

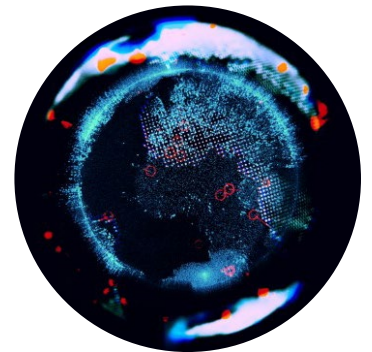
## Remote Working Across International Borders: Key Risks and Issues

### Overview

The COVID-19 pandemic has accelerated the remote working trend for organizations and workers around the world. Many employers are considering reorganizing their workforces to move to new hybrid or fully remote working models—with flexibility being a key feature at the top of mind for both the employer and the worker. These arrangements can take many forms, but one constant theme is the multiple risks and issues that arise when an employee continues to work for the same employer but has relocated overseas to do so.

Covington's [Global Workforce Solutions](#) team is well-suited to assist with identifying and managing these risks, and handling the related benefits, tax, and employment issues—which can be complex and challenging to navigate.

The alert below highlights critical matters to consider when employees work remotely across borders.



### Key Legal Issues With International Remote Working

Below, we outline eight key legal considerations when exploring a remote working program.

1. [Corporate Tax](#)
2. [Immigration](#)
3. [Income Tax and Social Security](#)
4. [Employment Rights](#)
5. [Employee Benefit Plans](#)
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## 1. Corporate Tax

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For many employers, the most serious—but often the least appreciated—risk of global remote work is that an employee working overseas and generating revenue can create a corporate tax liability for the employer in the foreign country, which could lead to double taxation on those overseas profits. This can be the case if an employee creates a ‘permanent establishment’ (PE) of the employer in the foreign country. A PE can exist if the employee is working overseas from a fixed place of business (which could be a home office), and/or where the employee is deemed to be a ‘dependent agent’ of the employer, entering into contracts on its behalf.

Rules on creating a PE are multi-layered, and can vary from country to country. However, if it is concluded that an employee’s remote working arrangements likely create a PE, the profits attributable to this PE would generally be taxable in the overseas jurisdiction too. Employers can seek to reduce the risk of an overseas employee creating a PE by, for example, ensuring that the employee does not negotiate or conclude contracts. However, there has been a concerted international effort in recent years to limit the effectiveness of such practical workarounds, and there is a clear focus on policing this area, making it even more problematic for employers.



## 2. Immigration

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Employees must have the right to both live and work in a country. Employers are usually legally responsible for ensuring their staff have the appropriate right to work, and documentation to confirm this. Failure to comply with immigration rules can lead to criminal liability, fines and audits by local immigration authorities for employers, and deportation for employees. Such enforcement action may also mean that an employer is ‘red-flagged’ for any future visas or work permit applications to that country, potentially hindering future access to that market.

Although many countries allow citizens from Western countries to enter only with a travel or business visa, these are usually time-limited (e.g., six months). A common misconception is that a business visa allows an employee to work in the host country. However, such a visa often only provides for an individual to enter the country to carry out ancillary actions such as attending business meetings, conferences or training, and not to establish a base from which they work permanently and perform their day-to-day duties. As such, even though an employee may believe they have six months to work in the country under a business visa, the nature of their working activities may in fact make those activities and their continued presence unlawful. As such, it is very important that any employee who might be working overseas regularly or who might have relocated due to the pandemic has their immigration status assessed.

“A common misconception is that a business visa allows an employee to work in the host country.”

### 3. Income Tax and Social Security

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If an employee becomes tax resident in a new country, this may trigger withholding requirements for the employer. Usually an individual will automatically become tax resident in a country if they spend 180/183 days in it during a tax year. However, tax residency tests can also be multi-factorial and catch employees with lower day counts if there are other ‘connecting’ factors involved (e.g., family, assets or real estate in the jurisdiction, or a record of regularly visiting the country over a lookback period). Also, where an employee moves to a new jurisdiction and it is clear from the outset that they intend to reside there permanently, local income tax and social security obligations could be triggered from the first day of employment.

