

# Remote work – getting payroll right.

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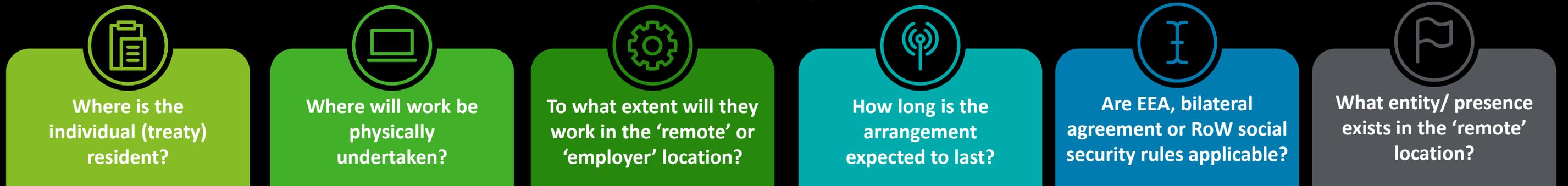
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# Remote Working

## Key Tax and Social Security Considerations



### Facts to establish:



# Domestic PAYE Triggers

...is the individual employed by, paid by or working for a 'PAYE employer' ...

## Employed by

- The legal employer has a UK tax presence, which includes:
  - UK employees currently on assignment overseas; and
  - Employees of overseas branches of UK companies; and
  - Employees of foreign companies with UK branches.
- For employees working remotely in the UK, this could in theory create a UK tax presence for their overseas employer but PAYE manual 81610 explains 'we need to show there is something in the UK similar to a branch or agency, office or establishment', so usually more of a risk for very senior individuals (exercising authority on behalf of the foreign entity).

## Paid by

- The individual is paid by an employer with a UK tax presence- i.e. earnings (ignoring simply QTSE amounts/ subsistence expenses) are delivered to the individual by an employer with a UK tax presence.
- In reality, this is often easier mechanically (if they're being physically paid by an employer within UK PAYE rules already).

## Working for

- 'Working for' a UK host employer- with the test being the right of control and management (rather than the UK employer benefiting from the services of the individual);
- Commonly the key test for STBVs and may trigger a shadow payroll/ PAYE reporting obligation for those employed and paid overseas;
- HMRC explained at the June 2014 Expat Forum that this is 'the right to control what the worker has to do, where it is done, when it has to be done, and how it is to be done';
- Consider extent of supervision by UK employees and any immediate, indirect or 'dotted line' reporting', as well as any UK entity sponsorship for those requiring a visa or work permit to travel to the UK;
- 'Working for' will often imply 'economic employment' (where the 60-day rule cannot be relied upon)- although these are separate tests, you'd commercially expect the controlling/ supervising entity to be responsible and bear the risk.

# Does a PAYE Obligation Exist?

In which of the following scenarios would we expect a PAYE Obligation to exist?

1

A Scottish finance manager of a Belgian entity (a Belgian company with no UK presence and separate from the UK group entity) agrees to work remotely from her Edinburgh home on Mondays and Fridays. She is UK resident and her husband and children remain in their UK family home. The Belgian entity has obtained an A1 certificate confirming that she is liable to UK National Insurance (and her earnings are reported via UK payroll for the purposes of employee and employer NIC).

