



VIRTUAL SERIES | EMPLOYMENT WORKING GROUP 2021

Remote Working: The challenge for businesses when a home-based workforce operates from a different jurisdiction

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FOREWORD BY EDITOR, ANDREW CHILVERS

Home Work: The challenges of cross-border remote working

The past year has witnessed a huge remote working experiment for many of the world’s businesses and their employees as a result of Covid-19. And, for many, these new working practices have become hugely complex depending on where in the world business owners and employees have suddenly found themselves. Almost overnight, people are in uncertain territory regarding issues involving employment law, tax, social security and pensions, to name just a few.

Tax rules

The rules concerning residency in a country – and therefore liability to pay taxes there – are complex and vary from jurisdiction to jurisdiction.

In Europe, spending at least half the year in one country is usually a key test, although other factors can be considered such as where the family home is located.

With the way the tax year falls – most run by calendar year, although in the UK it is April 6-April 5 – it could result in people being resident in two countries simultaneously and therefore paying tax in both jurisdictions, but out of the same income.

For those working for companies in low tax domiciles, such as the Gulf states, many have found themselves stuck in other countries with higher tax rates. Unsurprisingly, this has caused anxiety about how much tax they would now have to pay.

While many countries have double tax treaties in place that override local laws, as ever the devil is in the detail and this has to be closely checked.

There are also circumstances where a company may be considered liable for tax in another jurisdiction. For example, in the case of an owner-managed business, or one managed by a single director, if the owner/director happened to be stuck in another country but was still able to run the business from there, he/she would be liable for tax in that jurisdiction. In the UK, for instance, a businessperson is considered taxable if key decisions are made in the country – meaning they are liable for Corporation Tax on all income and gains worldwide. A double tax treaty could help, but it depends on the agreements between the two taxing authorities involved.

In addition, some countries have brought in emergency tax measures related to Covid-19, which again varies between countries. These will need to be investigated to find out if help

is at hand. In the UK, HMRC has allowed non-UK residents to stay an extra 60 days in the country under ‘exceptional circumstances’ such as being forced to quarantine.

For any employees who find themselves in these circumstances, it is recommended they keep records of all their movements, as well as issues such as when borders were closed, dates for cancelled flights, any doctor’s appointments and any other documents that could be relevant to a tax claim.

But it isn’t just with tax where potential complications occur. An employee working remotely can be entitled to the employment rights in the country they are residing in, which could be more generous than those where the business is based – for example, in terms of minimum days of annual leave.

The employer is legally obliged to honour these rights or the employee could start legal action against them. This also complicates matters if the business wants to terminate the employee’s employment and local legal advice should be sought.

Likewise, health and safety laws can vary between jurisdictions and all employers have a duty of care to their employees to provide a safe place to work. A risk assessment should be undertaken for any employee working in a different jurisdiction that considers local health and safety laws.

Regardless of the pandemic, the trend for working remotely and across jurisdictions has become more common in recent years. This will now accelerate going forward.

Covid-19 has shown that working at home is not only feasible but can also be more productive. With a high-speed internet connection, it is possible for employees to carry out their jobs as they do in the office. This also includes holding meetings via online conferencing facilities, sharing and storing documents securely via cloud-based systems and communicating and collaborating with colleagues via telephone, email and messaging apps.

As a result, issues such as employment law, social security and tax will need to become more defined in future and businesses and their advisors would do well to keep on top of these often complex problems to avoid any unwanted complications and costs.

In the following pages, nine IR Global members discuss the huge complexities involved with remote working and how that affects businesses and their employees in different jurisdictions.



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View from IR



ENGLAND

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Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

Featured Members



FRANCE

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Stephanie has been a member of the Paris Bar since 1998. As a tax lawyer, she developed specific expertise in the optimization, from a tax and social security standpoint, of high-level executives compensation.

Before co-founding Galahad, Stéphanie created the Compensation & Benefits and International Assignment department of Lexcom, of which she was a partner for 7 years. She also worked with Capstan, Baker & McKenzie and Slaughter & May.

Stéphanie advises companies on their global compensation strategy and on the implementation of share-based and profit-sharing schemes, and high-level executives in relation to the optimization of their global compensation, and in the structuring of their management packages. She also deals with international assignments, more particularly on tax and social security aspects.



INDIA

Aliff Fazelbhoy

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A senior partner with ALMT Legal with over 30 years of experience, Aliff is not only a hard-core M&A and tax lawyer but has also been instrumental in developing a thriving labour and employment practice at ALMT Legal. The practice encompasses all aspects of employment law right from structuring contracts, drafting company policies and procedures, including issues relating to sexual harassment, data protection and anti-bribery, implementing reduction in workforce schemes, terminations for misconduct and other reason, employee disputes, developing employee stock options schemes and advising on social security benefits and obligations.

