

Remote working – challenges and opportunities

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Focus of this presentation

- Remote working across borders
 - In an EU/EEA country, Switzerland or the UK
- The two cases forming the basis for the discussions
- Areas of law with potential problems
 - The main potential legal problems

Remote working across borders

Remote working across borders

- The concept of “remote working across borders”
 - Work performed by the employee in a country other than the country in which the employer has its place of business
 - With the exception of work performed in the context of a business trip or a posting (secondment) decided by the employer
- Remote working across borders includes
 - For an employee living abroad: work at the home address
 - For an employee living in Denmark or abroad: work performed in a country other than Denmark from a location chosen by the employee, for example as part of a "workation"

Remote working across borders

- Pros of allowing remote working across borders
 - Increase the ability to attract and retain employees by responding to a growing demand for remote working
 - Ensure the same opportunities for employees regardless of their country of residence
- Cons of allowing remote working across borders
 - May give rise to many issues due to the local law of the country where the remote work is performed
 - Compliance with local law can be difficult and administratively burdensome

The two cases forming the basis for the discus- sions

The two cases

- Case no. 1 – key facts
 - The employee is employed with a Danish employer under an employment contract based on Danish law
 - The employee resides in a country other than Denmark
 - The employer and the employee have agreed that, for personal reasons, the employee is entitled to perform part of their work as homeworking in their country of residence
 - The employee performs the majority of their work in Denmark
 - The employee has no other employment than the employment with the Danish employer

The two cases

- Case no. 2 – key facts
 - The employee is employed with a Danish employer under an employment contract based on Danish law
 - The employee resides in Denmark and performs the majority of their work in Denmark
 - Under the employer’s flexible workplace policy, the employee is entitled to perform part of their work as “homeworking” from places other than the employee’s residence, both in Denmark and abroad
 - The employee has decided to perform “homeworking” for a period of time from a holiday home in a country other than Denmark
 - The employee has no other employment than the employment with the Danish employer

Areas of law with potential problems

The main potential legal problems

Areas of law with potential problems

- Employment law
- Health and safety law
- Immigration law
- Social security law
- Tax law
- Data protection law

Employment law – potential problems

- The law to which the employment is subject under the rules on applicable law
 - If the employee habitually performs their work in one country → the law of that country
 - If the employee does not habitually perform their work in any one country → the law of the country in which the place of business through which the employee was engaged is situated
 - If it appears from the circumstances as a whole that the employment is more closely connected with another country → the law of that country

Employment law – potential problems

- Risk that the employment may **also** be subject to the law of country where the remote work is performed
 - All or only part of the law of the country concerned?
 - Only rules laid down by legislation or also rules under a CBA?
 - In relation to the entire employment relationship or only the part of the employee’s work performed in the country concerned?
- The potential basis for the application of the law of the country where the remote work is performed
 - The employee is considered to be a “posted worker”
 - The law is considered to be “overriding mandatory law”

Employment law – potential problems

- Issue on whether the employer will be obliged to register the employee in a specific register in the country where the remote work is performed
 - This issues is normally linked to whether the employee is considered to be a “posted worker”
- If a registration obligation applies in the country where the remote work is performed, the employer may also be subject to the other obligations that apply in that country in relation to posted workers

Immigration law – potential problems

- Issue of whether the employee has the right to perform work in the country where the remote work is performed without a work permit
 - This issue usually depends on the nationality of the employee
 - For remote work in an EU/EEA country or in Switzerland, the issue will usually depend on whether the employee is a national of one of these countries or of a third country

Social security law – potential problems

- Issue of whether the employee will become subject to social security in the country where the remote work is performed
 - Either for the entire duration of the employment or only for the period of remote work in the country concerned
 - An issue which, depending on the specific circumstances, can be very complex and cannot always be clarified with certainty
- The rules determining the country whose social security law applies to an employee depend on whether the employee is considered to a private sector or a public sector employee

Social security law – potential problems

- The relevant rules if the employee is considered to be a private sector employee
 - If the employee is considered to normally perform work in two or more countries
 - The importance of the so-called 25% rule
 - If the employee is considered to be posted for a period of up to 24 months
 - If the employee cannot be considered to be covered by either of the two situations above
- The relevant rules if the employee is considered to be a public sector employee

Social security law – potential problems

- Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework
 - An attempt to simplify and handle the social security issue in some of the situations where the employee performs homework from a country other than the country where the employer is established
 - Application of the agreement requires that the agreement has been accepted by both the country where the employer has its place of business and the country where the employee resides

Tax law – potential problems

- Issue on whether the employer can be considered to have a permanent establishment (PE) in the country where the remote work is performed, wholly or partly as a result of the work performed by the employee in that country
 - An issue which can be very complex and cannot always be clarified with certainty
 - An issue which depends, among other things, on the nature of the employee's work and the employee's authority to enter into or extent of participation in the conclusion of contracts on behalf of the employer

Tax law – potential problems

- Issue on whether, on payment of salary, the employer is liable to withhold income tax under the rules applicable in the country where the remote work is performed
 - Is the employer subject to a tax withholding obligation only if the employer is considered to have a PE in the country concerned? Or also if there is no PE?
 - Does any tax withholding obligation apply only in relation to the part of the employee's salary that relates to work performed in the country concerned? Or does any tax withholding obligation apply to the entire salary?

Questions from the
audience?