No PAYE

2

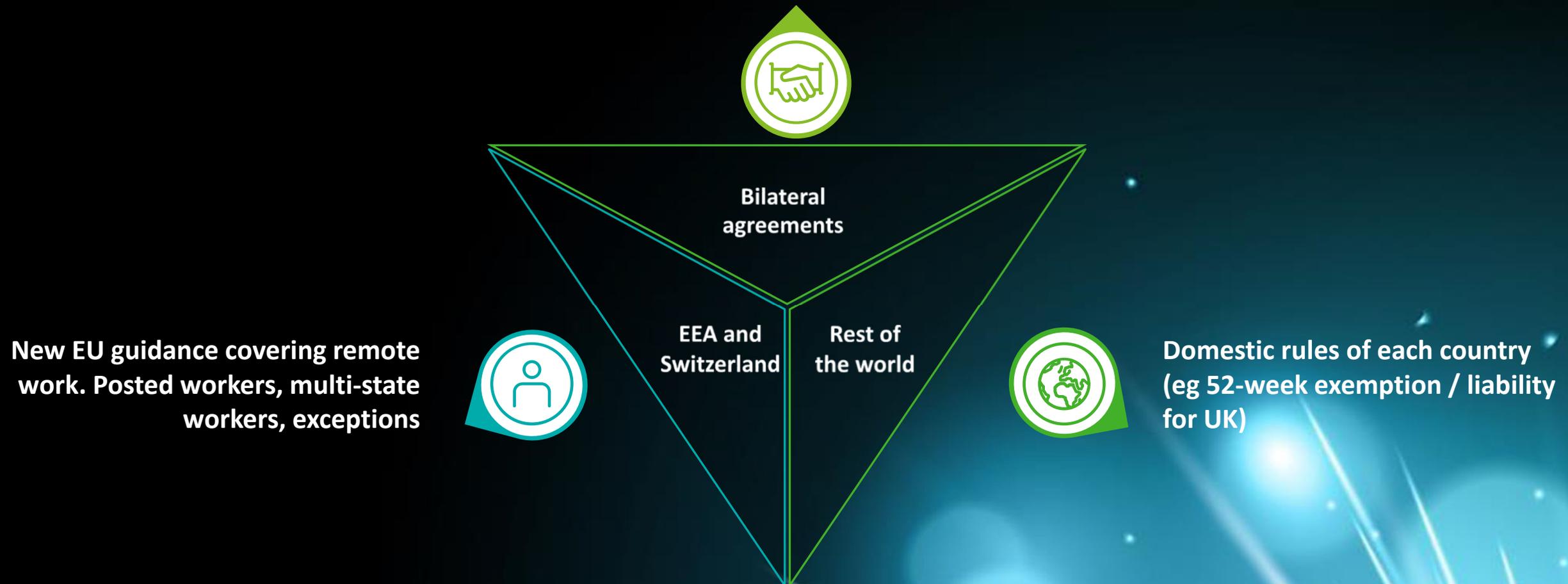
Assurance S.A. (a French entity) has a UK and an Irish branch. A UK resident begins a new role, employed by the Irish branch. He spends the first six months working from home in the UK, where his family are based, until they relocate to Ireland at the end of the school year.

PAYE

# Remote Working:

Where Social Security is Payable when Employed Outside the 'Employing' State

Depends on terms of each agreement, very few specifically cover remote work, but potential coverage for 1 – 5 years plus possible extension



**Basic principle** – 'pay where you work' (in a single location only for EU & bilateral) – but basic principle impacted by international agreements and domestic law

# New EU guidance on 'telework'

New guidance	'Telework' definition	What does the guidance say?	Impact elsewhere
<ul style="list-style-type: none"><li>• No change to the actual EU social security regulations, but the EU Administrative Commission has published guidance on how the existing rules should be applied to remote work situations (known as 'telework') in Europe.</li><li>• New guidance provides some clarity and flexibility on interpreting EU regulations to determine social security position for telework.</li><li>• Guidance should be used from 1 July 2022 for any new cross-border telework situation.</li><li>• For existing telework, there is a 12-month transitional period until 30 June 2023 allowing COVID related measures to continue (allowing for employers and authorities to determine and implement applicable legislation under the new guidance).</li></ul>	<ul style="list-style-type: none"><li>• Telework only covers the same work as the employee would have been performing if they had been at their normal office/ place of work.</li><li>• There is a requirement for some form of agreement between the employer and employee to allow them to work remotely.</li></ul>	<p><b>The main principle of 'pay where you work' remains applicable, but there are exceptions based on normal rules:</b></p> <ul style="list-style-type: none"><li>• Article 12 (posting/ secondment): A1 for temporary periods of telework in a country outside of employment, providing other 'normal' conditions met;</li><li>• Article 13 (multi-state): A1 for telework which is normally and usually exercised in more than one EU country; Guidance indicates flexibility in application of the 25% rule.</li><li>• Article 16 (exceptional circumstances/ mutual agreement): can be used to provide an exception to the normal 'pay where you work' principle where it is in the interest of certain persons or categories of persons.</li></ul>	<ul style="list-style-type: none"><li>• HMRC has confirmed an employee is eligible for an A1 certificate for temporary activity (including remote working) in the EU, providing this is done with the agreement of the employer.</li><li>• It should however be noted that the TCA has no equivalent of Article 16 post-Brexit. So unlikely coverage can be obtained over 2 years.</li><li>• For Switzerland, the current 'no-impact' COVID approach has been extended to 30 June 2023. Position thereafter TBC.</li><li>• No further guidance for countries outside the EU (e.g. USA), although published guidance has been requested.</li></ul>

# Scenario 1

## UK Employee Hired Overseas



### Scenario 1

Frederic is a Dutch national who is resident in (and has always lived in) the Netherlands and begins a UK contract with Hygiene plc as an IT support manager in September 2022. He will be paid via the UK payroll.

