



Evolution of work

New ways of working across jurisdictions

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Introduction

The prospect of workers using technology to work more fluidly in terms of work location looks set to evolve from being a transient result of the pandemic to becoming a long-term feature of the global working landscape.

With potential advantages in terms of flexibility, efficiency, talent attraction and worker retention, employers are increasingly exploring the possibility of flexible working models for their workforces.

However, there are challenges too. Where workers are spread over dispersed locations, maintaining culture, a clear sense of purpose and consistent values, as well as ensuring wellbeing, consistent benefit provision, safeguarding cybersecurity and maintaining an oversight of conduct and performance, can require additional attention. Further, where the flexibility extends to working across jurisdictions, there are several additional, often complex, legal questions to consider, including employment law, benefits and tax, immigration and other legal considerations.



New and developing employment laws

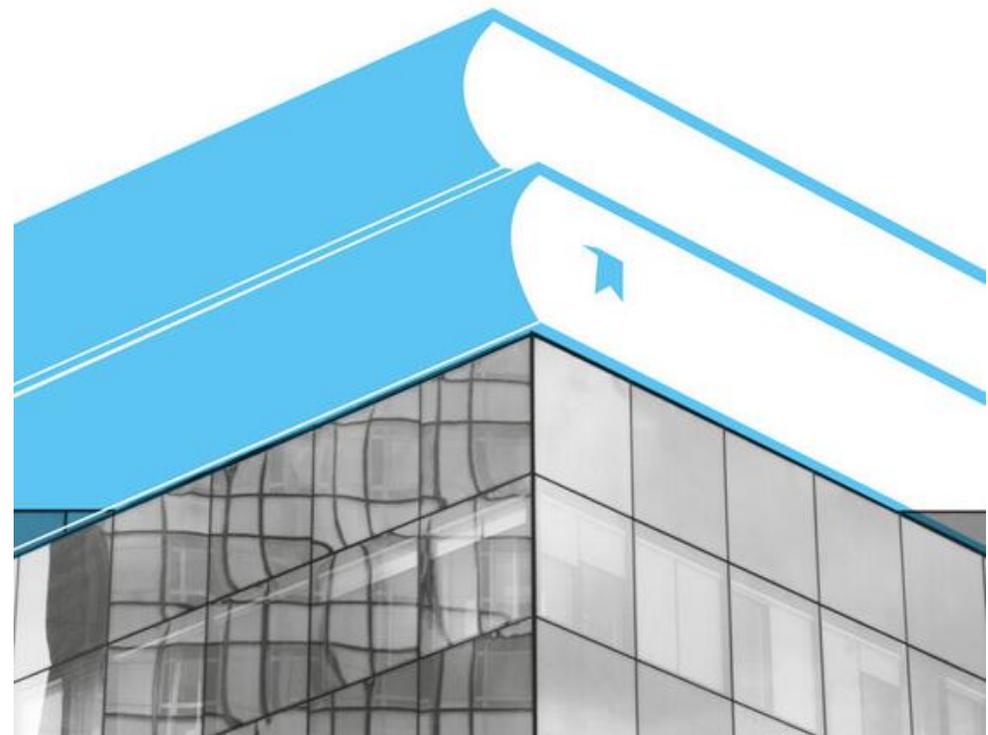
Prompted by the increase in remote and hybrid working during the pandemic and by awareness that pre-pandemic laws were often insufficient for the new working landscape, many countries have put in place additional legal protections for those workers working under such arrangements or wishing to request to take advantage of the possibility of doing so.

In some countries, new laws have taken the form of financial support for remote workers, such as tax-free lump sum payments and allowances in lieu of expenses. In others, reforms have focused on measures to protect the mental health of workers, including through bolstering workers' right to disconnect from work and ensuring that remote workers do not experience isolation.

In Europe, the EU Parliament has made clear that it considers the right to disconnect "*a fundamental right which is an inseparable part of the new working patterns in the new digital era*". However, the right is not currently explicitly regulated in EU law. As a result, regulation varies widely across the EU, with some Member States enacting laws to expressly regulate disconnection or other measures to protect the mental health of workers, and others simply falling back on general limits on working time. Portugal is one jurisdiction that has embraced regulation, where new laws have introduced some significant changes to the remote work regime, including an obligation to establish the frequency of face-to-face meetings between the worker and their co-workers and managers and a general duty on employers to refrain from contacting employees outside working hours.

