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TECHNOLOGY MARATHON

2023 Technology Marathon: International Employment,
Immigration, and Tax Considerations for a Mobile Workforce

Matthew Howse, Thomas Twitchett, Neil McKnight & Jennifer Connolly

1 June 2023 | 12:30 - 13:30 ET

Presenters



Matthew Howse

Partner, Employment



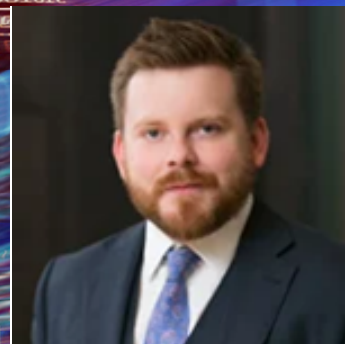
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Neil McKnight

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Agenda

- Global mobility in a post-pandemic era
- Structuring
 - International secondments
 - Local employment
 - Temporary remote working abroad
- Immigration
- Tax

Global mobility in a post-pandemic era

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The 'global war for talent'

- Huge upheaval in the labour market in recent years
 - Covid-19
 - Conflict in Ukraine
 - High inflation
- Significant layoffs in the tech industry
- Job vacancies surged during the pandemic, and are still prevalent post-pandemic
- Employers, globally, are continuing to experience difficulties filling posts
- Employers are still looking for opportunities across borders to find and to motivate talent



Global mobility trends

Remote working persists and encourages increased mobility



Endurance of remote working post-pandemic

The 'new normal' is still being established. Most employers continue to offer remote working.



Rise in requests for short-term transfers

Employees increasingly initiating or requesting temporary transfers to new locations.



Growth in mobility programmes

Employers are revisiting their mobility offerings and parameters to accommodate staff.



Increased need for compliance and legal advice

Global mobility generates complex employment, tax and immigration challenges.



% of employees now tethered to just one place

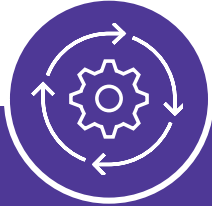
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Structuring

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Effecting mobility

Common ways of structuring cross-border mobility and accommodating overseas working



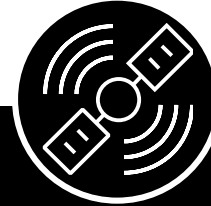
International secondment

The temporary assignment of an employee from one organisation to another for a specified period, usually to carry out a particular project.



Local employment

The permanent transfer of an employee's employment to a host country. Depending on the requirements of the host country, this may or may not be to a local entity in the host country.



Informal remote working

The temporary permitting of an employee to carry out their existing role from a country other than the country in which they are contracted to work for their employer.

International secondments

Temporary assignments with an expectation of return



Benefits

Commonly offered to build relationships with third party businesses; career development; and to deploy skills and experience in new markets.



Paperwork

Best practice to document arrangement between: (i) seconder and the employee to be seconded; and (ii) seconder and host entity.



Local employment contract?

In a typical secondment, the secondee remains employed by the seconder. But local laws may require a local (temporary) employment contract.



Mandatory local laws

In advance, should consider laws of jurisdiction in which the secondment will take place. Local laws may impact the viability of the secondment.



Temporary only

The duration should be agreed in advance. Some jurisdictions mandate that a secondment must be for a temporary period to be valid.



Tax and immigration

Need to identify whether employee can work in host country and what the tax and social security arrangements will be.

International secondments

Temporary assignments with an expectation of return



Payments

In some jurisdictions, even if employee remains employee of seconder, local employment laws apply and local tax and social security payable.



Relocation expenses

Consideration should be given to who bears the expenses of relocation, e.g., transport, shipping, housing allowances, school fees, and tax advice.



Benefits

Local laws may mandate provision of local benefits. Global benefit policies should be checked to see if they extend to host country.



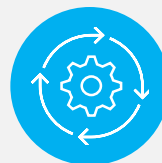
Cross-border data transfers

Seconder and host entity may have obligations under local data laws re: secondee's personal data, esp. regarding international transfers.



Business protections

Important to check existing confidentiality protections and post-termination restrictive covenants work in context of secondment.



Return of the secondee

Essential to consider at the outset what will happen at the end of the secondment. Most jurisdictions require return to old job or similar.