If tax residency is established, a new payroll may need to be set up to ensure the correct sums are remitted to the applicable overseas tax authority. Failure to assess and correctly deal with this issue can lead to retrospective assessment for back taxes, often including penalties and interest. If the employer has been remitting income tax deductions to the original home tax authority in the meantime, this has to be unwound (if possible), refunds claimed, and double taxation avoided, as far as possible. Special considerations must be paid to U.S. workers given the U.S. citizenship-based tax regime and global withholding and reporting obligations.

A similar issue arises in relation to social security, although this has different rules to income tax and therefore requires separate assessment. Depending on the jurisdictions and the nature of the foreign assignment, employees and employers could be responsible for social security taxes/contributions in the home country, host country, or both. Again, failure to establish the correct position could result in back contributions being required, plus penalties and interest.

### 4. Employee Rights

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An employee working in a foreign country for a period of time will almost always acquire local mandatory employment rights, sometimes from the first day of employment in the jurisdiction. Very often these are ‘baseline’ legal rights and so cannot be contracted out of or derogated from, i.e., they will apply automatically. They may be contained in statute, case law, collective bargaining agreements (CBAs), civil codes or even international law or conventions.

Such statutory rights can take the form of termination rights (notice periods and severance pay based on statutory formulae (often using length of service as a criterion)), family leave rights (maternity and paternity leave and pay in particular), mandatory minimum vacation allowances, working time rights (maximum working hours caps – daily and weekly), sick pay, minimum pay levels, health and safety protections, discrimination protections, etc.). Some of these rights can be enhanced by CBAs in continental European countries, where generally applicable ‘sectoral’ CBAs may make the rights even more protective and expensive. Another particular complication during the pandemic is that some countries have temporarily prohibited employee terminations during this period, to protect jobs.



In addition, contractual protections for the employer may not work as clearly in a foreign jurisdiction as they did in the employee’s original location. For example, for an employee post-termination non-



compete restriction to be enforceable in France, Germany, Italy, China and certain other jurisdictions, the employer must generally pay at least 30-50% of the employee's remuneration during the restricted period. U.S. and U.K. non-competes generally do not require this type of payment and are therefore not typically drafted this way, and so such non-competes would not be enforceable in those countries requiring payment. Even within the U.S., there is significant variation in employment rights and the enforceability of non-competes among the states. Other common employer protections such as confidentiality and intellectual property provisions would also need to be vetted for enforceability overseas.

A further enforcement complication for employers is the likelihood that due to the employee's overseas location the employer would need to enforce (and potentially litigate) any dispute in the overseas jurisdiction in which the employee was living and/or working. Settling cross-border employment matters can also be more complex. Release agreements will need to validly waive claims and meet applicable legal and tax requirements in both jurisdictions.

## 5. Employee Benefit Plans



Employees may be participants in company health and welfare plans, pension and retirement plans, and equity plans. The impact on these plans of a participant employee working abroad would need to be assessed. For example, could an overseas employee remain in a tax-approved pension or retirement arrangement? Do the scheme rules allow for this? Would such participation (if allowed) potentially invalidate tax-approved status for the employee or even the plan itself? What is the correct tax and social security withholdings treatment by the employer on employer and employee contributions to the

plan, particularly if the employee is no longer a tax resident in the home country and may no longer benefit from tax-free or tax-beneficial treatment? Is the relevant benefit a mandatory entitlement in the new jurisdiction, such that different limits or minimum coverage levels would apply? Does the employee's relocation potentially subject previously earned benefits to higher levels of taxation on an unfavorable basis? Are there additional complications arising from any tax treaty between the home country and the new country?