Aliff's expertise in these three areas enables the Firm to provide seamless advise in all kinds of cross border deals, something which clients have consistently appreciated. Aliff has consistently been recognised for his work by various legal publications and been ranked among the Top 100 Private Practice Lawyers in India by the India Business Law Journal in 2018-19 and 2020-21. He is also featured in Asian Legal Business magazine's 'A-List of India's Super 50 Lawyers' in 2020. Asia Law Profiles 2021 Edition has recognised Aliff as a 'Distinguished Practitioner' for Labour and Employment and Corporate M&A.



THE NETHERLANDS

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As a tax expert with about 25 years experience, Leo advises the internationally oriented clients in many fields: tax treaties, overarching international social security- and labour law agreements as well as applying permits for non-EU nationals to stay and work legally in the Netherlands. Leo combines his diverse expertise in a perfect mix within the ZIRKZEE GROUP one stop shop.

After his Master in Tax Law at the University of Leiden, Leo started in the mid '90s for one of the big tax firms. He arrived at ZIRKZEE Group in 1999, where he now holds the function of senior tax advisor. Split-salaries, the attractive Dutch 30% tax free ruling for employees, employment benefit plans and international pay-rolls belong to his day-to-day activities.

In his social life Leo tries to exceed his own endurance limits when cycling with a bunch of friends in the French mountains or on the flat and abandoned Dutch landscape between cows, moulins and narrow canals. It's an excellent diversion from day-to-day business.

Featured Members



US - CALIFORNIA

Rebecca Torrey

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Rebecca represents companies in litigation in federal and state courts nationwide. She is an across-the-board employment lawyer with significant trial experience representing management in bet-the-company cases involving wage and hour and fair credit class actions, trade secret, wrongful termination, discrimination and fair pay claims.

Rebecca provides strategic advice to companies aimed towards aligning personnel practices with an employer's culture, values and priorities and minimizing legal risk. She is committed to developing a client's understanding of the law to improve human resources practices and guide business forward. A frequent speaker and writer on key developments and cutting-edge legal issues, Rebecca is known for pragmatic, out-of-the-box solutions that support strategic growth.

Rebecca's clients include healthcare companies, professional services firms, entertainment, digital media and technology innovators, manufacturers and recyclers, and tax-exempt organizations, operating both domestically and internationally.



VENEZUELA

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Founding partner of Ponte Andrade Casanova since the year 2005, Franciso graduated as a lawyer from the Catholic University Andrés Bello in the year 1977, and postgraduate studies at Cornell University, NY, USA, where he earned a master's degree in Regional planning in 1983. Francisco's practice areas include Corporate law, Labor & Employment Law, Social Security, Occupational Health and Safety and insurance.

He has been a professor at the Institute of Insurance and the Universidad Central de Venezuela, and served as lecturer in matters related to insurance, social security, pensions and occupational health and safety in institutions such as: ANRI; AVE CAMCARONI; Chamber of Caracas; Miranda Chamber, Electrical Sector.



TURKS AND CAICOS ISLANDS

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Stephen Wilsom, QC heads the Litigation & Dispute Resolution practice group in the Turks and Caicos Islands ("TCI") office. Stephen has appeared in many of the TCI's recent headline cases involving disputes in the tourism and hospitality, banking, real estate, insurance and construction/building sectors.

Stephen has successfully worked on a variety of complex litigious Employment and Labour matters. He represents both employers and employees in wrongful dismissal cases, layoffs, redundancies, discrimination, equal pay and sexual harassment situations. He has broad knowledge of the nuances of employment contracts including non-compete, non-disclosure and non-solicitation agreements. He understands the challenges and the difficulties of disciplinary and discharge issues, layoffs and redundancies, unfair dismissal, overtime and service charges. Stephen has worked with numerous corporate clients on workforce restructuring and advised international clients on multi-jurisdictional labour compliance matters.



ENGLAND

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Shilpen has a dual practice focused on dispute resolution and employment law. His expertise as a litigator is in high-value commercial dispute resolution and contentious corporate matters, often involving an international element. He has conducted a number of reported cases and cross-border disputes. Shilpen also advises and represents employers, employees and professional clients in all aspects of employment law. He has particular expertise in acting for senior executives, self-employed professionals and company directors in connection with their entire employment needs, including claims in the Employment Tribunal and the High Court.



ENGLAND

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Menna specialises in tax advice, planning and tax enquiries, for corporate and individual clients. She has advised high net worth individuals, hedge funds, banks, and owner managed businesses, and dealt successfully with HM Revenue & Customs enquiries. She has advised fund management businesses, property funds and set up investment structures, and advised on oversea pension structures and internationally mobile individuals.

Who she works for:

- Banks and financial services businesses
- Property businesses
- Fund management firms
- Venture capital firms
- High Net Worth individuals
- Trustee corporations



BELGIUM

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Sofie Vandermeersch specialises in employment law and all related aspects of a business, company and criminal law. She has broad expertise gained over many years in the various domains of individual and collective employment law, as well as social security law. She assists both companies and employees with advisory services and in (appeal) court proceedings.

SESSION ONE

What are the consequences for a business when an employee works from home on a semi-permanent basis, transferring their residence to another country?

