# The Future of Work
## Tax and Legal Perspective

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# Key Considerations of Working From Home in a Foreign Jurisdiction

## Introduction

Covid-19 has fundamentally changed our personal and professional lives. We have had to quickly adapt to the "new normal" and have implemented new ways of working. For many, the opportunity to work from home is a welcome development.

Indeed, as we wait and see how we will emerge from the pandemic, it is likely that many organisations will maintain a longer term working from home option for their employees – both to facilitate an improved quality of life and importantly, as these few months have shown; because it can be done.

Where this involves employees working remotely from other parts of Ireland, it will directly align with the Ireland 2040 strategy. Contained within that document, there is an emphasis on strengthening the regionalisation agenda which will, of course, be facilitated if more people can feasibly reside in those areas in Ireland.

However, where this involves the remote working of employees in another jurisdiction, there are tax and legal consequences which need to be considered by companies. These do not necessarily preclude working from another jurisdiction as an option, but do need to be monitored and managed.

## 01 Personal Tax Compliance

The most obvious issue when people begin to work outside of Ireland is payroll and employment tax obligations for employers in foreign jurisdictions. Each country has their own prescriptive thresholds for determining when someone will be tax resident in that jurisdiction for payroll purposes. However payroll obligations are separate to residency rules – for example Irish payroll obligations could apply if a foreign employee spent 30 workdays in Ireland.

Other countries will have similar payroll triggers which may apply where an employee of an Irish company is working there.

While there are some concessions issued in various jurisdictions around the triggers for residency as Covid-19 continues, should the remote working arrangements continue beyond the pandemic, payroll obligations will arise for employers.

This may involve registering as an employer, obtaining a Tax Reference Number and operating payroll in that foreign jurisdiction.

From the perspective of the employee, there may be an increase in their personal tax bill and an obligation to file tax returns in multiple jurisdictions.

## 02 Immigration Requirements

Another aspect that employers need to consider is whether their employee requires immigration permission either to work in Ireland or in the foreign jurisdiction.

Some permissions received in Ireland may require them to work in the State. Some individuals who typically do not require immigration permission to work in Ireland may now require some type of permit to work in that foreign jurisdiction.

The threshold for obtaining a permit to perform duties in a particular country may be lower than the typical payroll obligation threshold and should be considered separately.

## 03 Permanent Establishment (PE) / Company Residence

A PE can give rise to a corporate income tax liability in a foreign jurisdiction. Any company should monitor its PE risk if it has a fixed presence in another jurisdiction, including employees working there, particularly those in sales roles.

There have been concessions granted where employees are working in a particular jurisdiction as a direct result of Covid-19. Indeed, Irish Revenue have confirmed that where an employee of a foreign jurisdiction is working in Ireland, or where an Irish employee is located abroad where it can be clearly shown to be Covid-19 related, they will disregard such presence from a PE perspective.

However, not all jurisdictions have announced similar concessions and, in any case, where this continues long term, there is the risk of a PE being created in a foreign jurisdiction where an Irish company has a presence there. This can also, in certain cases, include a home office.

In an extreme case, there may be a risk that the residence of a company no longer sits in Ireland by virtue of it being resident elsewhere under the central management and control test. For example, where board directors no longer work in Ireland or the board meetings do not physically occur in Ireland as frequently, care will need to be taken that residence is not triggered elsewhere, and the key business decisions, including strategy and investment, have clearly occurred in Ireland, preserving Irish residence. A close examination of company law provisions with respect to the impact of conference call board meetings should also be considered.

## 04 Transfer Pricing

Where a company's employees continue to work in a foreign jurisdiction long-term, it may have implications from a transfer pricing perspective (which is intrinsically linked to PE issues as previously outlined). Transfer pricing operates where there are transactions between companies belonging to the same group or where there are dealings between a company's head office and any PE of the company which exists in other jurisdictions. There is a requirement to ensure such transactions between group companies and any internal dealings involving a PE are priced at arms' length.

Where a company's employees are working in a foreign jurisdiction, their activities could create a PE (a fixed place of business PE or an agency PE). In such cases, the PE would need to be remunerated at arm's length for the activities of the employees who exercise their duties abroad.

Depending on the nature of the business and the activities undertaken by any PE, this could have significant implications for the level of profits earned in Ireland or elsewhere and could potentially lead to disputes with tax authorities. There may also be compliance obligations, such as transfer pricing documentation, which could arise and would need to be considered.

For instance, say there's an Irish group which generates the bulk of its profits as a result of its technology. If the key activities related to the technology are undertaken in Ireland then the transfer pricing analysis may support that a significant portion of the profits are earned in Ireland. If, as a result of Covid-19, the team undertaking technology development is no longer in Ireland, this will be more difficult to sustain and it will be particularly acute where the key decision makers (e.g. the CTO) are not located in Ireland.

## 05 Research & Development (R&D) & Other Incentives

Ireland has generous R&D incentives, including an R&D tax credit regime which is available at 25% of allowable expenditure on R&D activities and plant and machinery. Small and micro companies may benefit from a 30% credit on certain costs.

However, qualifying for the R&D tax credit may be impacted by a longer term trend of working from home.