International secondments

Temporary assignments with an expectation of return



Employee rights

Seconded employee may be able to bring claims against seconder or host based on rights under laws of home country and also of host country.



Discrimination

Seconded employee likely to be protected by national discrimination laws in home country and of host country.



Governing law

Irrespective of parties' choice of governing law, the mandatory employment laws of host country often override.



Jurisdiction for disputes

Can be complex. Irrespective of parties' choice of fora for settling disputes, mandatory local laws or case law may dictate alternative fora.



Execution

Good practice for secondment agreement to be in writing and signed. May need to be registered or filed with a government authority.



Language

Secondment agreements can often be written in English, but local laws should be checked as they can mandate local language requirements.

Local employment

The employing entity

- Not always necessary to employ through a local entity
- May be possible for existing employer to continue to employ employee in new country (as an overseas employer)
- Local laws must be checked

Contracts

- Most countries require a written employment contract
- Other countries may require a written statement with key details
- Certain countries have local language requirements

Policies

- Local law may dictate that local policies be in place
- UK: disciplinary policy; grievance policy; GDPR-compliant data policies, H&S statement
- Policies should reflect size of local workforce

Payroll, etc

- Essential to consider how payments will be made to employee and the withholdings that must be made for tax and social security
- May need to outsource payroll initially if no previous presence in new country

Local employment

Overriding local laws

- Employee will benefit from mandatory local employment laws
- Per secondments, alternative choices of law and fora likely overridden
- Must ensure package offered complies with local law (e.g., re: pay and benefits)
- Know the local rights and restrictions (esp. dismissal)

Business protections

- Confidentiality, IP and restrictive covenants vital to protecting employers
- Local laws re: restrictive covenants vary hugely
- Important to ensure that these business protections are valid under local law

Mandatory local registrations

- As an employer, even with one employee in a country, may be necessary to make certain local registrations (e.g., with local authorities and tax authorities)
- May also need to register with local data protection authorities

Other compliance issues

- May need mandatory local insurances (e.g., ELI)
- Increase in local headcount may trigger additional local rights (e.g., equality quotas)
- Will need requisite immigration permissions

'Employers of record'

What?

Employers of record or EORs can employ and pay local employees under an employment contract. Employees are supplied to the end-user company under a commercial contract.

Why?

Ease, but for a fee!
Keep headcount down
May be useful as a temporary measure while finding feet

Commercial considerations & terms (1)

What are the fees for general services?
Is there a fee for client engaging individual directly?
Is there an express clause confirming EOR is employer?

Issue: local restrictions & rights

Local laws may restrict or prohibit the use of EORs (and comparable employee leasing arrangements), or give additional rights to employees

Issue: protecting the business

Need to ensure business protections that kick in on termination of employment are appropriately drafted to ensure 'end user' client protected (local laws may restrict)

Commercial considerations & terms (2)

Who will carry out suitability checks?
What is the process to terminate an individual?
Who picks up tab for employment claims?

Temporary remote working abroad

1

Employers continuing to receive requests

- Covid-19 left many employees asking if they could WFH abroad
- Employees asking to spend time downtime with family abroad or extend time in vacation destinations

2

Employment, immigration & tax risks still apply!

- While the proposed arrange may be a matter of weeks, it still generates the risks discussed
- The longer the arrangement, the higher the risk

3

Consider putting in place a policy on handling requests

- Policy helpful for setting parameters and best ensuring consistency of treatment across staff
- May be especially useful where high volume of requests

4

Recommendations

- Before accepting request, ensure role can be performed properly and lawfully in proposed country
- Depending on risk appetite, take local advice on the risks
- Document arrangement and expectations in writing
- Check whether existing insurance and benefit arrangements still work

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Immigration

Remote working considerations for employers



Level of risk

Will vary depending on the employer's policy.



Prior work authorization

May be required in more than one country.



Cost and time spent

Becoming increasingly costly and time consuming.



Management time

May be burdensome for employers to comply with compliance duties.



Long term ability to settle

Often a residency requirement to be satisfied on settlement.