Stéphanie Le Men-Tenailleau, France

In France, when employees decide to live and work in two different states, putting in place payroll in compliance with French and EU regulations and integrating this into French legislation can get very complicated for employers who are not used to international mobility. It means understanding social security and tax rules of another country and being able to combine them correctly with French law. Furthermore, we have two different systems of wage tax, depending on whether the person is resident or non-resident. It's not the same system at the same rates, and not the same reporting obligations for the employer. Consequently, it's crucial for a company to know whether the employee is a non-resident or a resident – and this also applies if the company is located outside France.

It's really about understanding these situations as they're now clearly happening more. People and foreign companies need to see what their obligations are when the employee is either living or working in France.

Sofie Vandermeersch, Belgium

In Belgium as throughout the EU, the basic principle is that the social security system is determined by the country in which you work, and the tax system by the country where you live. Suppose I live in Belgium, close to the border with France, and I work in France for a French company. Leaving aside the pandemic and how that has changed remote working, let's say I commute every day into France for my job, or maybe worked only one day at home. That would mean that I'm socially insured in France and will have pension rights in France, but for tax purposes I'm actually in Belgium because that's where I live. Regarding social security benefits such as health care and child benefits and employment allowance should I lose my job, they would be exported to my country of residence from France. As a result, I pay in France, but I get the benefits in Belgium.

That was the situation up to 2020 before the pandemic. After that everything changed. Everybody had to work from home, which means that I'm now living and working in Belgium. Because of that my social security enrolment changes. I have to be socially insured in Belgium and my French employer is obliged to organise a payroll in Belgium. But not many have done that to date because at first, it seemed to be a temporary situation and it's very complex and fairly radical to do so.

But remote working seems to be here to stay, even without a pandemic. As soon as you work 25% of your working time in your country of residence, the social security system of your country of residence becomes applicable. Employees generally prefer that. Also from a government or inspection point of view, the individual employment situation becomes all of a sudden much easier to manage, because both tax and social security positions are now united in one country.

I do believe that companies that used to be reluctant to comply, will have no choice but to adapt to this new reality of structural remote working.

Shilpen Savani, England

There are complexities here, particularly with Brexit, and although we've sadly waved goodbye to the EU our employment laws are unchanged for the moment and we have committed to a level playing field to ensure open and fair competition between the UK and the EU. The three main considerations are:

- the applicable employment law itself. If you're an English employee who decides to relocate to France or to Belgium, there's still a likelihood that you're going to be in a contract governed by English employment law. This is relevant to the question of where any dispute relating to their employment rights will need to be resolved.
- then there's the possibility of a duality coming in, because then they may also be governed by domestic law at the same time. Of course, there's also GDPR and the need to protect privacy and confidentiality, which every EU lawyer is familiar with.
- then the third and the biggest one, of course, which both Sofie and Stephanie have touched on, is tax and social security. There is a point at which the question of residence leads to a change in how an employee (and their employer) are taxed in the second jurisdiction rather than the UK jurisdiction. I will defer to Menna at this point!

Menna Bowen, England

I think there are a lot of red herrings here. The situation in the UK is very dependent on the individual one is talking about. Or the employer; depending on where they are situated and where the normal business is carried out. It also matters for what reason a person goes to work overseas as this is just about accepted as a non tax reason to move out of the UK. The main red herring so to speak is the fact that you, under the UK system, do NOT necessarily become tax resident somewhere else just by spending time there, in and of itself. Most countries have different tests as to how your residence is determined, not just counting days. That, plus overlapping tax year ends and the all important treaty provisions as to residence for tax purposes need to be considered when dealing with internationally mobile individuals. Similarly, one does not get out of most regulatory requirements by being resident somewhere else.

Aliff Fazelbhoy, India

Besides employment law, there are also tax and exchange control regulations that need to be considered. Exchange controls which govern foreign investment into India is governed by the Foreign Exchange Management Act or FEMA. FEMA has been interpreted to mean that a foreign company cannot employ someone in India unless they have a presence in India such as an office or a subsidiary.

As an example of this, one of the overseas banks had an Indian employee who wanted to come back to India and work from here. This created a host of complications because you can't have an employee here without having a presence. A way around this would be that the employee living here could become a consultant for the overseas entity but by this he forgoes some of the employment benefits. One then has to look at the tax issues and these depend more on residence than citizenship. Under the Income Tax Act, you are taxed in India if you are resident, irrespective of citizenship.

Another issue that arises is withholding tax. Foreign employers who have people working from home in India need to withhold Indian tax on their salaries which will mean having to obtain a tax registration in India thus there are a lot of tax issues that need to be considered including the possibility of creating a permanent establishment (PE) for the offshore entity if some of its employees work from India. As everyone knows, many more people are trying to relocate to their home countries or their preferred place of work. These issues are going to create a lot of problems and pressure on the tax authorities to come up with clarifications, especially for non-resident Indians who are citizens of foreign countries and have been stuck in India during the pandemic.

