Cross-Border Workers - Where Are Your Business Travellers?

Cross-border workers are not a new phenomenon and international companies have always had need of an internationally mobile workforce. This may be due to the inherent nature of their business or to ensure talent is managed and careers developed for succession planning. It is the nature of these moves that has changed over time and the increase in focus by revenue authorities on both the personal and wider tax implications. This also interlinks with the increased global focus on ensuring everyone pays their "fair share" of tax in the correct location.

Although traditional assignments remain a major feature of expatriate secondment programmes, we have seen a marked increase in employees commuting across multiple jurisdictions while the family remains living in the home country. This has proved popular for numerous reasons including the family remaining settled with no change to children's education arrangements and no dual income issues arising. More flexible arrangements also meet the multi-national demands of modern day business and are often led by the perception that by not formally assigning an individual, associated costs, administration and compliance requirements will be kept to a minimum or simply do not arise. As there is no formal relocation taking place these "commuter" arrangements can be put in place relatively quickly, as the demands of the business dictate. Often formal terms are never put in place, leading to "accidental" business travellers or perennial commuters. This can leave HR playing catch up as the individual commences their working arrangements before terms and conditions of the employment have been revised, formal paperwork has been completed, or in fact they are even aware that the individual has changed their working pattern. It can also result in wider tax and legal consequences for the business to consider, more of which is set out later in this article.

One down side to commuter arrangements is that it is no longer a case of having one or, at worst, two countries rules and regulations to address. Employees travel across numerous borders, potentially creating a tax obligation and/or legal issues wherever they touch down. These will more than likely fall on the local corporate entity in each of those locations where one exists and it will be down to the business to ensure they are being compliant both from a legal standpoint and for income tax and social security withholding purposes.

Each country will have its own guidelines on when payroll withholding tax is required. The UK is particularly onerous in this regard as the revenue authorities (HM Revenue & Customs - HMRC) expect withholding tax to be operated where an individual works as little as one day in the UK. Indeed, the tracking of business visitors to the UK has been at the forefront of HMRC's clamp down on tax avoidance for a number of years now and they are actively checking compliance in this area. Where businesses have failed in their duty to track and report visitors to the UK, HMRC is also asking that records for earlier years are obtained and submitted as part of an overall settlement of payroll taxes that are due. The deadline for submitting year end reports in the UK is 31 May following the end of the relevant tax year.

The general rule for employment tax is that it is payable where you work; however, the country where an individual is tax resident will broadly tax worldwide income regardless of the working arrangements. As a starting point this will lead to double taxation as two or more countries are taxing the same income. For example, a German tax resident working in Germany, France and Belgium will typically have full tax due in Germany with tax in France on the income relating to French workdays and tax in Belgium on the income relating to Belgian workdays. It is then a case of establishing how this double taxation can be alleviated. If there is a relevant double tax treaty this will provide clear steps as to which country has the taxing rights and how any double taxation is remedied. Otherwise it is down to the domestic law of each location to facilitate relief.

Do bear in mind that tax treaties are constantly being revised or introduced. Ireland has recently updated its interpretation of the employment tax article and has moved to an "economic employer" position. This is becoming more common place with tax authorities moving away from looking at who the legal employer is and placing greater emphasis on which entity is benefiting from the work being done and/or meeting the costs of the employment.

There are also special rules to consider for frontier workers within Europe where individuals may live in one country but work just over the border in a neighbouring country. These rules tend to focus on ensuring individuals claiming tax residence in their country of abode, but working in another, are not able to play the system and pay tax in whichever country has the lower rate of tax.

Although it is very rare for eventual double taxation to occur, there may be a period where the individual is out of pocket from a cash flow perspective because of the tax withholding requirements in each location. Consideration must be given to situations where payroll withholding is operated in more than one country as each country's rules may stipulate that tax is deducted on all employment income – unfortunately payroll withholding requirements do not always tie in with the individual's final tax position. Where possible, it is then imperative that any up front application is submitted to the revenue authorities to allow for double taxation relief to be given via the payroll process. Payroll departments will need to be involved in this process and payroll systems checked to ensure they can process the adjustments as each pay period arises. In many jurisdictions double taxation credit via payroll is not feasible and employers may need to loan their employees the funds to pay tax withholdings.

