in their home country.

Shape Of Global Mobility In Future

While at present we can only speculate on the post COVID-19 global mobility landscape, several 'trends' that can be anticipated are:

- **Increased requests for international work from home arrangements** - After so many employees will have had to adapt to prolonged remote working, it is difficult to imagine that there will not be more employees wishing to embrace it on an ongoing basis and locate themselves overseas
- **Tax and social security increases on the horizon** - Understandably, global tax authorities are currently prioritising ways of alleviating financial burdens for employers and employees alike. Normally, state economic support programmes are worth a fraction of a percentage of national income. Due to COVID-19, governments have been announcing economic support programmes equivalent to fractions of their entire GDP. This will need to be paid for and one can anticipate, given the relatively high earnings levels of internationally mobile employees, that they will fall into the demographic where the highest of any new tax rates will apply
- Varied supply chains may arise as a consequence of the crisis. Having a single source supplier has been shown to be risky. Having multiple suppliers in different

regions or closer to home or at home, may be possible outcomes. New countries, projects, investments and assignments might be on the horizon as companies decide to hedge their risk

- **Virtual assignments** – This term is now being mentioned, perhaps the death knell for traditional assignments? Why travel, given overall costs, the relative ease of working from home, travel costs/time and health risk issues etc.? Perhaps one should simply undertake the 'assignment' whilst staying in the home location. Of course this is a possibility, and the ramifications of staying at home whilst performing an 'offshore' job do need to be considered as referred to in this article. Companies will undoubtedly be reviewing future costs with a near certain global recession looming, and assignment necessity will be under increased scrutiny. The frequency of short-term business visitors will be significantly reduced in the short-term – perhaps forever. What is certain is that the new airport, bridge or petrochemical plant will not build itself, and the personal trust that is needed for international business, and when working with others, will not necessarily develop over the internet or mobile phone. Whilst future volumes may diminish, people will still need to travel and work in other jurisdictions.

One thing we can all guarantee is that the word of international mobility has been tested of late, and certainly will be tested again in the forthcoming months and years.



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