Hygiene plc has subsidiaries in Belgium, France, Germany and Luxembourg, but no presence in the Netherlands and Frederic is therefore employed on a UK contract (as he reports into the UK-based group CIO).

Frederic will mainly work from home in the Netherlands but is expected to travel regularly to visit offices and teams in mainland Europe, but no UK workdays are anticipated at this point.

### 1 To what extent should Frederic's earnings be liable to UK PAYE?

- Although he's employed by and paid by a UK company, he should not be taxed as a resident and therefore if he does not perform any duties in the UK, he will not be in receipt of 'PAYE income'.
- Earnings should not therefore be liable to PAYE and the employer should simply monitor the position so that they are comfortable that no duties are performed in the UK and are aware if this changes, so that PAYE can be operated from that point.

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### 2 Would an NT code need to be obtained to validate this position

- It should be possible to self-certify in this position and an NT code should not need to be requested in these circumstances.
- HMRC's CWG guidance (at 4.6.6) states that *'Where a business in the UK... employees someone who's non-resident, and the employee is working wholly outside the UK, has not been resident in the UK before' and 'does not intend and will not perform any duties in the UK, Code 'NT' may be used for payroll purposes if the paying system demands a code number. An FPS is not required... If the residency position of the employee or the place the duties are performed change so that the employee becomes liable to UK tax, you should immediately stop using code NT'.*

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## UK Employee Hired Overseas



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3

**Frederic joins a UK IT project implementation team in 2023 and travels to the UK for 2 days each month- how would this change his UK tax and PAYE position?**

- As a UK employee, PAYE should be operated, but if Frederic is non-resident in the UK (or is treaty resident in the Netherlands), a s690 direction could be applied for to limit PAYE to 10% of remuneration- i.e. 2 UK workdays per month.
- The UK offices may be regarded as Frederic's permanent workplace (if this was considered his normal place of work or if he personally chose to work from home/ a 'remote work' contract)- in that case reimbursed UK hotel costs would be taxable.
- If Frederic is non-UK domiciled, relief would be available for the reimbursement of travel costs between the Netherlands and the UK.

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## UK Employee Hired Overseas



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Frederic will mainly work from home in the Netherlands but is expected to travel regularly to visit offices and teams in mainland Europe, but no UK workdays are anticipated at this point.

#### 4 What would be the expected social security position?

- Frederic's regular duties in the UK and in other European countries would mean he would be considered a multi-state worker- as he spends more than 5% of his working time in the UK or any EU country other than the Netherlands.
- Frederic will be habitually resident in the Netherlands and will work substantially in the Netherlands (i.e. for these purposes, spending more than 25% of his working time in the Netherlands as projected over the course of at least the next 12 months). Frederic would therefore be subject to Dutch social security, and exempt from UK NIC. An A1 certificate should be requested from the Dutch authorities (i.e. the country where Frederic is habitually resident) to confirm this.
- In addition, the UK company will have an obligation to register in the Netherlands as a withholding agent for social security purposes- applying for a Dutch wage tax registration number, setting up a payroll system with the employee's details and filing monthly Dutch wage tax returns. Dutch social security premiums are capped around €11k, so may be less expensive than the UK employer equivalent but will still be an administrative inconvenience (rather than an additional cost) in this case.

# Scenario 2

## Remote Working Overseas Employee



### Scenario 2

Sanjay works as an HR manager for an Indian consultancy company and is employed by the Indian entity in Hyderabad.

In October 2022, his wife is assigned by her employer to the UK for two years and Sanjay decides to accompany her.

Whereas there is a separate UK group entity, Sanjay is relatively junior and simply continues to perform his Indian HR role remotely (solely responsible for Indian staff) from their UK home and does not have any dealings with the UK business.

