

Call for Evidence: Review of Hybrid and Distance Working

Response from the Employment Lawyers Association

28 October 2022

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GENERAL

1. The Employment Lawyers Association ("**ELA**") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.
2. A Working Party, co-chaired by Ivor Adair, Anna Dannreuther, Richard Fox, and Stephen Ratcliffe was set up by the Legislative and Policy Committee of ELA to respond to this call for evidence. Members of the Working Party are listed at the end of this paper.
3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.
4. As an organisation representing employment lawyers, the responses below are intended to represent the Working Party's collective experience of the approach of their clients, as opposed to the approach of the organisations in which they themselves work.

EMPLOYERS - EMPLOYEES WORKING IN A DIFFERENT COUNTRY TO THEIR EMPLOYER

What is happening and how have things changed

5. Pre-pandemic: did the business have employees working across borders before the pandemic that were not on traditional expatriate assignments?

Before the pandemic struck, and pre Brexit, there had been a trend for companies to move away from long term assignments. There had also been an increase in international commuter arrangements, cross-border "virtual" working, and a wider range of destinations.

In this context, we believe the UK has always been a "centre of excellence" for global mobility work. Partly this is historic, since over the years many international assignments started and ended in the UK. But it is also due to the fact that a large proportion of international employment arrangements have been documented in English, and UK contract and employment laws suit international assignments. As a result, many multinationals have chosen to locate their global mobility teams in the UK. Advice has historically not just come from professional services firms, such as firms of solicitors and accountants, but also through in-house mobility teams and commercial providers of services, such as "employer of record" (to which we refer below), relocation and training services.

6. During the pandemic: how did the pandemic change this?

We believe the situation in this respect has significantly changed on account of the pandemic.

We are aware that employees did start to work from different locations around the globe, either as part of a specific and deliberate move to begin doing so, or as a result of a need to accommodate, perhaps initially temporarily, to whatever requirements and strictures were applying for them at any given time.

That began to change, however, once it became clear that the pandemic was not going to be a short-term phenomenon, and companies began to become comfortable with new arrangements to keep their operations maintained. For some, they were new to the business of international employment. Many were unaware of all the various factors that need to be taken into account and which have led those who advise in these areas to adopt a multidisciplinary approach, in order to accommodate to all the arrangements and regulations that will apply.

The move away from long term assignments has continued, there has been an increase in international commuter arrangements, more cross-border "virtual" working, and an increased range of destinations. We are seeing a far wider range of employers making enquiries about working abroad and putting in place non-traditional international assignments. We believe this is a consequence of the pandemic.

In addition, during the pandemic, many employers found themselves in the position of inadvertent employers of expatriate employees, either because employees had unilaterally relocated outside the UK, or because individual managers (perhaps unaware of the sizeable tax and regulatory burden associated with working from another jurisdiction) permitted members of their team to relocate abroad on an ad hoc basis. This has led to material tax and immigration risk in some cases, and costly and time consuming remedial action.

7. Emerging from the pandemic: Where are your employees now working, what are the location arrangements (contractual or casual), and are these trends

for short-term working (such as after a holiday), or long-term relocation (such as to where family are located)?

Both short-term and long-term working from outside the UK has become more prevalent than pre-pandemic.

A number of employers have policies which permit employees to work for a limited period from jurisdictions outside their "home" jurisdiction. These necessarily require careful consideration, since they sometimes require either an appetite for legal risk or a willingness to invest significant time and resources in checking immigration and tax compliance even for short-term working.

Conversely, long-term assignments abroad have always been acknowledged as requiring investment of time and resources in ensuring tax and immigration compliance, as well as more formally documenting the relevant employment arrangements.

- 7.1 If employees working in different countries to their employer is new to the organisation, how easy has it been to understand the tax, social security, payroll and other implications of this?

Not easy at all. We believe there is a lot of work that can usefully be done in this respect. In our experience, employers and employees find it difficult to access useful, practical information on international working so as to appreciate what they will need to do to make these arrangements work.

The government's website and public bodies such as ACAS and the Equality and Human Rights Commission provide useful practical information for employees wishing to work only in the UK. Advice of corresponding quality and accessibility is not available in relation to international working.

We accept, given the complexity of this area, it is probably not going to be practical to offer the same level of detail in terms of advice and guidance for outbound international working. However, we believe that at least there could be provided clear explanations as to why tax (both corporate and personal), social security, immigration, employment law and compliance is important.

We suggest some basic checklists can be made available. For example, these could make clear that mandatory employment laws will usually be those of the place where the employee is actually physically working. We believe some employers erroneously believe that local employment laws will not apply if they, the employer, are based in the UK, or if the contract is governed by the laws of a country other than the one where the employee lives. Another example should be, making UK employers aware that onerous overseas health and safety obligations may apply if their employees are working overseas. Sometimes mandatory employment laws in both the country in which the employer mainly operates and the country in which the employee is currently based can apply at one and the same time.