Rebecca Torrey, US - California

I would echo many of the themes that each of you has mentioned in terms of taxation, payroll taxes and benefits in the US. We've had a dual or sometimes triple layer of taxation for a long time because, as you know, the US has both federal, state and local laws that are not coordinated but rather overlapping.

The general rule is that anyone working in the US, whatever their citizenship, US law will apply to them. That was true before the pandemic and continues to be true even with disrupted working patterns. Employers must comply with federal regulations relating to employee benefits, health care and retirement plans, and also with state and federal taxes. The dual system relates, of course to employment taxes, income tax withholdings, worker classifications and other nitty gritty details like minimum hourly wages and minimum salaries permitting an exemption from minimum wage.

And then on top of this, a number of metropolitan areas have instituted local requirements impacting workers performing services in that city. It is only if a person is an alien and working in the US, not a resident or a citizen, then they would not be not subject to these laws.

In my experience many companies that have personnel working temporarily in the United States or for shorter periods of time, may take the liberty to classify the workers as independent contractors to avoid the complication and expense of compliance, including the laws relating to taxation and payroll taxes and social benefits.

And sometimes the businesses who are simply seeking to avoid the complications of compliance with the tax and the payroll requirements in the US, could end up with a larger, more costly set of problems by classifying workers as independent contractors. For that reason, it is important to get thoughtful assistance when workers are working while living in the US for a business located elsewhere.

Francisco Casanova, Venezuela

In Venezuela, the laws and court decisions have historically held up the importance of the territorial application of the law. And that's why our labour legislation applies to employees as long as the employment relationship is carried out in Venezuela.

Venezuelan legislation will only apply for the period that the employee actually finds themselves effectively working for an employer in Venezuela. The consequence of Venezuelan law is that the employer will have to comply with a set of obligations set out in our legal instruments. Among them is the obligation to register with the Venezuelan Social Security Institute, as well as having to make periodic contributions to that institute. This also applies to all other government operated welfare funds. And the employer will also have to take tax obligations into consideration. For example, it's possible for the employer to have to withhold tax depending on the particular circumstance.

The local occupational health and safety law also has its own set of obligations, such as the employer's obligation to inspect their employees' place of work. This will be rather complicated in practice given these very particular circumstances that we are going through.



Stéphanie Le Men-Tenailleau pictured at the IR Global Annual Conference in Amsterdam, 2019.



IR Global Employment members pictured at the Annual Conference in Berlin, 2017.

Leo Oudshoorn, The Netherlands

It is important to monitor an employee's actual work place during 2021 for tax- and social security purposes.

The Netherlands – Belgium/Germany. If an employee works in another country, it can have an impact on the country where this employee is taxable and in which country social security contributions are liable. For Belgium and Germany the Dutch government approved that the factual situation can be overruled and that taxation and social security liability will remain the same as if the employee would have continued to work in the Netherlands; likewise, the situation before 13-3-2020 (start date Dutch measures as a consequence of Covid19 crisis). The approval was valid until 1-1-2021 but has been extended to 1-7-2021.

The Netherlands – other countries / tax. For other countries the regular rules apply. The Netherlands has an extensive international tax treaty network based on OECD guidelines. Employees who used to reside in the Netherlands in 2020 and who are carrying out activities in another country in 2021 can become taxable in that other country if they physically stay there for more than 183 days, or if their salary is eventually borne by an employer in that country. If an employee is changing his/her residency to another country than the Netherlands because (s) he switches to permanent accommodation in that other country where (s)he will be partly working, (s)he will be taxable in that country. The salary over the days that (s)he will be working in the Netherlands will only be taxable in the Netherlands if the employee physically stays in the Netherlands for more than 183 days or if his/her salary is borne by a company that has its residency in the Netherlands.

Stephen Wilson QC, Turks and Caicos Islands

I note that many of my colleagues have said that the position in their respective jurisdiction is "very complicated" and that there are "lots of complexities", citing such things as social security, employment taxes, income withholding tax and exchange controls. The position in the Turks and Caicos Islands ('TCI') is far simpler. To all intents and purposes there are no direct taxes – I never get tired of saying or hearing that! Specifically in the employment field, there is no income tax or payroll tax. The only statutory deductions made from an employee's pay-package are National Insurance and National Health Insurance contributions. In very general terms, insurable employment means employment

in the TCI of a person under a contract of service or apprenticeship or under such circumstances from which the existence of a relation of employer and employee may be inferred, including employment by or under the Government of the TCI; though there are exceptions including employment of a person who is not ordinarily resident in the TCI, if the employer of that person is not ordinarily resident in the Islands and has no place of business there. A "temporarily resident employed person" means an employed person—

- (a) who is not an Islander as defined in the Turks and Caicos Islander Status Ordinance or a permanent resident as defined in the Immigration Ordinance;
- (b) who is employed in the TCI for a period not exceeding 180 days in any period of 12 months; and
- (c) who, when not so employed, resides outside the Islands.

Other than that - and here's a sentence I never thought I'd hear myself say – the TCI is similar to Venezuela, in this sense: our employment protection legislation (the Employment Ordinance) specifically does not apply to employment during any period when the employee is engaged in work wholly or mainly outside the TCI unless the employee ordinarily works in the TCI and the work outside the TCI is for the same employer.