Sanjay has never previously lived in the UK and intends to return to India in October 2024 on completion of his wife's assignment.

### 1 To what extent should Sanjay's earnings be taxable in the UK and liable to PAYE?

- Sanjay will likely be seen as resident in the UK under the UK's Statutory Residence Test. It is likely he will also be regarded as treaty resident in the UK for the two-year period. Although he could potentially benefit from 'overseas workday relief' if he does spend time working abroad, otherwise his remuneration will be liable to UK tax in full and a foreign tax credit can be taken for Indian tax on Indian workdays only.
- On the basis he is employed and paid by an Indian employer, it is unlikely that there would be a PAYE obligation (if he is not controlled or managed by the UK entity), assuming his own activities don't create a PAYE obligation. In this case, any UK tax would be paid via his tax return (and payments on account).

# Scenario 2

## Remote Working Overseas Employee



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Sanjay has never previously lived in the UK and intends to return to India in October 2024 on completion of his wife's assignment.

2

**Would the position be different if Sanjay only spent 5 months living in the UK with his wife?**

- It is likely that Sanjay would be seen as domestically resident in the UK, but if he retained his home in India, it may be possible that argue that he remained treaty resident in India. In these circumstances, Sanjay may be regarded as exempt from UK tax on his employment income under the UK/ India treaty, although any previous and future visits would need to be tracked so as not to exceed 183 days in the relevant UK tax year (the UK/ India treaty does not consider a rolling 12-month period);
- From an employer reporting perspective, if Sanjay was seen as exempt from UK tax, it should still not be necessary to include him on the UK employer's Appendix 4 STBV report, if there wasn't a PAYE obligation under UK law to begin with.

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## Remote Working Overseas Employee



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Sanjay has never previously lived in the UK and intends to return to India in October 2024 on completion of his wife's assignment.

3

### Assuming Sanjay did indeed move for 2 years, to what extent would we expect UK National Insurance to be due for this period?

- As a remote worker moving to the UK from a non-agreement or 'rest of the world' country, under UK rules based on Reg 145 of SI 2001/1004, Sanjay would be liable to UK NIC after 52 weeks (irrespective of any ongoing social security liability in India). This does require that Sanjay is not 'ordinarily resident' in the UK- which we would assume is the case if only coming here for 2 years.
- However, employer NIC only applies if there is a 'secondary contributor' - if there was no 'host employer' and the Indian business itself had no 'place of business' in the UK, only employee NI would be due.
- A 'host employer' exists if there is a UK entity that the employee 'works for' - i.e. a UK entity that could (at least in theory) supervise, direct or control Sanjay.
- A place of business could apply if there is a fixed address, occupied premises or activity takes place in the UK in furtherance of the Indian business.
- Strictly the employee should operate an Employee NIC-only scheme after 52 weeks, with NIC paid over from that point.

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Whereas there is a separate UK group entity, Sanjay is relatively junior and simply continues to perform his Indian HR role remotely (solely responsible for Indian staff) from their UK home and does not have any dealings with the UK business.

Sanjay has never previously lived in the UK and intends to return to India in October 2024 on completion of his wife's assignment.

4

### What if Sanjay instead was a US employee (moving from the US) in similar circumstances?

- The UK/US social security agreement Article 4(2) covers seconded workers and so whereas Sanjay's wife might remain liable to US social security in equivalent circumstances as she is posted, Sanjay himself is not 'sent by' his employer. The starting point is that 'a person employed within the territory' should be only subject to social security in that territory (Article 4(1)); As such, NIC due from day 1.
- If there is no 'host employer' and the US business itself has no 'place of business' in the UK, only employee NI would be due.
- Strictly the employee should operate an Employee NIC-only scheme and under Article 4(1) should have a reverse Certificate of Coverage (which would be a cost saving for the employer in terms of employer US social security);
- However, taking into account the upfront costs of setting up the arrangements, ongoing compliance and the individual not having a full FICA record, in practice some employers may decide practically to wait for HMRC to ask for NIC and then get a backdated reverse certificate at that point (although they would need to be mindful of the 3-year US statute of limitations).

# Scenario 2

## Remote Working Overseas Employee



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Sanjay has never previously lived in the UK and intends to return to India in October 2024 on completion of his wife's assignment.