Beyond Europe, other countries also have started to put in place new regulation. For example, in Latin America, where several recent new laws in Argentina, Colombia, Mexico and Uruguay have sought to guarantee workers' right to disconnect from work and have strengthened enforcement avenues.

In other countries, legislative changes have been focused on giving workers greater rights to request more flexible working arrangements, often putting more onerous obligations on employers to justify any refusal of requests. For example, in the Netherlands, where the Dutch government's "Work where you want" proposal is intended to amend existing flexible working legislation to limit the grounds on which an employer can refuse an employee's request to work from home.





Key legal considerations

Where an employer's people strategy extends to allowing or requiring workers to work across jurisdictions, some of the legal questions to consider include:

Engagement model

The identity of the employing entity should be clarified in good time of the arrangement commencing, as the laws in certain jurisdictions can place restrictions on, and in some cases prohibit, certain models of engaging staff. In addition, some countries require a formal local presence to be able to obtain the necessary visa and work permits to allow workers the right to live and work in the country. For example, in the UAE, where work permits must be sponsored by an entity that is locally licensed and incorporated in the UAE.

Further, in several countries there are restrictions on employees being employed by one entity and then being dispatched to work for another entity (under so-called "labour leasing", "labour dispatch" or "employer of record" models). Official licences permitting such arrangements can be required, or the arrangement can be subject to other restrictions, including in terms of duration or the types of roles into which workers can be supplied. In some cases, such restrictions can apply even within the same group of companies. Again, ensuring an early understanding of any restrictions and procedural requirements can avoid unexpected issues arising on the commencement of proposed arrangements.



Click the icon to see some sample questions used to assess key employment model risks.

Applicable employment laws

The question of whether local employment and other relevant laws will apply to the arrangement will be critically important, often directly impacting the cost and risk of an organization's people strategy and informing the legally correct approach when an employer recruits, rewards or dismisses an employee in any cross-border employment arrangement. It also determines the extent to which workers can validly "forum shop" or "cherry pick" the jurisdiction that offers them the most beneficial position.

Any choice of governing law expressed in the contract of employment will often be the starting point for determining the applicable law, although some laws (typically including statutory employment rights) may be mandatory, regardless of what the contract states. Further, other rights and benefits might arise in collective agreements that may be automatically applicable to employees because they are working in a particular location or sector.

Within the EU, where the governing law of the employment contract has not been chosen, the so-called Rome I Regulation will determine the applicable law, taking account of where the work is habitually carried out, the place of business and/or the closeness of connection with a particular country. Other jurisdictions have similar choice/conflict of law rules, including in the US where, subject to some exceptions, applicable employment protection laws are generally deemed to be territorial to the location of employment.



Click the icon to see some sample questions used to consider the applicable law.

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Taxation and social security issues

Long-term or permanent cross-border arrangements can often give rise to complex cross-border tax and social security considerations. From a risk profile and an administrative burden perspective, this is often made more challenging due to the application of individual circumstances informing the correct approach.

The question of whether there will be any liability to pay income tax in the jurisdiction in which work is being performed will be determined by several factors, including local laws on tax residency. Further, some countries have special domestic rules for taxing employment income, which may result in certain other administrative obligations being imposed on employers.

The application of local tax laws may sometimes result in tax being payable both in the original/home location and in the country in which the employee is actually working. In that case, it will need to be considered whether any double taxation treaty applies or whether there is any other relief available. Further, some countries have agreements between them on tax, including in many European jurisdictions. The rules are complex, but they often allocate taxing rights to the country where workers carry out their employment.

Where workers, particularly those in management positions, are working in a location where the employer does not have an existing legal presence (to the extent this is permissible in the location in which the employee is working), the arrangement may risk creating a permanent establishment in the jurisdiction for corporation tax purposes, with risks of fines and significant unexpected tax expenses. Further, many countries use a tax residence-type test for certain company law/regulatory matters. Care should therefore be taken to ensure that potential triggers for such matters are understood, and the arrangements are routinely monitored to mitigate any risks.

Obligations to pay social security contributions should also be considered, including any local social security rules and the existence of any protocols, bilateral agreements or exemptions between the original/home country and the country in which the work is being performed.



Click the icon to see some sample questions used to consider the tax and social security issues.

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Retirement Plans and Employee Benefits

Where an individual is regarded as legally working will also impact on the options and requirements which apply in relation to the provision of retirement benefits. It may not be possible for an employee working in a different jurisdiction than their home country to simply continue participation in the home country plan due to the terms of the plan or legal requirements. Certain jurisdictions may require participation in mandatory local retirement benefit arrangements, which could result in workers carrying out similar roles in different locations being entitled to different retirement benefits. Some employers may prefer to try to harmonize benefits across different locations or to use centralized benefit arrangements. These will be subject to compliance with local employment and negotiation arrangements, and they may not always be tax efficient.