UK Immigration

Common routes for remote workers entering the UK



Short term routes

Employees may enter the UK under the visitor route, but strict restrictions on permitted activities and receipt of payments



Non-sponsored routes

Where a company has no established UK presence, there are several routes that allow individuals (that do not intend to set up a business in the UK) to enter



Employer sponsored routes

Where a company has a UK presence, employees may be sponsored by that company for the duration of their time in the UK

Short term routes

A visitor must not intend to work in the UK

- taking employment in the UK
- doing work for an organisation or business in the UK
- establishing or running a business as a self-employed person
- doing a work placement or internship
- direct selling to the public
- providing goods and services

Activities undertaken as a visitor

- must fall within permitted activities
- must not amount to them filling a role or providing short-term cover for a role within a UK based organization

Payment whilst in the UK

- must not receive payment from a UK source for any activities undertaken in the UK
- visitor must remain paid and employed outside of the UK
- reasonable expenses to cover the cost of their travel and subsistence permitted

Non sponsored routes

High Potential Individual

- international graduates from the most prestigious universities around the world can work in the UK for up to 2 years without first needing a job offer

Youth Mobility Scheme

- young adults from participating countries and territories can work in the UK for up to 2 years without first needing a job offer

Global Talent

- “leaders” in academia or research, arts and culture, or digital technology, provided they have secured an endorsement from the relevant industry body

Employer sponsored routes

Skilled Worker

- Allows skilled individuals to come to the UK to take up an offer of employment with a sponsor (employer) approved by the Home Office

Global Business Mobility

- Allows senior managers or specialist employees working for the business overseas to come to the UK on a temporary assignment undertaking a skilled role in the UK

Government Authorised Exchange

- Offers flexibility for individuals to be sponsored to come to the UK to undertake numerous supernumerary roles

Scale-Up

- Allows qualifying high-growth companies to attract talent to the UK by offering a more flexible visa option with workers tied to their UK sponsor for a period of 6 months after which they are able to work for any employer in the UK

Immigration

- Many countries have not adopted immigration policies that mirror the flexibility that remote working is intending to provide
- Employment-based immigration channels are generally structured around full-time, in-person employment
- Routes that do not require employer sponsorship are few and far between
- The visitor route is high risk
- Immigration considerations should be looked at in the context of the employment and tax risks

Tax

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Key tax considerations

Employees

- Will the employee become tax resident in another jurisdiction, and what impact will that have on the employer's tax obligations?
Is the employee complying with their own tax obligations?
Are equalisation arrangements being made available?

Payroll

- Will the presence of an employee in another jurisdiction mean that the employer has to operate payroll withholding?
- Are there any social security obligations?

Corporate taxes

- Does the employee create a taxable presence in the other jurisdiction?
- Could the employee change the tax residence of the employer?

Compliance

- What tax filings are required?
- Will the employer need to set up a payroll?
- Risk of penalties for getting it wrong.

Employee considerations

- What impact will the arrangement have on the employee's tax position?
- Tax residence
 - 183 days is generally the magic number
 - UK – complex (and formulaic) residence test
- Implications of changing tax residence
 - liability to tax on more sources of income/capital gain in that jurisdiction
 - equity compensation
 - pensions
- Is the employer offering an equalisation arrangement?
- Directors – more complex

Payroll taxes

- If an employee is liable to pay tax in a jurisdiction, does the employer need to operate payroll withholding?
- Most jurisdictions require employers to deduct income tax and social security from remuneration paid to employees
- Temporary visitors
- Social security
 - does the employee need to pay it?
 - social security treaties/coverage certificates

Corporate taxes

- Permanent establishment
 - fixed place of business – but what about the home office?
 - dependent agent – signing authority?
 - what are employees doing on the ground?
- Anti-avoidance rules – UK diverted profits tax
- Corporate residence
 - central management and control/place of effective management
 - impact of changing residence

Compliance

- Does the employer need a payroll? Who is going to operate it?
- Are tax filings required?
 - corporate tax filings
 - personal tax filings for employees
- Monitoring employee location
- Remote working policies

Ukraine Conflict Resources

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Biography



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As practice group leader for Morgan Lewis's labor and employment practice in London, Matthew Howse represents clients in the financial services, media, legal, and insurance industries in High Court and employment tribunal litigation and in class actions, collective actions, and group litigation. His experience includes employment law as well as privacy and cybersecurity law. In addition to litigating both contentious and noncontentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

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Thomas Twitchett advises national and multinational clients on all aspects of UK employment law. With a particular interest in dispute resolution and litigation, Tom assists clients with internal investigations, forfeiture processes, exits, grievances, and disciplinaries, and represents clients in Employment Tribunal and High Court proceedings. He also counsels clients on the employment law aspects of transactions and helps clients more generally to navigate legislative updates and the growing impact of FCA and PRA regulation.