In relation to equity plans, employees need to understand whether any grant, vesting or purchasing event will be taxed in the home or host country, and whether this alters the employer's tax withholding obligations. Could the employee's presence in a foreign jurisdiction trigger any securities law requirements for the employer in that country (such as securities registration requirements, which can be onerous), or run up against any foreign exchange prohibitions or limits? In some countries, variable compensation such as that received pursuant to equity plans can be counted as remuneration for the purposes of calculating mandatory employee severance or other employment-related payments, which can significantly increase the overall cost to the employer.

Another key question is whether employee-related insurance cover such as health, dental, life or income replacement insurance will apply outside the employer's home jurisdiction. Many insurers will not cover out-of-country employees but often this is not discovered until an acute issue arises and a claim is made. If the employer has given a contractual promise to provide such cover to an employee, it may then face significant costs if it has to replace the insurance benefits from its own pocket due to invalid cover (in particular in relation to health, life or income replacement insurance).

## 6. Corporate Insurance

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As with employee-related insurance, an employer would also need to consider the impact of overseas working on its corporate insurances. Will generic travel insurance apply if the employee is strictly not travelling on business, but has relocated abroad? If emergency hospitalization or repatriation is needed, will the insurance still cover this, or does additional cover need to be obtained? Will an employer's public liability coverage continue to protect against an employee who is working overseas? Will the employer be covered against a catastrophic event caused by the employee? Even if the insurance coverage does provide for this, what are the risks and/or potential claims in the overseas jurisdiction? Is the employee carrying out regulated or controlled activities that might require additional insurance coverage or other protections to shield the employer from consumer or regulatory risks abroad?

## 7. Data Security

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An employer should assess how data is protected. Does the employee need stronger security software and/or protocols to protect data from accidental disclosure or from third party or state interference? Where is the employee working and on what devices? How accessible and secure are these physically? Can cybersecurity insurance be procured to cover risks of data breach overseas? Which regulator would the employer be dealing with if there was a data breach overseas, and is there a data breach response plan in place to deal with serious and acute issues?



If an employee is relocating into the European Union (EU) and then transferring personal data out of it, the EU's stringent rules on data transfer may apply. Where the receiving country's data protection standards have not been deemed adequate by the EU (e.g., the U.S.), intra-group corporate rules ensuring minimum data protection standards may need to be put in place in order to legally transfer data outside the EU. The EU's data protection legislation (the General Data Protection Regulation) provides for a maximum fine for serious breaches of the greater of EUR 20 million or 4% of annual global turnover.

Employers will often be bound by a web of contractual confidentiality obligations to third parties, whether they be clients, suppliers, vendors or partners. If a public disclosure of confidential information occurs due to the lower data security of an employee working abroad, could third party confidentiality provisions be breached as a result? If so, could this cause commercial contracts to be terminated by the counterparty, resulting in economic losses and/or reputational damage for the employer?

“...(the General Data Protection Regulation) provides for a maximum fine for serious breaches of the greater of EUR 20 million or 4% of annual global turnover.”

## 8. Risk Assessment/Compliance with Local COVID and Public Health Requirements

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Given the current pandemic, an employer's duty of care and health and safety duties (to provide and ensure a safe workplace, for example) are heightened if the employee is overseas and working from home. However, it will be much harder to make any risk assessments or to evaluate the situation without local knowledge or physical insight.

An employer should review the home country statutory health and safety obligations it has to its employees, and consider how these can be discharged when the employee is abroad. The obligations are still likely to apply if the employee is working from home, wherever that is. Do additional checks need to be put in place or a new risk assessment carried out? Would failure to do so invalidate reliance on any employers' liability insurance? Can the employer foresee potential harm in the overseas remote working arrangement? Could it be liable in negligence if not considering, or ignoring, these issues?

### Contact Us to Learn More

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The areas highlighted above are the most critical for organizations considering remote working, but they are not exclusive. Even within each area, many issues will arise depending on the program design the organization wishes to pursue. If your organization is considering a remote working program or other reorganization in the U.S. or internationally, we encourage you to contact anyone in our [Global Workforce Solutions](#) practice.



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