Employers should also consider the impact of remote work in another jurisdiction on other employee benefit arrangements. For employers in countries that primarily offer private, employer-sponsored health plans, having employees working in other jurisdictions can limit the availability and coverage provided by these plans, necessitating other arrangements. Other employer-provided benefits, such as dependent care, transportation, and disability and life insurance coverage can have unexpected tax results or may not be appropriate or feasible under the laws and practices of the remote work jurisdiction.



Click the icon to see some sample questions used to consider the retirement plans and employee benefits issues.

Immigration

If a worker is a national of the country in which they wish to work, immigration issues are unlikely to arise. However, where immigration considerations apply, due to the worker not being a national of the host country and not otherwise having a right to live or work in the country, it will be important to take early immigration advice and factor into the plan the timescale for any immigration process. Careful and agile planning will be necessary, as the implications for illegal working can be serious for both the worker and employer, including criminal liability in some cases.

Immigration status should be monitored throughout the cross-border employment arrangement. Changes to job roles, salary and working hours can all impact immigration status, as can periods of time spent outside the country in which an individual habitually works.



Click the icon to see some sample questions used to consider immigration issues.





Health and safety

In most jurisdictions, the employer will be under an obligation to provide a safe place of work, in many cases extending to where the worker is working remotely. Increasingly, that duty of care will include an obligation to not only to protect the physical health of a worker but protect their mental health too.

Employers will often be required to undertake a risk assessment in relation to the working arrangement and take measures to address any identified risk, although the particular requirements for such assessment will often differ by jurisdiction. In Germany, for example, the risk assessment in relation to those working from home or under a hybrid arrangement on a permanent basis must be carried out by a physical assessment of the home office environment, whereas in other countries an on-line self-assessment by the worker may be sufficient.

In some jurisdictions there are express obligations to provide remote workers with guidance that specifically addresses remote working risks. For example, in Italy, where remote workers are required to be provided with an INAIL (National Authority for Insurance against Accidents at Work) health and safety notice on remote working.



Click the icon to see some sample questions used to consider health and safety obligations.



Stock Options and Share Incentive Awards

Many employers motivate and reward employees with share-based incentive awards. These may take many forms ranging from stock options, restricted stock unit awards, performance stock unit awards, stock purchase rights, restricted stock, conditional awards and performance shares. Many of the incentive plans under which such awards are granted are specifically designed to bestow certain tax advantages on the award holder and/or to enable certain tax reliefs to be obtained by their employer by reference to the tax legislation of the employer's home jurisdiction. If an employee holding any such award moves from the employer's home jurisdiction to another jurisdiction during the life of an award, this can have significant and unexpected consequences which can be highly problematic for the employer. In particular:

- Many countries have strict securities laws which either prohibit the issue or transfer of foreign company shares to a person resident in the country concerned, unless an exemption for the delivery of such securities into that country exists or certain filings are made. If an award held by an employee who is working in a jurisdiction other than the employer's home jurisdiction ("foreign jurisdiction") vests, it may therefore not be possible to satisfy that award by the delivery of shares without breaching the foreign jurisdiction's securities laws. In some cases, issuing or transferring shares to a person resident in another country where an appropriate exemption does not exist or where the appropriate filings have not been made, can carry criminal sanctions.
- In any case where a payment must be made for the shares to be acquired by the employee residing in the foreign jurisdiction, the payment of such funds cross border may also be prohibited by exchange control laws.

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- The fact that the award holder has moved from the employer's home jurisdiction to the foreign jurisdiction at any point during the life of an award is highly likely to give rise to income tax and social security issues, the extent of which may depend upon the duration of the award holder's residency in the foreign jurisdiction and/or where the award holder resides at the point of vesting. Such tax issues may not just be an issue for the award holder, as many countries will have strict reporting and tax withholding obligations which are imposed on the employer.
- The rules of the Plan under which the award was granted to the employee who has moved to the foreign jurisdiction, which the employer believes are applicable to the award in question, may be rendered wholly ineffective by the laws of the foreign jurisdiction, so that it is not possible to enforce them. This can be particularly problematic in the context of enforcing the provisions of a share incentive plan which deal with loss of rights in the context of cessation of employment and/or malus and claw back provisions which enable the recovery of amounts from the employee in certain limited circumstances set out in the relevant Plan rules.
- In addition, the laws of the foreign jurisdiction may impose unexpected onerous and costly obligations upon the employer.