Looking at the question from both sides (and I agree with Menna that it is misleading to equate (i) working from home on a semi-permanent basis in a country with (ii) transferring residence to that country); firstly in the case of an employee employed to work in another country but who is working from home in TCI, the consequences for the relevant business are going to be determined by the laws of its jurisdiction, save that the relevant employee will be required to have Immigration status in TCI allowing them to remain here. Secondly, in the case of an employee employed by a TCI company, but who is remote working in a foreign jurisdiction (I am aware of a few employees in that position), there is unlikely to be any consequence to the business under TCI law (save that it may no longer be bound by the Employment Ordinance), but there will likely be tax consequences for the employee in the relevant jurisdiction in which they are carrying out their remote work and there is the possibility of consequences (including tax consequences) for the employer under that foreign law, particularly if there is a requirement (such as there is in India) for the company to maintain a presence in that foreign country in order to have an employee there.



Rebecca Torrey pictured at the IR 'On the Road' conference in Miami, 2020.

SESSION TWO

Are there specific rules applicable to remote working in your country? How do they apply to domestic and foreign companies?

Stéphanie Le Men-Tenailleau, France

French rules regarding remote working are much stricter than other countries. We have had employment rules for some time regarding remote working, and obviously the current situation has not really changed the rules. But new agreements were signed at the end of last year giving more focus on the wellbeing of people working from home. The rules say that the remote person has to be voluntary – similar to that in Belgium. And I think it's the same in the UK. Employees have the same rights, even if they work from home. The employer also has the right to determine the types of jobs that are eligible for remote working, so there are some rules saying that additional expenses for the employees have to be paid by the employer, but it does not say how much and what type of expenses.

Consequently, there need to be good relations between the employer and the employee. The employer has to ensure health and safety, and that working time rules have been met. And also the right to have downtime from the employee side. Normally, the policy or the employment contract has to provide for times when the employer is allowed to call the employee and times when they're barred from calling.

Currently, employers who want to put in place remote working policies have to negotiate the with employees' representatives. A lot of French companies have been working on such policies and negotiating with the workers representatives. I recently had a call from one of my correspondents in the UK saying they had a client, which is an international group, that wanted to implement a global remote working policy, starting with the UK. But with France it's just not feasible because the wording is so different, although ultimately the rules, and the principles are the same. What I've heard is similar to France, but putting it all into policies and in the right wording in employment contracts seems to be very different.

Sofie Vandermeersch, Belgium

Remote working in Belgium has always been treated rather poorly. Remote working has not been contained in the law, but only in collective labour agreements. But the rules in these collective labour agreements are binding. They are also binding for foreign employers who are active in Belgium, even with employees subject to a foreign labour law. It's important to understand that due to the application of international private law and the Rome I-Treaty, binding local law prevails. That's something to keep in mind when foreign companies employ people in Belgium.

A basic principle of these remote working rules has always been that it has to be voluntary, so it could not be imposed by the employer or enforced by the employee. And the details of how it would be organised have always been left to negotiation between employers and employees or their representatives or trade unions. The results of these negotiations could be included in collective labour agreements, in company policies or even in the individual labour agreement between employer and employee. The rules have always been very diverse.

But then the pandemic came along and remote working became mandatory. Until very recently, there were no arrangements according to Belgium labour law. It was assumed that the rules issued by the government in fighting COVID-19 were a sufficient legal basis to impose remote working. This changed on January 26 this year. A new, generally applicable collective labour agreement was concluded, that finally laid down the rules of remote working for companies that had not yet made their own arrangements on this subject. As a result, things are changing as we speak and we need to look more closely on how that is going to work going forwards.

Shilpen Savani, England

That's fascinating because it's quite different in the UK. We have very little in the way of regulation for working at home and stipulating where people work. The main thing we have here is an overarching obligation, which goes back to the Health and Safety at Work Act 1974. Under our law an employer must look after the welfare of employees and provide a safe working place as far as is reasonably practicable. In terms of what that means, in reality, it's not too heavily prescribed. What normally is required is a risk assessment of where the employee is going to be working.

The rest of it is guidance, but it's not necessarily obligatory. And, of course, the other important statutory aspect for us is the statutory needs of data protection and maintaining confidentiality which means making sure that the higher risks of breaches at home are dealt with. Whether it's using less secure mediums like Zoom to conduct business or whether it's sharing hardware, laptops with family members or accessing personal data for the employees, there are practical issues to deal with.

This is a very relevant discussion right now, given how much the workplace has changed with the impact of the Covid-19 pandemic. It is forcing employers, employees and governments to rethink things and is bringing changes fast.

Menna Bowen, England

If you have a big multinational corporation you may want to check if there are different health and safety requirements or if you fulfill the necessary ISO requirements for using home as a base. But as the employee is working remotely, it is up to the employer to check all this. If you went to work abroad and got stuck because of Covid-19 you would still be subject to these standards even though you could be working in another country half way round the world.