Similar rules also need to be considered for employees working within the US. There is both a Federal and State system of tax. Each State has its own tax laws and rates and these need to be applied where an individual usually lives and works in one State but has business trips to others. These are effectively considered cross-border workers with many of the same issues which arise for international workers.

Social security usually works a little differently to income tax. Although the same basic rule applies in that social security is due in the country where the work is performed, social security legislation tends to override this to ensure it is only paid in one country at any one time. This is especially true within the EU (including Switzerland, Norway, Iceland and Lichtenstein who have adopted the EU social security regulations) and between countries who have signed social security agreements for the avoidance of dual contributions. In particular, there are specific provisions within the EU regulations that deal with multi-state workers. These tend to site the social security liability in the home country, but the necessary certificate must be applied for and approved by the relevant authorities. The same is true where countries have social security agreements in place.

Where interacting countries do not have a social security agreement then the domestic social security legislation of each country needs to be reviewed and this can sometimes lead to a dual social security liability. Contractual arrangements can be adjusted to factor this possibility into account. Much like tax, social security rates vary widely from country to country. Careful planning with contractual and working arrangements can lead to a much reduced social security liability. Care needs to be taken however, as social security/state benefits typically flow from the contributions paid. This can lead to conflict where the employer is focused on limiting their cost but the employee is concerned with the provision of social benefits and the long-term aim of maximising their state pension. Taking France as an example, although their social security rates are high (especially for employers), French nationals tend to prefer to remain within the system to maintain their entitlement to various benefits. This is especially true for commuters who not only have to consider their own healthcare coverage (usually dealt with by way of private international medical cover), but also that the family remaining in the home country will have full access to medical care.

Some countries will allow voluntary social security contributions to be paid and in certain circumstances the arrangements can be constructed which allow the best of both worlds – social security being paid at the lowest possible rate whilst enabling the expat to pay into their home country social fund and access home country benefits. Many companies are not even aware that they are creating any tax and social security problems as they view commuter arrangements as business trips. Additional benefits provided such as flights, accommodation costs and subsistence, which would normally be allowable business expenses, may actually be considered taxable income. This is due to the fact that there is permanence or regularity to the duties being performed which is a clear distinction from a genuine business trip which tends to be ad-hoc in nature. This may create a number of permanent workplaces for the employee across the globe. Again the rules in each jurisdiction need to be reviewed to determine the taxability of these additional benefits and planning measures considered to minimise the tax and social security impact.

Given the likelihood that tax liabilities will be created in multiple jurisdictions, the employer will almost certainly want to include a commuter within their tax equalisation policy to ensure the individual is not adversely affected by their cross-border role. For some companies this may actually mean implementing a tax equalisation/protection policy for the first time or adjusting their existing policies to formalise the terms and conditions for commuter arrangements. Individual tax return preparation assistance will be required in each country as well to meet the legal filing obligations which arise.

There are also potential corporate tax consequences arising from the activities of cross-border workers. In particular, it is necessary for multi-national businesses to consider whether there is sufficient presence in a particular country to create a permanent establishment ("PE") for corporate tax purposes in that country. If commuters are concluding deals and signing on behalf of the company whilst overseas, or if there is some kind of fixed place of business created overseas, this may well be the case.

Each country has its own domestic rules regarding whether a PE arises, albeit the bar for a PE to arise is typically higher than the bar for there being local income tax consequences (for example, it is unlikely that a one off visit for a day or two would create a PE in isolation, but it could result in income tax liabilities as mentioned above). Where there is a PE, its' taxable profit will need to be determined, as well as considering whether there is a tax treaty to provide relief from any double taxation that arises as a result. There will also be compliance and administration requirements to meet in the PE country.

It is worth noting that the on-going project on Base Erosion and Profit Shifting ("BEPS") headed by the OECD has recommended a tightening up of the definition of a PE. As a result, it is likely that domestic law changes will be made in the future in various countries to lower the bar in terms of when a PE arises, as well as there being less ability to claim relief from double taxation under treaties in relation to PEs.