Whilst we accept it may not be practical to give employers specific advice in these respects, and where appropriate there may be the need to consult professional advisers, we do think basic guidance addressing these issues would greatly assist.

Many UK employers will not appreciate the value or protection that may be accrued by employees in their "home" country. This may be particularly relevant where the employees travel to other EU countries because UK employers are bound by the trade and cooperation agreement ("TCA"). In most cases, the TCA will oblige UK employers to register as a foreign employer to operate Social Security in the EU country that their employee is living and working in indefinitely. This will apply even if the UK employers have no corporate presence in the EU country in which the individual is living.

Another consequence of the lack of readily available guidance at present, we believe UK employers may not appreciate that if they fail to comply with overseas requirements, this could trigger criminal penalties being imposed on their directors and senior managers.

UK employers may also be unaware that compulsory insurance may be required if one of their employees begins to work overseas, even if they are doing so part-time.

All EU countries may be obliged to publish information about local employment laws, and this may assist, but we believe links to relevant information in this respect should be better publicised and would be helpful.

There are also consequences of a personal nature that could be of real significance when employees begin to work abroad and in our experience these can often be overlooked. These can include health cover, how exchange rate movements might affect net income, what happens on inheritance, death or divorce, the impact on personal investments, mortgage, pension, life assurance, the need to submit tax returns in more than one jurisdiction and the impact on children's education, custody arrangements or a partner's ability to work. We do not suggest that the UK government should be providing comprehensive guidance on all of these matters for every jurisdiction, but we do believe that an early available "checklist" for employees who may be considering moving and working abroad would be extremely useful.

Given the above, and in order to illustrate the points we have been making, we set out below specific comments made by one of our members on her own experience. This is provided merely to illustrate some of the challenges employees may face when choosing to work abroad.

"I took the decision with the support of my UK-based company to move from London to Europe part way through the pandemic. With so many employees moving further out of London - to enjoy the benefits of more space, a different lifestyle, a lower cost of living, a move to the continent seems a natural extension of that. When attendance in the office is required, often the

commute is not significantly further, or much more expensive. The idea of being an international commuter/virtual worker suddenly seemed tangible.

I moved prior to the end of the Withdrawal Agreement at the end of December 2020, in order to secure residency within Europe prior to Brexit. The physical move of my family and our belongings was straightforward in comparison to the tax, regulatory and legal considerations which we are still grappling with. The move required extensive personal tax advice. To my surprise, my employer also needed advice to consider the tax impact for them caused by me sitting at home with my laptop in Europe rather than the UK. The rules as we approached the end of the Withdrawal Agreement were particularly uncertain: particularly the impact on double taxation treaties and what would happen to regulatory rules around doing business overseas.

I am now tax resident in both jurisdictions. I pay tax as usual in the UK, and regular advance tax payments locally. I submit two sets of tax returns based on two different tax years. Two years on, I am yet to recover any of the double tax I have paid, which has obviously created challenges for personal cash flow. Neither jurisdiction can decide where I should pay social security contributions, despite professional advice in both jurisdictions. I presently continue to contribute in the UK, but I believe this will need to change soon. As a result, I am still not in the local state healthcare system, and it took considerable work to get my children covered. My firm's medical insurance does not cover me in Europe, and so I am required to take out my own private medical insurance here, and do not benefit from a company policy.

There are other unanticipated personal ramifications of this move: there are adverse tax consequences in respect of the tax-free savings plans and pension that I hold in the UK; we are required to declare all assets held worldwide for the purposes of a wealth tax; we have had to relinquish our UK driving licences for local ones; and we rely on a temporary permission to let from our UK mortgage provider in order to rent our UK home.

It has been a journey in many respects, and my employer and I have learnt a lot along the way. We have both been driven by a desire to ensure this move is fully compliant in both jurisdictions. Even the expert professional advice we have received has been quite siloed. We would have greatly benefited from an overview of the range of potential issues to consider at the outset and a better appreciation of their complexity both prior to and after a move such as this."

Employers of Record ('EoR') / Professional Employer Organisations ('PEO')

For some years, commercial organisations have sought to offer customers easier ways of managing the challenge of cross-border working arrangements. Some offer practical payroll support but frequently they go further and offer to employ staff 'for' the employer.

A number of names have been applied to 'direct' labour arrangements, such as 'Employers of Record' ('EORs') or professional employer organisations ('PEOs').