Aliff Fazelbhoy, India

India, like the UK, doesn't yet have rules on working from home. There are some rules around providing a safe working environment and that is provided for in many statutes such as the Factories Act and the Shops and Establishments Act. The only regulation that allows specifically working from home is the OSP, which is the other service provider guidelines under the Department of Telecom. This applies to outsourcing business

processes and companies using leased lines and those kinds of services. Here it specifically says that remote agents are allowed to work provided they maintain the security protocols and keep all the data for at least one year.

Before the pandemic, there were four labour codes proposed to be introduced that would combine about 20 labour laws into these four codes. These are now more or less final and due to become effective from April 1st. Whether there'll be more detailed guidelines or not, we don't know.

One issue that is troubling a lot of our clients in a work from home scenario is estimating overtime. Most people are entitled to overtime if they work more than nine hours a day or 48 hours a week. If you're working from home, how do you monitor that? That's one issue that we've had a lot of queries on, and the other issue is whether employers are still obliged to give allowances such as travelling and food allowances.

Rebecca Torrey, US - California

The US is very much like the UK and India, as Shilpen and Aliff have described, in terms of there being really no laws specifically relating to virtual or remote work. The only ones we've seen are those relating to shelter-in-place requirements resulting from the pandemic, which has forced so many people to work from home on a regular basis for the first time in their working lives.

Before the pandemic, it was an anomaly and considered a privilege in the US to work from home. For the most part, employees had to demonstrate that they earned the right to work independently with little visual supervision, and that they could be trusted to focus on the work at hand, record their time as appropriate and maintain a safe work home environment. And employers were reluctant to take on the challenges of sorting out the issues except in exceptional circumstances. What has been interesting to see happen so quickly over the past year is that many businesses and individuals working remotely have embraced and worked the kinks out of their work at home arrangement. Both have been forced to address and solve these puzzles in the current crisis as a matter of survival.

The conclusion many enterprises have reached is that it's really not that difficult, that they can come up with ways to supervise the people on their team, and even use technology to monitor working time in a productive, non-invasive manner. By way of example, some use software that measure keyboard clicks and virtual meetings to check whether there are gaps of time when employees should be working but may not be diligently working. Those activity gaps also can confirm when employees may be taking the requisite break and meal periods whether or not those critical breaks are reported.

A significant pre-pandemic concern involved data security when using home equipment. Many employers considered it an unnecessary expense to have to provide the needed equipment, software, cell and Internet access to work securely from home. I see many employers who have reversed their policies this past year to enable people to work remotely while providing the same protections afforded in the traditional office workplace.

Francsciso Casanova, Venezuela

In Venezuela, unlike other Latin American countries like Argentina and Chile, there really hasn't been much of an initiative to regulate remote working through new legislation. We do not expect that to change any time soon. Nevertheless, the Minister of Labour recently said that the National Assembly should look into regulating remote work.

For the time being, remote working is usually handled on a case-by-case basis by the employees and their employers. Employers tend to get around remote working by using independent contractors, but this requires a careful analysis of the particular relationship given that there is a possibility that when an employer wants to hire an "independent contractor" they might, in practice, end up hiring an employee. This is important in part because Venezuela follows the International Labour Organization's recommendations with regards to determining the existence of an employment relationship, and if a court finds that the relationship established with the contractor meets the elements of an "employability test", the employer risks legal action.

Therefore, any company seeking to hire someone in Venezuela from abroad should take care to understand what constitutes an employee under Venezuelan law and thus make informed decisions when entering into agreements with local individuals.

Leo Oudshoorn, The Netherlands

Onboarding employee remotely. The first days of the new employee are crucial for alignment. This is the opportunity to take him or her along in the organisation: who are we, what do we stand for, what do we aim for and how can the new employee contribute to this? Organisations with an effective onboarding programme provide new employees with the right information and tools throughout the onboarding phase. In this way they ensure that employees become involved and can contribute to the objectives and ambitions of the organisation.

If the new employee is deemed to start up employment from home, serious measures must be taken in order to efficiently get the employee onboard. Home-work distances are not that far in the Netherlands, but the Dutch government has introduced the standard to work from home as much as possible and employers must guarantee the 1.5 metre distance between work spaces in the office. Anticipating frequent web, zoom and teams meetings with the responsible manager and with other team members should be timely and organised. Most organisations appoint a buddy colleague to familiarise the new employee as quickly as possible.

Right to change work place. In the Netherlands employees have the right to apply for a change in work hours and in work place. Employers have a duty to consider this. Generally spoken employers can only refuse these applications in cases of compelling business interests. Changing the work place to remote working from home must meet some conditions such as the guarantee that the work can be done safely and certain minimum standards are complied with in terms of good lighting and heating. If the employee is not functioning well, the employer can decide to urge the employee to work a certain number of days per week from the office.