Overall, this is likely to increase the compliance costs for businesses as well as introduce uncertainty. In addition, we are already seeing evidence of tax authorities using comments from the BEPS project in order to challenge the PE position of businesses under current rules.

It's worth highlighting that the BEPS project has considered a number of other areas, including how profits are allocated for transfer pricing purposes and the associated documentation that multi-national businesses need to prepare. The general theme is towards a more thorough approach to ensuring that pricing and documentation genuinely reflect the substance and control of risks within the business.

There will also be more transparency in future as a result of the introduction of Country by Country Reporting ("CBCR") for larger multi-national businesses. Under CBCR, businesses will be required to report various pieces of information including profits, taxes and number of employees, on a country by country basis. This will require them to have systems in place to accurately extract the necessary data, and also consider whether the picture painted is in line with how they would like to be viewed.

It is therefore more important than ever for multi-national businesses to have processes in place to manage and control their PE position. This is both in terms of understanding when the threshold for creating a PE is going to be met in a particular country, as well as being proactive in terms of the profits attributable to the activities conducted by a PE once it is established. It is also to enable them to comply with the wider transfer pricing and disclosure requirements arising from BEPS.

The BEPS led corporate changes raise the profile of business travellers within an organisation. No longer is it purely questions for HR that are limited to that of potential payroll withholding and individual tax liabilities. Now questions also arise for finance and tax, which embrace permanent establishment creation, transfer pricing and corporate reporting.

Each business will need to determine what processes are appropriate based on their specific circumstances. However, generally they should consider providing clear protocols to internationally mobile individuals in terms of their activities in different countries, for example, where individuals have regional or sales roles. They should also have a mechanism to monitor the location of their cross-border workers, for example, when they travel overseas or work at home in cases where home is in a different country to their employer. This way, potential PEs can be identified early and proactively managed to minimise costs. The business can also minimise the risk of any reputational damage as well as the increased tax authority scrutiny that can arise when errors have previously been made.

Apart from the tax considerations there are other issues to factor in. Although EU nationals generally have free rein to travel within the EU, moves between other countries will almost certainly involve obtaining the necessary work permits/visas. Some countries will have additional requirements such as registering with the local police or town hall. It is not uncommon for commuters to start working in a country before the necessary paperwork is completed and there has even been the occasional case of an expat being arrested as a result – this does not usually go down too well! It can also impact on the company's future ability to do business in that location if they are prevented by the relevant authorities from doing so due to prior non-compliance.

One longer-term factor often overlooked is pensions. Employees invariably want to remain within their home country scheme and continue contributions in that country. Although this is nearly always possible where an individual remains employed and resident there, it may not necessarily provide optimum tax relief. Pension schemes in one country are not always recognised as allowable retirement vehicles in other countries. This can lead to unexpected tax charges, reduced tax relief and therefore a reduction in overall return on investment upon retirement.

Forward planning is essential to minimise disruption to the employee and the business and to quantify hidden or unknown costs; robust tracking measures must be implemented to ensure global tax compliance. In this digital age, companies are turning to technological solutions to help in their continued drive to keep abreast of the rapidly changing tax map. Online platforms, such as BDO QuickTrip, combine with a smartphone app to provide a simple yet innovative solution to enable companies to track their business travellers through the use of GPS (although this function can be turned off if required). A system of built in alerts notifies you when a tax event may be on the horizon so that planning measures can be implemented and reports can be produced throughout the year to ensure you actively manage your compliance obligations and plan ahead.

As we can see, what may have been considered a series of low key business trips to start with is comparable in many respects with a full blown assignment, with all the associated ramifications and some of the potential costs and compliance requirements of a traditional assignment, magnified across a number of countries. Commuter arrangements are likely to continue to increase in number, especially within regions where you can travel anywhere within a particular continent within a few hours. There is a clear business need for commuters in multinational companies to cover regional or global roles and besides, more employees are demanding such flexible arrangements due to the reduced family and personal impact. More and more, businesses will be required to have a good understanding of the issues they face when instigating this type of arrangement.

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