On occasion, the use of such services can itself give rise to compliance issues, for example:

- (a) The identity of an employer is a question of fact in most jurisdictions. The true employer may not be the stated entity. As a result, more than one entity (or a different entity from that named on the contract) may be held responsible for employment obligations.
- (b) Continental European 'employee leasing' restrictions may give rise to particular legal and financial risks.
- (c) The use of an EOR service may not avoid the creation of a local permanent establishment for corporate tax purposes.

Of course, many companies choose to utilise EORs notwithstanding these issues. We nonetheless consider this to be an area that would merit further guidance, due to the increased use of EOR services.

Policies and procedures

8. Since the pandemic have you changed your policies and procedures regarding employees working from other countries to where their employer is based?

As noted above, many employers have expanded their policies on short-term and long-term working since the beginning of the pandemic. Those who have permanently relocated to, other jurisdictions will typically be subject to the applicable policies of that jurisdiction. In contrast, those on short-term or even long-term assignments will typically remain subject to the "home" country policies, including those relating to disciplinary procedures, for example, reflecting the subsisting employment contract in their "home" location. This can give rise to challenges where employees gain employment rights in their "host" location which require different processes from those in their "home" jurisdiction, leading to increased cost and time in managing two (often contradictory) regimes.

EMPLOYERS - EMPLOYEES BASED IN THE UK WORKING REMOTELY IN THE UK

9. Pre-pandemic: Where were your employees working - wholly remotely, hybrid, or wholly in the office? How did this vary by seniority, role or other distinctions, and why?

Pre-pandemic, an overwhelming number of employees worked in the office, where the business was office based. However, as the question presupposes, experiences were varied.

Generally, pre-pandemic employees with longer service were more likely to work on a hybrid basis, along with more senior employees and those in specialist roles. Employees who worked in disparate teams based throughout the UK and abroad were more likely to have worked on a hybrid basis than those who worked in teams based in one office.

A growing proportion of those in the professional services sector worked under a hybrid working arrangement, reflecting the fact that work done in this sector was mainly office-based. A long-hours culture and intensification of work in some fields may have perpetuated stereotypical models of work that deterred an approach that better reconciled work and caring responsibilities.

A larger proportion of those working under consultancy arrangements with clients in the IT sector worked remotely. This flexibility arguably reflected their status, the foundation of which may be a more flexible or ad hoc relationship consistent with true self-employment.

To some extent, those with caring responsibilities were more likely to have requested and agreed flexible working arrangements with their employers, which may have resulted in hybrid working. Note, however, that only employees with at least 26 weeks' of continuous employment (at the date the request is made) benefit from the statutory right to make a request for flexible working pursuant to section 80F(1), of the Employment Rights Act 1996.

Larger employers tended to accommodate more flexible working requests and were more likely to have a larger percentage of employees formally working on a hybrid basis. However, smaller employers were more likely to have offered a hybrid working arrangement informally.

The Equality and Human Rights Commission reported in 2017 that fewer than 1 in 10 job adverts mentioned flexible working. According to that report, 8.7 million full-time workers wanted flexible arrangements, 1.5 million part-time workers said they are trapped in poorly paid part-time jobs, and a further 400,000 were unable to work non-flexibly¹.

10. During the pandemic: How did the pandemic change this?

During the pandemic this had to change significantly as the Government at various stages required people to work from home where possible. Employers across a range of sectors considered that working from home (if at all possible) was in their best interests in terms of avoiding interruptions to their business from COVID-19 outbreaks within the workforce and the risk of claims if they were seen to have put their employees' health at risk.

For many employers in sectors such as construction, care, manufacturing, hotel hospitality and leisure as well as many others, working from home for

¹ <https://www.equalityhumanrights.com/en/our-work/blogs/making-all-jobs-flexible-realistic>

many of their employees was not an option so they were not in a position to adapt in the same way as other sectors.

10.1 Did the company's business' procedures and policies change?

When the pandemic started in the UK, prudent employers, whether their employees could work from home or not, underwent a huge change in their policies and procedures, in many cases the change was wholesale.

Prudent employers required the assistance of employment lawyers on drafting and implementing new or updated COVID-19 specific policies. These commonly included:

- (a) Health and safety policies and risk assessments covering all employees, particularly vulnerable employees and how to handle outbreaks in the workplace;
- (b) Written rules on which employees and under what circumstances employees can work from home or from the workplace according to business needs and how to deal with employees who were reluctant to attend the workplace when required;
- (c) When flexible furlough was introduced, many employers who did not previously require employees to record their working hours had to implement procedures for recording these hours to ensure their compliance with the Coronavirus Job Retention Scheme ("CJRS") when claiming employee furlough salary;
- (d) From a more practical/operational perspective, most employers were forced to implement new rules and ways of working as well as new mechanisms (usually involving new technology) for maintaining effective lines of communication. For those working from home this involved new technology and systems. For employees who were not able to work from home this often meant needing to pre-book attendance at the workplace, social distancing, one-way systems, enhanced hygiene in the workplace, staggered start times, and sometimes very prescriptive rules on receiving of goods.