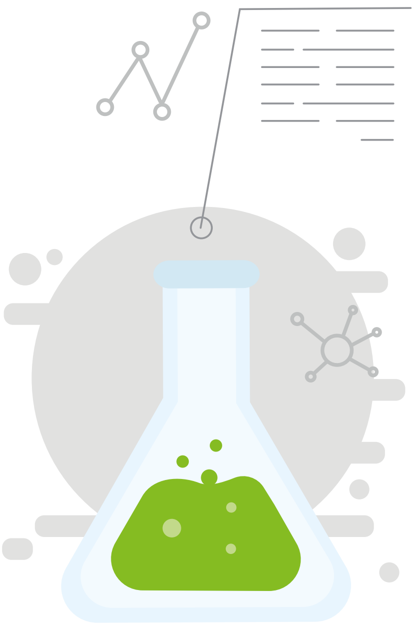
For example, the company must be undertaking the R&D activities within the EEA.

If we revisit our previous example of the CTO or a number of their team working outside of Ireland but further assume that this team conducts all of the company's R&D functions within the remit of their DEMPE functions, and are now working from their homes in Germany. The condition to qualify for R&D credits is still satisfied as the R&D activities are undertaken in the EEA. However, if we had assumed that they are working from their homes in India (or indeed the UK from 2021 in the absence of extending the relief to EEA + UK), the condition would not be satisfied and the expenditure will no longer be qualifying for R&D credit purposes.

Irish R&D legislation does not allow for connected party outsourcing, so in our example above to the extent that a German group company began to incur the costs for the employee based in Germany, notwithstanding that the activities are still undertaken in the EEA, costs would no longer qualify for the R&D tax credit.

Where Irish PAYE payable is reduced due to additional foreign payroll obligations, this may impact on the level of cash repayments if they are linked to the PAYE paid in Ireland. This is likely to be limited in application, but may apply to smaller, R&D focussed companies.

Finally, IDA Ireland provide a range of incentives for companies which locate in Ireland and employ people in Ireland. Where this ceases to be the case, the impact on any such incentives or grants need to be considered.



## 06 Tracking, Monitoring and Compliance

It is evident that the advent of working remotely abroad will bring additional compliance, tracking and monitoring obligations for any companies that adopt such a policy. It is critical for the company to establish clear policies and procedures as well as robust processes that identify all additional obligations and risks, tax and non-tax (e.g. data privacy, data protection, visas, etc), that could be associated with each employee, individually and collectively, that request to work from abroad.

The additional workload and data requirements to meet compliance obligations in addition to the continued need to track and monitor tax positions and risks should not be underestimated. This will likely require companies to consider implementing new tracking and monitoring technology in addition to ensuring increased collaboration between tax, HR, legal, people operations and IT functions. This includes dealing with issues around data transfers, GDPR and other regulations which are of particular relevance when employees are working outside of the EU.

## 07 VAT

Remote working can also give rise to VAT issues. Companies will need to consider whether remote workers could give the business a fixed establishment for VAT purposes. A fixed establishment is the sufficiently permanent presence of human and technical resources that allow you to carry on a business from that location. Whether you have a fixed establishment will depend on the nature and number of employees working from a given country and the nature of your business. The more independence that those remote workers have the greater the risk of a fixed establishment.

Having a fixed establishment in another country could mean that services provided from that fixed establishment are subject to VAT in that country, with associated foreign VAT registration requirements. It could also mean that there are VAT accounting obligations in relation to purchases made by that establishment. These new accounting and reporting obligations also have knock on systems requirements to ensure that the data is available to accurately meet the new compliance requirements

## 08 Other Factors

There may be other factors which need to be considered when a company has employees working in a foreign jurisdiction.

a) The reward package or compensation profile of a company's workforce may need to be considered where disparities arise due to different locations e.g. if some employees have a higher/lower tax bill by virtue of their location or to reflect a different cost of living.

b) Labour law issues in other jurisdictions may need to be considered – for example are employees now working in Germany now subject to the full range of German employment law protections. These include differences in items such as statutory holidays, social insurance, pension obligations, redundancy procedures, tenure rights, and statutory leave entitlements.

c) In extreme cases, there may be a reporting obligation under the Mandatory Disclosure Regime where there has been a significant shift of functions cross border.

d) Integrating a remote workforce raises numerous challenges, which are increased when those employees are working abroad. Topics such as collaboration, employee wellbeing, innovation and organisational culture all need to be considered.

## Conclusion

The growing trend towards a more diversified workforce and flexible working arrangements has been expedited to an extent by Covid-19. Employees are now working from home which in some cases includes from a foreign jurisdiction.

There are tax and legal implications which may need to be considered when this is the case. There are concessions for some of these during the Covid-19 pandemic. However, they will need to be considered and managed where the arrangements continue long term, as the world emerges from the pandemic and some of the concessions begin to relax.

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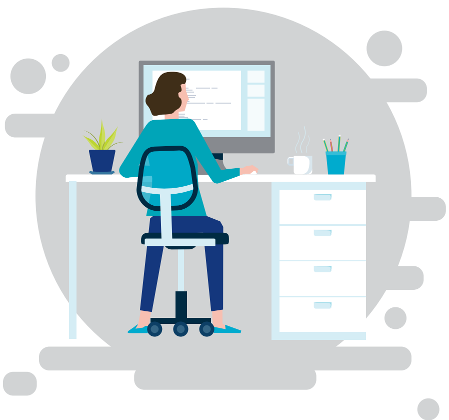

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