Stephen Wilson QC, Turks and Caicos Islands

Save that when the COVID-19 pandemic first hit the TCI in late March 2020 and His Excellency, The Governor issued a proclamation of emergency allowing him to make emergency regulations, and those regulations included a 'shelter in place' provision as well as a curfew, meaning that businesses other than hotels and essential businesses could not open and employees who could work from home were required to work remotely from home (which provisions gradually fell away from early May 2020), there are no specific rules applicable to remote working in the TCI. The position is therefore similar to that identified in the UK, India, the USA and Venezuela, save that we don't have any real health and safety legislation, merely the common law duties of an employer to provide a safe system of work.

Stephen Wilson, QC pictured at the IR 'On the Road' conference in Singapore, 2017.

SESSION THREE

Will companies have to provide new policies for remote working? Will this include providing employees with the necessary equipment and reimbursing costs related to remote work?

Stéphanie Le Men-Tenailleau, France

Many French companies are currently working on new remote working policies, providing for necessary equipment or indemnities to allow employees to purchase such equipment. But the increasing trend of remote working will also have side effects. One thing that we've seen recently for French companies is that many people now want to live outside Paris or French big cities. Employees want to commute to Paris from other parts of France once or twice a week to work. And this is good, but normally you don't pay the same salary to someone who lives in Paris and someone who lives outside Paris. These people want the same salary and also want the employers to pay for the commuting expenses. And this has a big impact on the package's employers are prepared to give employees, because obviously you would not normally employ someone who does not live in Paris for a job in Paris. They will have to take everything into account and their compensation and benefits or compensation policy. And this is something that will really change in the next very next months and years.

Sofie Vandermeersch, Belgium

In the new regulations, the rule is that if the employee uses his own equipment, an agreement must be made about reimbursing the costs of the software, use, maintenance, depreciation of the computer and so on. But it's not defined who should bear the costs, only that arrangements should be made. Broadband in your house, for example. If is not strong enough at your home, then you should make arrangements on how to deal with it and work out who will pay for it.

Even before this new collective agreement, it was already quite clear that in the end, it is the responsibility of the employer to bear all costs relating to remote working. Whether the cost is borne directly by the employer or is reimbursed afterwards, does not matter.

The preexisting collective agreements on structural remote working stipulated it this way, the welfare regulations regarding health and safety too. And over all, it is a general rule in Belgian labour law that the employer is obliged to provide in the necessary tools and materials needed to carry out the work.

Shilpen Savani, England

That's similar to here in the UK, where we are already fairly well equipped for remote working. I would summarise what it means, practically speaking, in three categories. The first one is risk management, and that comes down to making sure there's a proper risk assessment done and that the workstation is properly assessed. The employer must meet its common law duties and health and safety requirements.

The second includes insurance and making sure the workplace is insured. This also extends to a need for safeguards to maintain privacy and protect confidential information.

Third is to maintain productivity. Whether it's checking a number of clicks or whether it's just making sure the manager knows what the employees are doing, how do you maintain targets and measure the delivery of work? How do you maintain effectiveness when your staff are working remotely?

The challenges thrown up by Covid-19 including home schooling, for example, have largely been dealt with in a common sense way by employers with employees that are working from home. Employers are aware that people have real life issues to deal with at home right now and mostly I have seen a cooperative and practical approach to the problems posed.

It will be very interesting to see if these changes are here to stay and I think flexible working will become the norm in many industries even after the pandemic is over. I don't think we need to change very much at all in the law to keep up with this in the UK.

Menna Bowen, England

I was in the fortunate position to have been on the other side of the world during the first two lockdowns in the UK. Having gone to Mauritius for business it seemed a good idea to stay there, but then it turned into a 9 Month stay which was a bit unexpected. The internet is super fast there most days and guess what now the Mauritian government are offering one year special "work remotely" visas. Apart from any IT disasters which could have been fatal and a bit of time difference it actually worked very well. Gunnercooke is so set up for remote working that it was pretty seamless and also is an eat what you kill model which I think is the better way forward for remote working as policing hours would I imagine get very boring indeed. Also, despite 9 months out of the UK I will unfortunately however still be deemed UK tax resident.

Aliff Fazelbhoy, India

A lot of problems people have mentioned with regards to other jurisdictions are also here in India. The most common being broadband issues; people have smaller houses, especially in the big cities, often with large families. Consequently, privacy and space to work has become very difficult for many people. Therefore, many employees are keen to get back to the office.

Since August, people have been going to office, but there were regulations for a few months saying offices should operate at between 10 to 50 percent capacity. For our Firm, the corporate department has largely worked from home for the past 11 months while the litigation team has been coming to office since July 2020. I think most of our staff are now looking forward to coming back to office on a more full-time basis. We however plan to continue a rotation policy for a few more months until everyone is vaccinated.

Data protection is the biggest issue that's going to face everyone across the world. How do you maintain privacy and ensure that computers at home are not misused or breaches don't happen?

Companies will have to incur extra costs to build up these security systems but might be able to save a little bit on certain allowances like food and travelling given to staff who come to office every day.