Some employers needed to update their contracts of employment. In particular, those who placed staff on furlough needed to issue temporary amendments to contracts which reduced employee working hours and pay as well as setting out the rules for returning to work, sickness absence, annual leave and specific rules for those still in their probation period. These contracts required a number of updates as the CJRS rules changed as the pandemic progressed, for example with the introduction of flexible furlough.

Many employers also took the opportunity to make permanent changes to their contracts of employment and policies in order to future-proof their business against the same upheaval in the event of a future pandemic. These amendments included:

- (a) Updating disciplinary and grievance procedures to enable remote meetings, how to facilitate the right to be accompanied in remote meetings and dealing with employees on furlough leave;
- (b) Updating disciplinary rules and capability procedures to specifically identify misconduct arising from remote working and to enable effective performance management of remote working employees;
- (c) Many also enhanced their employee monitoring policies;
- (d) Many employers updated their standard contracts of employment to include a contractual right for the employer to lay-off staff or consider short-time working in certain circumstances to avoid the need for temporary furlough contracts in the future.

Changes to policies and procedures dominated the advice given by employment lawyers to employers during the pandemic and often amounted to significant work and expense for the employers.

It is important to note that the above was carried out on behalf of prudent employers who had the foresight to seek timely assistance from their employment lawyers and the motivation and means to pay for these updates. Many employers focused on survival and cost saving during the unprecedented pandemic and did not take any formal steps to update their contracts and policies.

- 10.2 What was your policy during the pandemic in terms of claiming working from home allowance? Did you pay it as a business expense to your employees or did they claim it directly from HMRC?

The process for claiming the allowance (whether by the employer or the employee) was straightforward. Some employers claimed this for their employees, but a larger group left it to their employees to apply for this directly from HMRC.

- 10.3 What expenses and allowances did you pay directly to employees when they worked from home, or did you provide them with equipment or an allowance to buy equipment?

In the initial stages of employees working from home, employers and employees did what they could with the equipment they had. Some employees took IT equipment home from the office to use; others used their personal devices.

Those sectors which already allowed for some of their staff to work remotely, for example professional services, often had the technology in place for employees to work from home and found it easy (albeit costly) to simply scale this up to enable more of their employees to work remotely from home.

Other sectors, such as education, which traditionally did not provide for home working for teachers, were forced to adapt very quickly to purchase new hardware and software to enable lessons to take place remotely and to ensure adequate training across the board.

Regardless of the sector, most employers purchased the equipment required for their employees to work from home.

In addition, some companies which had a history of providing significant benefits at the workplace such as free meals, provided additional (taxable) allowances for those working from home which were intended to offset the additional costs faced by those now required to work from home.

10.4 Did the new arrangements give rise to any tax or payroll reporting issue, for example, in relation to the treatment of expenses and allowances?

Those companies who had questions about tax on employee benefits and expenses during the pandemic were assisted by the Government Guidance on "*How to treat certain expenses and benefits provided to employees during coronavirus (COVID-19)*". For the most part, the tax treatment of additional allowances, such as those intended to cover costs of food noted above, were straightforward. However, since the advent of homeworking, there has been some confusion over the circumstances in which travel costs may be paid tax free, in particular when travelling to the employer's offices. Existing HMRC guidance on the concept of ordinary commuting in the context of those who work wholly or partially from home (see e.g. EIM32170) leaves room for interpretation. Further clarification would be welcomed, particularly in the common context of policies which require staff to attend the office for a certain minimum number of days only, but where employees exceed this number due to particular requirements to attend the office in any given week. Employers should, however, be aware of the risk of direct and/or indirect discrimination claims if such arrangements are introduced without proper thought and advice on these topics.

11. Emerging from the pandemic: Where are your employees now working: wholly remotely, hybrid, or wholly in the office? How does this vary by seniority, role or other distinctions, and why?

We have identified a broad variety of working practices. In some cases, employees are working wholly remotely as offices have been closed as a cost saving measure. In other cases, for example, notably in financial services roles, there has been a mass return to the office. In professional services there appears to be a broad consensus of working from the office for a set number of days a week, and from home for the remaining days. A growing minority of employers are linking office attendance with bonus eligibility.