The example issues identified above are not exhaustive and can be compounded if the employee moves to several different jurisdictions during the life of the award(s) held by them.

It is therefore vital for employers to be able to track any jurisdictional movements of each of their employees holding share awards so that appropriate advice can be taken to avoid the employer being inadvertently exposed by virtue of the employee's temporary or permanent residence in a foreign jurisdiction.



Click the icon to see some sample questions used to consider the share incentive award issues.

Contract considerations

In some jurisdictions, there will be obligations to ensure that certain information is recorded in contractual documentation when a remote or hybrid working arrangement is entered into, or contractual variation requirements where the original arrangements change. The remote working arrangement may also impact benefits such as insurance, which should be addressed with the worker.

Contractual formality requirements should be observed. For example, where a new contract is issued or a contract is varied, there may be requirements for the amendment document to be in the local language and/or comply with prescribed methods of execution. An electronically signed variation document will not be legally effective in some jurisdictions, meaning the document will instead need to be in paper hard copy with a wet ink signature. Arranging signing will therefore need to be factored into the timescale and process.

An issue that can often be overlooked is ensuring the protection of a business's client and supplier base and other legitimate interests through the use and enforcement of restrictive covenants and confidentiality provisions. This can be particularly important under remote or hybrid work arrangements, where there is often less visibility and control over workers' actions. The ability to contractually restrict certain activities varies significantly around the world, however having in place enforceable protections can maximize the options available should an individual operate in a manner that has the potential to damage the business.



Click the icon to see some sample questions used to consider contractual issues.



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Establishing an effective approach

The multitude of factors when considering new ways of working across jurisdictions can be overwhelming. With the unique interplay between tax, social security, employment law, immigration, health and safety, corporate law and data privacy all potentially impacting the options available and risks, maintaining a clear, effective and consistently fair strategy on remote working across jurisdictions can be a particular challenge.



Click the icon to see an overview of some of the key considerations regarding new ways of working across jurisdictions through a scenario example

Establishing a comprehensive policy that establishes the core principles, will be key. Further, having a process in place to establish a clear understanding of the factual matrix of each individual case and how that impacts the risk profile and any legal obligations will be essential to structuring and documenting each arrangement correctly.





Key practical considerations

As noted above, the current legal framework regarding remote working is inconsistent globally and often insufficient for the new working landscape. Ensuring clear contractual arrangements with supporting policies and procedures, including on the remote management of conduct and performance, will be essential to the effective management of cross-border arrangements and ensuring appropriate protection both for remote workers and the business.

One area of practical difficulty with remote and hybrid arrangements can be monitoring hours worked. On the one hand, employers will often wish to (and in some jurisdictions, be required to) have in place a system that enables the duration of time worked each day by each worker to be measured or tracked. On the other hand, there are often significant data privacy obligations and restrictions that impact whether working time and performance can be monitored and, if they can, how the data can be used. Further, there will often be obligations to inform and consult with employee representative bodies in advance of implementing any technology or other methods of controlling or otherwise monitoring worker hours or performance.

Cybersecurity is another major concern. More fluid working arrangements that rely on remote connectivity and the existence of a proliferation of personal devices can result in an organization's control systems being stretched to the limits. It is essential that policies and procedures are adapted for a remote workforce and regularly tested to ensure they are sufficiently robust. Monitoring and surveillance systems should be adapted to local laws, but strong enough to detect where the employer's confidentiality of information may be compromised.

In addition, companies operating remote working arrangements are considering how an organization's culture, purpose and values can be maintained and developed where new working arrangements mean that face-to-face contact in a physical workplace is absent or reduced. Reinventing initiatives and processes that underline the company's culture and values to maximize their effectiveness in a remote environment, reinforcing key messages through effective communication and ensuring leaders model behaviours and values in their on-line presence, can all have an impact. In addition, requiring some face-to-face contact, including a requirement for the worker to attend the physical workplace for specific events, in specific circumstances or after a specific period of time, can be beneficial.





Summary and how we can help

The increase in remote working arrangements can be a thorny topic from a legal perspective, with multiple potential pitfalls that can often catch-out the unwary, particularly where cross-border issues are added into the mix.

Structuring and documenting the arrangement correctly and accurately assessing the risk profile will often require a detailed assessment of the individual circumstances and an understanding of several legal elements. However, once the legal issues are addressed and appropriate control structures are in place to manage risk, the new working landscape offers a significant opportunity for organizations to make considerable gains through a more agile workforce.