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Jennifer Connolly is a member of the firm's immigration and global mobility team. Jennifer advises businesses of all sizes from a range of sectors on corporate immigration issues and provides legal and strategic advice related to the movement of global talent, global immigration policies, and compliance best practices.

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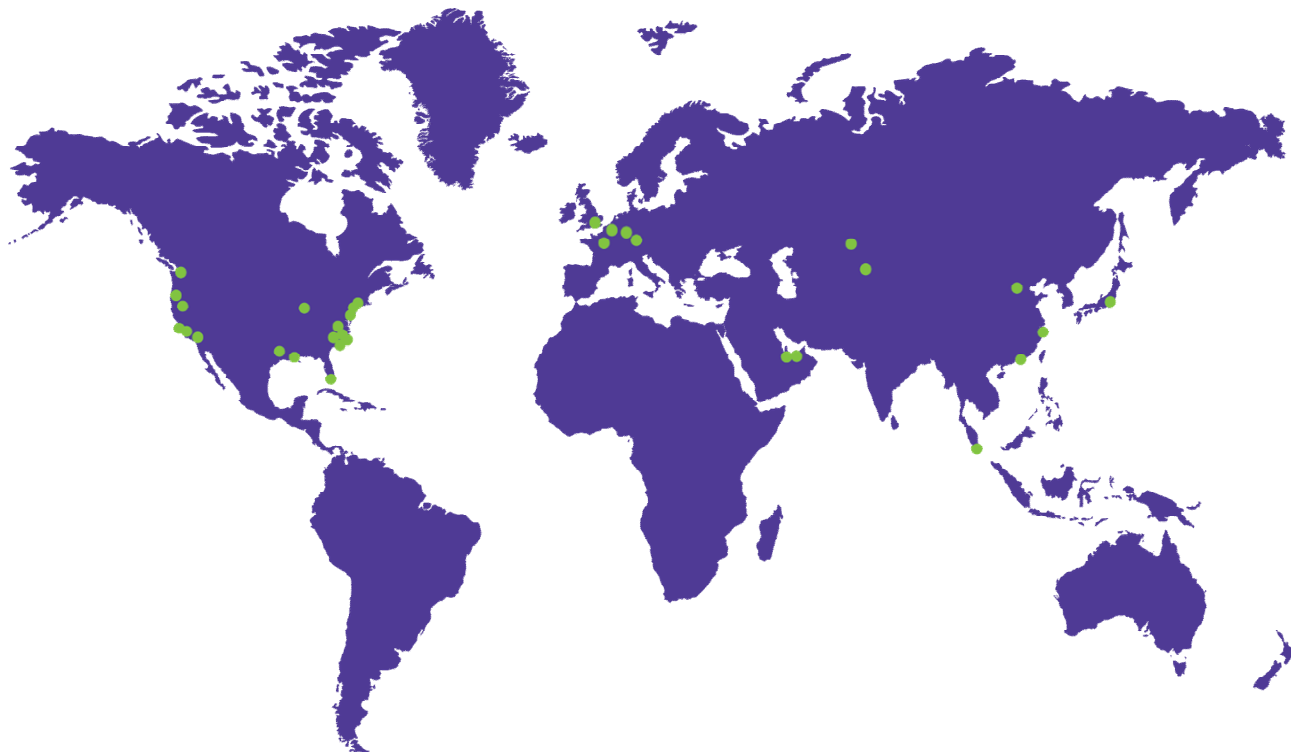
Neil McKnight advises on transactional tax matters, focusing on M&A transactions, domestic and international tax structuring, financial transactions (including securitisations and structured finance), and real estate tax matters (including transactional real estate, landlord and tenant, and real estate investment). Neil advises on indirect taxes, particularly regarding financial services and cross-border supplies of goods and services. He also supports the firm's employment practice, advising on matters including international mobility of employees and employee incentivisation arrangements. He is a co-leader of the firm's LGBTQ+ Lawyer Network and is recognised in The Legal 500 UK.

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