There are a number of key factors that we have noticed in relation to a decision to work remotely, hybrid, or wholly in the office. The first is seniority; many junior employees wish to attend the office in order to 'learn by osmosis' and to integrate into the team. At the mid-level, some employees moved

further away from the office during the pandemic, and may have additional family responsibilities, which means that they are more likely to work in a hybrid fashion. At the most senior level the approach may vary, as some employers are putting pressure on seniors to attend the office in order to set a top-down precedent for their teams, whilst other seniors will split their time between the office and being out with clients. The second is location; with the rising cost of travel, those who live closer to the office may find it easier to come in, whereas those who live further away will have to balance the cost of travel with the cost of energy if they choose to work from home. The third is in relation to the home set up; in cases where employees are working just on a laptop, they may wish to come into the office to benefit from the IT equipment provided there, in contrast to employees with a set-up at home which mirrors their office set-up.

- 11.1 Have the new working arrangements given rise to any tax or payroll compliance challenges, including in relation to the treatment of employee expenses?

See above in respect of additional allowances and travel expenses.

- 11.2 What specific issues have you identified with the interaction between the existing permanent workplace rules and any new hybrid working pattern? Are any changes to the guidance needed to make things clearer?

In our experience, employers are still very much grappling with establishing their approach to the new hybrid working pattern, particularly in relation to the application of key workplace policies such as expenses, IT usage, and data protection.

Another area where advice has been sought by employers is in relation to employees with reasonable adjustments made to office hardware. This has arisen in two main areas: (i) duties to replicate the adjustment for the working from home environment; and (ii) maintaining the adjustment in a hot-desking environment. Recent case law has highlighted the potential difficulty in providing a hot-desking environment, and ensuring that employees with adjustments to their hardware are able to access their specialised set-up.

As a broader comment in relation to the hybrid environment, employers are having to think on their feet in relation to maintaining workplace culture, monitoring employee wellbeing, and maintaining development and training standards.

Guidance would be welcomed around: (i) key changes to be made to workplace policies in order to facilitate a hybrid working pattern; (ii) the application of reasonable adjustment duties in relation to hybrid working; and (iii) best practice for management concerns such as culture, wellbeing, and development and training.

- 11.3 What expenses and allowances are you still paying/equipment you are still providing in relation to working from home? Are you clear on the tax treatment of these?

The additional allowances paid during the height of the pandemic in relation to e.g. additional costs of food, heating etc. are in some cases now being withdrawn or incorporated into salary. Their tax treatment remains relatively clear.

In relation to the provision of equipment, we noted a range of responses. At one end of the scale, employees have been asked to work from their own laptop and were not provided with any additional equipment, and in other cases, employees were provided with a working from home set up which is equivalent to the equipment provided in their place of work. Again, the tax treatment of this equipment is relatively straightforward.

- 11.4 Do individuals still have working from home allowance in their PAYE codes?

We have no comment to make on this question.

Policies and procedures

12. Since the pandemic have you changed your policies and procedures regarding employees working location? If so:

- 12.1 What was your reason for doing so?

In our experience employers have, on the whole, not made sweeping changes to their policies and procedures post pandemic. This has been for a number of reasons.

There hasn't been a clear line that determined that the pandemic was now over and so there was no impetus for organisations to change. Most had temporary measures in place and have slowly reversed some of measures as different restrictions changed or public/staff perception about mixing with others improved. Organisations were effectively testing the waters in order to get the right level. They didn't want to be seen to rushing people back too quickly only to find that Covid cases rose quickly again and restrictions were reintroduced.

Further, many employers did not have a clear idea as to what changes they wished to make to their policies. In our experience the majority employers obviously saw the benefit of the flexible/hybrid working arrangements to both them and their staff. Organisations have been trying to find the right balance, usually by testing staff reaction to proposed changes to informal arrangements.

It is likely, however, that this is something employers will need to face head on in the not too distant future. In our experience the lack of clear policies in any aspect of employment is open to either abuse by employees or employers

being challenged when trying to enforce rules. In particular, we expect a solidifying of hybrid working rules, and an increased desire to enforce requirements in respect of office attendance over coming months for some of those employers whose approach has until now been relatively permissive.

12.2 What are your new policies and procedures?

Where changes have been made, most have sought to reinforce the flexible/hybrid arrangements that have been informally or temporarily agreed during Covid, but to set boundaries around them. These will usually relate to core hours of work or a requirement that staff attend the office on at least a minimum number of days.

Some policies have made it clear that the ability to work remotely is discretionary and subject to performance and business need. This allows employers to ask staff who they believe are not carrying out the duties properly from home to come in to the office/premises. Further, they can ask staff to come in if they believe that remote working is having a negative impact on service delivery.

12.3 To what extent has your ability to recruit and employees' requests for flexible terms driven changes to policies?

It is clear that most organisations recognise that the ability to work remotely or flexibly is attractive to potential employees. They therefore make it clear on any adverts that the post includes the ability to work remotely or flexibly. Organisations recognise that being able to offer this means that they can competitively recruit the best candidates available.