Our extensive global footprint means that we are well placed to help employers, wherever they have a presence. Our teams across the world have significant experience of supporting employers to steer through the legal and practical implications associated with workers working remotely and across jurisdictions. The depth and breadth of our experience means that we are able to draw on the many areas of expertise with the firm to offer a complete solution.



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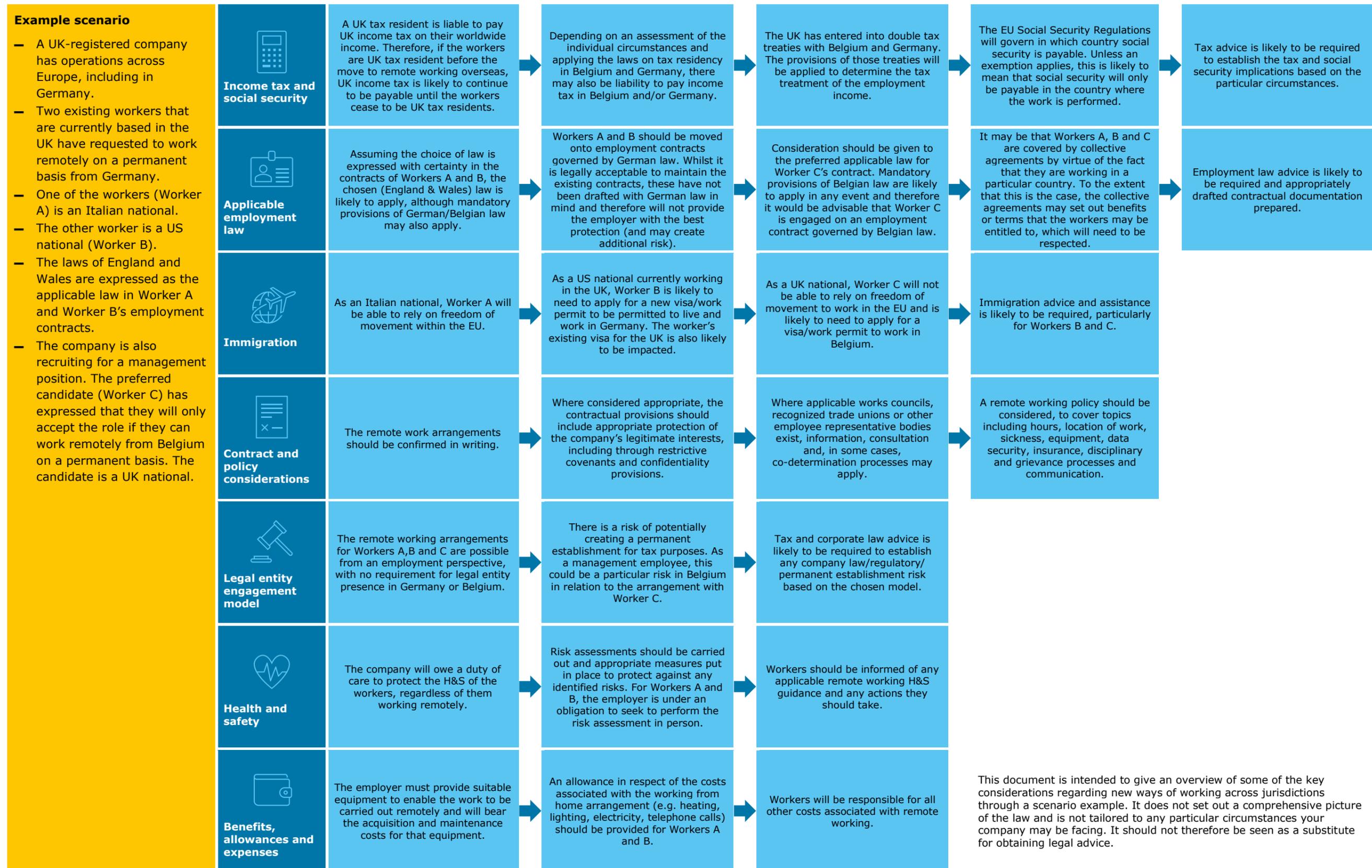
Sample questions to assess key risks