Rebecca Torrey, US - California

I don't expect in California or the US as a whole there will be new laws pertaining specifically to remote working. Instead, employers will fill the gaps with a network of policies structuring virtual work. This is an area where success will follow agility. Companies that embrace the shift to virtual work, making adjustments in a positive, forward-looking way will likely be the businesses that succeed both in terms of productivity and, I think, a positive workplace culture.

One of the most significant challenges that businesses are grappling with is not just compliance with the laws, but how do they make their company work when their people aren't gathered together in the same physical space? This impacts productively and also development of a culture that encourages loyalty and the ability to perform at the highest levels in a creative and collaborative way. Policies can provide the structure, although it may be trial and error to find what practices work best in a particular context.

Francsciso Casanova, Venezuela

In Venezuela, remote work remains an uncommon practice. It wasn't until the COVID-19 pandemic that this began to change. Therefore, there's a lack of advancement in this area, mainly in the legislative field. Another reason is that the country is undergoing a prolonged economic recession. As a result, people prefer to attend the workplace rather than seeking alternative solutions, given the fact that they may have not have a stable internet connection nor the hardware necessary to carry out their jobs from home.

In addition, a lot of big companies offer great benefits to their employees when they turn up for work, like breakfast, for example. Regarding the question of data protection, while Venezuela has entered the digital age in practice, with new mobile banking solutions, online subscription-based TV services and a whole host of digital platforms dedicated to e-commerce, the country has not adapted its data protection laws and regulation.

We are behind other nations in that respect. Our two largest data protection regulations come from what we call the Habeas Data, a constitutional protection that allows Venezuelans to request access to any and all information about them in private and public records and even request that it be deleted. The other protection stems from a law that protects people from crimes committed over electronic media or networks. With the rapid growth of the digital economy in Venezuela in the recent years, we do expect that data protection norms will be catching up soon.

Finally, there's a rule in our Labor Law which regulates work from home, which states that employers who hire employees destined to work from home must provide said employees with all the necessary instruments and tools to carry out their jobs. This rule was not meant to cover this current situation of online remote work, but it could serve as a guide for judges and the legislative when looking at these current circumstances.

Leo Oudshoorn, The Netherlands

Reimbursement of commuting costs. Employers usually reimburse the costs of commuting to employees in the Netherlands. No matter the type of transportation from home to work and back, it is allowed to pay up to € 0,19 cent per kilometre tax free. Pursuant to a formula based on the average factual commuting days in a month, employees can get paid a fixed monthly allowance for commuting.

Reimbursement for remote working. Costs incurred during working from home are often reimbursed by employers. The regular reimbursement is about € 2 per work day.

This is a taxable benefit for the employee. It can be either taxed in the monthly payslip or it can be added to the so-called free space in the Labour Costs Scheme. The free space provides in a tax free amount of 3% over the annual accumulated taxable salaries of all employees up to € 400.000 and of 1,18% over the excess. If the free space is eaten up, the employer is taxed at a flat rate of 80%.

Office equipment like a chair and a desk can be made available to the home working employee, but this is taxable unless there is still sufficient free space left in the Labour Costs Scheme or if the employer's sickness prevention plan provides in the payment of office equipment. Laptops and other computer equipment can be made available or paid tax free to the employee if the employer considers this as a necessary condition to fulfill the employment tasks of the employee.

Long term. The Covid19 crisis has encouraged employers and employees to continue to work far more remotely in the future. Organisations have to pro-actively monitor and develop new ideas and business strategies to cope with the new world order. Future remuneration packages will differ from today: making a company car available to an employee will be discouraged, commuting allowances should be re-considered on actual commuting days, office equipment should be made available, compensation for home work costs should be considered.

Stephen Wilson QC, Turks and Caicos Islands

I very much embrace what Rebecca has said regarding the lack of expectation of any new systems of laws in TCI to deal with remote working. TCI's economy is highly reliant on tourism and, as such, it is not a country with a culture of remote working. Indeed, for the vast majority of the workforce, their jobs can't be performed from home.

Further, for a country with a population of around 40,000 people, the vast majority of whom are situated on an island that is 17 miles long from tip to tip and only 35 square miles in area, commuting to work is not really an issue and so, unlike the situation in France, people are not looking to move out of the 'city' to work from home.

Although as a law firm (in common with many other professional businesses) we ensured that those of our workers whose jobs could be carried out from home were provided with laptops, printers and other essential office equipment if required, we are finding that most people are desperate to return to the office and in TCI (as opposed to our offices in the Bahamas), we've been fully back to the office since 8 May 2020. This is true for the vast majority of private business, though some government departments are still requiring persons to work from home or are on split-shift systems. Overall, the only new policies I anticipate coming into play in the private sector are likely to be linked to businesses' reluctance to send employees to overseas meetings or conferences and require them instead to attend by video platforms.

That all said, forward thinking employers should already be embracing policies for working from home and particularly flexible working arrangements for those who may wish to work part of their time from home, as a way of aiding recruitment and retaining employees. I would also urge legislators when considering revisions to employment law and health and safety at work legislation to take into account working from home and to recognise the value of the same as part and parcel of a 'new normal' working environment, where applicable.

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