Many organisations have also recognised that remote working widens up their pool for recruitment as they are no longer restricted to those potential employees who live in commuting distance or are willing to relocate. The ongoing war for talent means that some are therefore more willing than ever to consider employees who live a long distance away and have had to ensure that their policies accommodate those employees.

12.4 What steps are you taking to monitor the location of your employees? Have you had to implement new procedures/technology to be able to do this or have you been able to do this through existing means?

Although most IT policies will have the ability to monitor communications, this is subject to significant data privacy restrictions. It is therefore unlikely that employers would be able to rely upon such existing policies to monitor staff as a matter of routine, and would instead need to seek legal advice on specific applications designed to monitor employee location. In practice, a combination of the data privacy restrictions on the ability to monitor location and deliberate employee deception has, in some cases, led to employers inadvertently employing staff for extended periods outside the UK, leading to inadvertent tax and immigration non-compliance in some cases. This issue was most acute at the height of the pandemic, but remains a common issue,

particularly in sectors in which fully remote working is common. Widespread publicity regarding the "digital nomad" lifestyle, and the rise in living costs domestically, has compounded this issue.

13. Looking forwards, are you likely to continue to evolve your approach to hybrid and distance working over the coming months?

13.1 Do you have any plans to constrain working from a non-office location and if so, how?

It is likely that employers will continue to evolve their approach to hybrid and distance working over the coming months and over the longer term. For many employers, difficult decisions have been delayed in the wake of dramatically changed working arrangements during the pandemic, and in some cases attitudes to work and family life, which continue to evolve.

The design and timing of the implementation of plans are likely to differ significantly, dependant on sector. Leisure and travel, production, retail, education and sectors which have largely returned to a pre-pandemic set up, along with essential workers, are unlikely to make major changes in the short term. A different picture may emerge in the longer term.

Sectors such as financial services increasingly may require more employees to work from the office over the shorter term. This is likely to be done by way of line manager dialogue and encouragement, followed by management request and policy. The execution side of the financial services industry, which has remained largely office based, is unlikely to make major changes.

13.2 What factors are you expecting might alter your approach?

Broader economic concerns and pressure from employers and consumers may affect the pace at which plans are rolled out and their design. Fixed costs, such as office space and location are likely to be more carefully scrutinised. In some cases, the costs versus benefits of some overheads may be fundamentally re-evaluated. Employers are more likely to consider the potential of new models, including operating from smaller office spaces, designed to offer more spaces for collaboration, predicated on a hybrid working model and supported by an enhanced IT infrastructure. Conversely, the cost of living crisis may result in a partial reversal of the homeworking trend, with employees returning to the office in greater numbers to benefit from the reduction in their energy bills arising from no longer needing to heat and light their homes during the day.

Employers remain concerned to avoid attrition and ensure their recruitment strategy is aligned with up-to-date market preferences and skills. Employers may also be willing to recruit farther afield and accommodate hybrid working models that allow for working families, who would prefer not to relocate, but may be willing to occasionally conduct a lengthy commute, or short stay over near to their physical place of work. This may require building relationships

with new recruiters and take more time to understand new market possibilities.

The success of recruitment strategies, such as including offering a clear position on remote or hybrid working, or technology as part of a package of benefits, may have an impact. Staff surveys and employee engagement sentiment may also influence the approach adopted.

The level of skill and education attainment of the workforce in question and type of occupation will play a part. Broadly, it seems likely that those employers with no plans to constrain working from a non-office location will be concentrated among highly skilled, highly educated workers in a limited number of occupations in the computer-based office work arena.

The view taken by leadership teams on any adverse impact to the culture of the business along with the importance of the physical dimension of work; on sessions demanding creativity or providing sensitive feedback, could be a powerful force. Larger employers may seek advice from third party experts, before making changes. Smaller employers may be monitoring the approach taken by competitors.

Business IT spend as a percentage of turnover and / or headcount is likely to increase for many employers, particularly in the field of computer-based office work. Employers are more likely to be willing to invest in new technologies that offer the prospect of reconfiguring work, improve service delivery and teamwork. The availability of appropriate technology and resources to ensure adequate training and support is made available to make successful changes to ways of working may be another factor. The availability of technology to displace workers and changes in skill requirements could also alter the approach.

Addressing performance concerns in a remote or hybrid working model remains a challenge for many employers. Managing employee long-term sickness fairly and the risk of discrimination complaints may also be a concern.

Constraining employees from working from a non-office location may increase the potential of discrimination occurring, with attendant damage to employee relations and potentially expensive employment tribunal claims. The risk of indirect discrimination claims brought by those with childcare or caring responsibilities and or disabled workers may be a focus for employers poised to implement constraints on work location.