Engagement model	Applicable law	Taxation and social security	Retirement Plans and Employee Benefits	Immigration	Health and safety	Stock Options and Share Incentive Awards	Contract requirements
<ul style="list-style-type: none"> – what entity will be the employing entity? – will the worker be dispatched to work for another entity under a labour leasing, labour dispatch or employer of record model? – are there any local restrictions on the models of engaging staff? – are there any practical reasons why a local legal entity or the local registration of an entity is necessary? – where applicable, are there any restrictions on workers being employed by an entity either within the same country or elsewhere, and then also working for another entity? – if so, is the employer required to hold an official licence to be able to operate in this way or do any other restrictions apply? 	<ul style="list-style-type: none"> – is a choice of law expressed in the contract with reasonable certainty? – what mandatory laws apply, regardless of any choice of law? – if the worker is based in the EU, how does the Rome I Regulation apply to the circumstances to determine the applicable law? For example, where is the work habitually carried out, what is the place of business and/or what is the closeness of connection with any particular country? – are there any other local conflict of law rules that require the application of local employment law in certain circumstances where they are more favourable to the employee? – does any territorial scope of any particular legislation restrict its applicability? 	<ul style="list-style-type: none"> – is there any liability to pay income tax in the host jurisdiction? – if so, who is liable to pay the tax? – if income tax is payable in both the home and host jurisdictions, is there a double tax treaty that applies and/or is there any relief from double tax available? – do any special tax rules apply due to the nature of the role being undertaken? – will workers/employers need to make social security contributions? – if so, does any protocol, bilateral agreement/exemption apply? – if so, is it necessary to obtain any certificate to prevent social security liability arising in the host jurisdiction? – is there any risk of the arrangement creating a permanent establishment in the host country for corporation tax purposes? 	<ul style="list-style-type: none"> – can the home country retirement benefit plan continue to apply to the remote worker? – is there a mandatory retirement benefit plan scheme in the local jurisdiction that may create duplicate benefits or fairness issues across workers? – is a harmonized or centralized plan scheme possible, and what are the tax implications? – are there employee benefits, such as health coverage or other employer-provided arrangements, that cannot be continued as expected or should be replicated, and what are the tax consequences of doing so? 	<ul style="list-style-type: none"> – is the worker a national of the country in which they wish to work? – if not, what are the immigration options for the worker, taking account of the worker's nationality, skills, salary, role type, recent country of residence history and immigration status of family members? – does the structure of the arrangement impact immigration considerations? – does the employer have safeguards in place to ensure that it receives notification of any changes to immigration status? – does the employer have safeguards in place to ensure that any changes it makes (e.g. to job role, salary, working arrangements or hours) that could impact immigration status, are identified? 	<ul style="list-style-type: none"> – is it sufficient for the employer to provide suitable equipment, or must it go further by physically checking whether a home office complies with health and safety requirements? – can an employer comply with its duty by requiring remote workers to complete an online health and safety document/module to self-assess any risk? – can an employer comply with its duty by requiring remote workers to enter into a written agreement where they confirm that they will take steps to maintain their health and safety such as taking regular breaks or immediately reporting faulty equipment or other safety concerns? – is there any requirement to provide remote workers with specific written guidance/other documentation on health and safety? 	<ul style="list-style-type: none"> – are there appropriate provisions in place to track the movement of award holders from one jurisdiction to another? – are there any local securities laws that would prohibit the delivery of shares by the employer to the award holder? – are any filings (whether securities law based or tax based) required by the local laws in respect of the award(s) held by the employee? – what is the income tax and social security impact of the employee moving from one jurisdiction to another in respect of the award(s) held by the employee? – does the employer have any local tax reporting and withholding obligations in respect of the award(s) held by the employee? – can funds be paid by the employer to the employee under local laws without breaching any exchange control regulations? – is it possible to enforce the provisions of the share incentive plan against the employee (especially in the context of cessation of employment) under local laws? – do the local laws impose any additional obligation or costs upon the employee in respect of the share incentive plan concerned? 	<ul style="list-style-type: none"> – do any applicable local laws require provisions on remote working to be confirmed in writing? – if so, is there any local language legal requirement for the contractual documents and/or any other document content/formalization requirements? – is any collective consultation or other collective process required? – are there any benefits/allowances which must be provided to homeworkers that should be set out in the contract? – should any provisions be included/updated to address business protection, including confidentiality and/or restrictive covenants?

This guide is intended to give an overview of some of the key questions regarding new ways of working across jurisdictions. It does not set out a complete list of all the potential considerations or the law and is not tailored to any particular circumstances your company may be facing. It should not therefore be seen as a substitute for obtaining legal advice.



Key considerations – sample worked example





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