In broad terms, indirect discrimination occurs when a worker is subjected to acts, decisions or policies, which are not intended to treat anyone less favourably, but which in practice disadvantage a group of people with a protected characteristic, such as sex. Where the employer's policy disadvantages the individual with characteristic, it will amount to indirect discrimination unless it can be objectively justified.

Accordingly, where changes are being proposed, employers may wish to reflect harder on the aim being pursued and be motivated to gather evidence and consider less discriminatory or less onerous alternatives. Employers may also look to consult more extensively with the workforce or their representatives, before adopting new policies that constrain working from a non-office location. Whether or not this occurs more frequently remains uncertain, however doing so is likely to be relevant to the issue of objective justification.

Other considerations such as certain groups being disadvantaged by a lack of exposure to mentors, to certain types of work or promotion opportunities, particularly into more significant leadership roles may influence the approach taken by some employers. This is more likely to be the case where the employer has developed an effective diversity and inclusion strategy, which has proper regard to hybrid and remote working issues.

13.3 Do the current tax rules allow you to change your approach when there is a business need?

The current rules regarding the creation of a permanent establishment and the complexity over application of tax and social security deductions cross-border give rise to significant cost and therefore represent a practical prohibition on desired flexibility, leading employers to adopt a very cautious approach in this regard. More flexibility in these rules would be welcomed, to allow employers to take a pragmatic approach where there is a business need.

A checklist of wider issues which arise from home working in the UK may also be helpful. While many of the legal and regulatory challenges of home working are well known to both employers and employees, there can be others which are not so obvious. For example; tenancy agreements, restrictive covenants and mortgage arrangements may contain prohibitions or restrictions on domestic dwellings being used as a workplace. While these restrictions may have been overridden during the government imposed lock down and work from home advice, people looking to shift to a permanent work from home arrangement may unexpectedly fall foul of such restrictions. Employers do sometimes ask their employees to check that by working from home their employees are not in potential breach of these restrictions, but it is not a universal practice.

In addition, it may be helpful to clarify the rules on principal private residence relief for Capital Gains Tax purposes. The current government guidance states, in order to qualify for the relief, that, *inter alia*: “*you have not used a part of your home exclusively for business purposes (using a room as a temporary or occasional office does not count as exclusive business use)*”. Individuals who have designated a particular work place in their home or built a “home office” may unknowingly affect their tax position.

SELF-EMPLOYED

14. Have your practices in terms of where you perform your work changed since the pandemic, and if so, how?

Traditionally the self-employed would typically have had complete flexibility over the place of work, unless it was physically necessary to be present at the place of work.

A typical feature of most self-employment arrangements is the right to determine the place of work. This is usually unfettered. In contrast, most employment contracts include a contractual place of work and historically these were usually an office or other business location.

As a result of the pandemic, many employees now also have this flexibility and so there is a less clear distinction now between the work arrangements or employees and the self-employed as relates to the place of work.

15. Have you seen any new trends in self-employed working since the pandemic?

We have not seen an increase in those who are self-employed. We have seen a reduction in the use of IR35 type arrangements over the period, but this appears to be a result of the 2021 changes to the "off payroll working" rules in the private sector.

As noted above, the ability to work from anywhere would be a traditional badge of "self-employment", but with many employers offering significant flexibility over the place of work, in many cases there will be far less of an obvious distinction between "employment" and "self-employment" than would have been the case in years gone past.

As noted below, those wishing to work outside the UK are more likely to be engaged on a self-employed basis and employers may insist that staff who wish to work overseas do so on a self-employed basis.

Anecdotally, the digital nomad is more likely to be engaged on a self-employed basis rather than be an employee. Most self-employed persons that we will encounter who are providing services outside of the UK will be highly skilled and have significant bargaining power. As a result of a shortage of skilled workers in recent years, most engagers have been required to take a pragmatic approach and find ways to accommodate those who wish to provide services from outside the UK.

16. Have any changes to your working practices given rise to new income tax, social security, or permanent establishment risks or issues? Or have changes in others' practices done so? If so, please explain.

A customer who permits the self-employed to provide services is still exposed to certain of the same risks as an employer would. For example, a self-employed person can still create a permanent establishment for the engager

and may be misclassified for tax purposes resulting in a local PAYE/social security liability for the engager. However, the actual or perceived separation from the organisation tends to mean that engagers are more willing to accept these risks.

A self-employed person will still be required to declare their income in their host country and accept a considerable compliance burden.

17. If you are currently working abroad, do your customers/clients prevent you from performing certain activities or taking data overseas?

Engagers do not typically impose restrictions of this nature. However, as engagers become better acquainted with the risks associated with overseas working together with data protection and data sovereignty issues we expect that engagers will become more sensitive to these issues.

As noted above imposing limitations on the place of work is not consistent with the typical view of self-employment and by imposing geographical restrictions engagers may be concerned that this is an indicator towards employment.

18. If you receive work through one or more online platforms (gig workers, for example), or represent those who do, do you consider work through online platforms is more mobile or flexible in terms of location now? Do the platforms or the end customers know where people are working?

Most of the more sophisticated platforms will carefully assess the various employment, worker and tax issues before making their app available to service providers in each jurisdiction.

Less sophisticated platforms are likely to be jurisdiction agnostic until they reach a scale where their investors insist that they complete the necessary legal work to ensure applicable laws in the jurisdictions in which they operate.

It is typically very easy for platforms to say where they are willing for service providers to operate although it is less easy to police in practice.

PERMANENT ESTABLISHMENT AND CORPORATE RESIDENCE

19. Has your business had to consider whether the activities of employees or officers might create new permanent establishments in other territories?

- 19.1 What happened to make this a consideration

There has been a growing number of queries from employees who, following COVID, increasingly consider working remotely as the norm. The number of requests received by businesses, coupled with the scarcity of talent in the market, now means that refusing a remote working request has progressively become more difficult for businesses. Increasingly these requests have

involved employees wanting to work in different countries when there is no business need for them to be in that country.

19.2 Did you consider this a risk or an opportunity, and

This is both a risk and an opportunity. If businesses fail to adapt to the demand for remote working or fail to consider the potential of a PE in other territories, they will risk a loss of talent, make attracting key talent more difficult, or will potentially create operational and significant tax risk, where staff work remotely without the necessary approvals.

Remote workers pose other risks as well, including payroll, disputes over jurisdiction/employment rights, health and safety, immigration, data protection, and for regulated businesses, regulatory compliance, which often places restrictions on the level of activity that can be performed cross-border.

Additionally, there may be transfer pricing risks in certain circumstances as a result of being compliant from a PE perspective where services are being provided to the UK entity or wider group. In these circumstances, an assessment and creation of an appropriate transfer pricing policy should be carried out.

19.3 What actions if any were taken to mitigate or prevent it?

Against the backdrop of an increased number of requests, businesses have had to adapt how to detect, triage and manage tax risks.

A blanket refusal of requests is the obvious preventative measure but is likely to put businesses at a competitive disadvantage in the marketplace. It also exposes employers to potential employment claims e.g. indirect sex discrimination. Remote working can form part of key talent retention practices and the employee value proposition that businesses would be offering in the market, in alignment with the changing landscape. In managing the risk and as part of the approval process many employers would consider the seniority of the individual involved and the nature of the activities they would be carrying out and the length of their proposed stay.

As PE risks are primarily the responsibility of the Group Tax function rather than HR, the business, or regulatory compliance there is a need to agree on and educate decision makers within the organisation to ensure all are aligned to the opportunities and risks of remote working.

In our experience, whilst there have been different approaches taken, most groups have revised their existing policy or introduced a new remote working policy in the last couple of years.

Considering the above, it is key for businesses to be on the front foot and proactively tackle PE issues as well as seeking specialist tax advice early in the process rather than react to individual remote worker requests, which

place a considerable compliance burden in investigating whether a PE arises each time someone goes to work in a new country.

20. Has your business had to consider whether the location of senior staff might change the corporate tax residence of the company?

20.1 What happened to make this a consideration

The trend in remote working requests has seen a shift toward senior levels of the workforce. An increasing number of senior staff now live and work abroad with less emphasis on the need to be based in the country where the business is located. The pandemic has accelerated the ability to work remotely such that with appropriate technology it is possible to routinely work from anywhere and that could be inside the UK or overseas.

20.2 Did you consider this a risk or an opportunity, and

This is both a risk and an opportunity for businesses for the same reasons as set out under section 20.2 above.

The corporate tax residency risk becomes more acute where there are several senior/executive staff living and working across several different jurisdictions, which is not uncommon in global organisations.

Additionally, transfer pricing in respect of senior global/regional leadership roles based in the UK has been a key focus area for HMRC challenge in recent years.

20.3 What actions if any were taken to mitigate or prevent it?

It will be key for businesses to apply their mind to potential tax risks and ensure they know where, when and for how long staff will be based in other territories. It will be important to have policies and procedures in place to deal with the movement of workers.

To reduce these risks and businesses' tax exposure, there has also been a marked increase in the use of commuter contracts with individuals working out of a head office a few days a week but otherwise based at home (in whichever jurisdiction that might be). Whilst this may mitigate the risk relating to corporate tax residency, it does give rise to other risks, such as the tax treatment of accommodation and travel expenses, which will need to be considered. As each case will turn on its own facts, specialist tax advice is likely to be necessary in all cases.

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