5

### What if Sanjay instead was an Italian employee (moving from Italy) in similar circumstances?

- Sanjay would not be considered a 'posted worker', but the recent EU 'telework' guidance suggests that a temporary period of telework should be covered by Article 12 as long as there is agreement between Sanjay's Italian employer and him for the remote work and 'normal conditions' are met- i.e. Sanjay was subject to Italian social security immediately before cross-border telework and the intended period of telework is up to 24 months. An A1 certificate should be obtained for the temporary period to confirm exemption from UK social security;
- If the period spent in the UK was extended beyond two years however, as there are no Article 16 provisions in the TCA, UK social security would then be due and Article 21 of Reg 987/2009 would impose the same obligations on Sanjay's Italian employer as for a UK entity (including employer social security).
- Either Sanjay's Italian employer would need to register with HMRC to obtain a new employer compliance pack and look to set up an NI only RTI scheme or else the obligations could be undertaken by a UK affiliate or outsourced provider. In some countries the employee can agree to operate the reporting, however the UK does not allow this for EU employers.

# Scenario 3

## UK Employee Moving Overseas



### Scenario 3

Christine is a marketing manager for her UK employer and has always lived and worked in the UK.

Christine owns a villa near Malaga and as part of her employer's more relaxed remote work policy, agrees with her line manager that from October 2022 she can work remotely from her home in Spain.

Christine's employer has no existing entity or presence in Spain.

It is agreed that Christine will return to the UK as needed- typically 2 days per month, as required, for client pitches or project meetings, with her employer reimbursing her for the costs of flights and hotels for these return trips.

### 1 What are the UK tax and PAYE implications of these arrangements?

- Depending on the period the work-arrangements continue for, Christine may or may not be seen as non-resident for UK tax purposes- potentially full-time work abroad conditions could be met;
- As a UK employee, PAYE should be operated, but if Christine is non-resident in the UK, splits the tax year or is treaty resident in Spain, the UK employer may seek agreement from HMRC that PAYE can be operated on UK workdays only based on a s690 direction- i.e. only in respect of the 2 UK workdays per month.
- Christine would remain taxable in the UK on any UK workdays under the UK/ Spain treaty as she is legally and economically employed in the UK.

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Christine's employer has no existing entity or presence in Spain.

It is agreed that Christine will return to the UK as needed- typically 2 days per month, as required, for client pitches or project meetings, with her employer reimbursing her for the costs of flights and hotels for these return trips.

2

**What would be the UK tax and social security implications of her flights and hotel costs? Would it make any difference if Christine was Spanish?**

- The UK offices would be regarded as Christine's permanent workplace and this would not be affected by her personal decision to work remotely- reimbursed UK hotel costs would therefore be taxable and, even if she was non-UK resident, would be attributable to days spent working in the UK. The costs would also be liable to Class 1 NIC, if she was within the scope of UK NIC.
- Christine's flight reimbursements would also be taxable- they relate to travel to a permanent workplace and the separate s370 travel provisions would not apply as the duties do not need to be performed outside the UK. The costs would also be liable to Class 1 NIC, if she was within the scope of UK NIC.
- If Christine was Spanish (specifically, if she was non-UK domiciled) but had been living for several years in the UK previously, relief would be available for the reimbursement of travel costs between Spain and the UK under s373, but only once she had been non-UK resident in the previous two UK tax years- so from April 2025 onwards. Where s373 applied, the costs would be also exempt for UK NIC purposes.

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Christine's employer has no existing entity or presence in Spain.

It is agreed that Christine will return to the UK as needed- typically 2 days per month, as required, for client pitches or project meetings, with her employer reimbursing her for the costs of flights and hotels for these return trips.

### 3 What are the social security implications in these circumstances?

- Christine's regular duties back in the UK are sufficient for her to be considered a multi-state worker- as she spends more than 5% of her working time in the UK or EU countries other than Spain.
- Assuming she does continue this arrangement long-term, Christine will be habitually resident in Spain and will work substantially in Spain (i.e. for these purposes, spending more than 25% of her working time in Spain as projected over the next 2 years the Article 13 multi-state A1 application would usually cover).
- Christine would therefore be subject to Spanish social security, and exempt from UK NIC. An A1 certificate should be requested from the Spanish authorities (i.e. the country where Christine will be habitually resident) to confirm this.
- In addition, the UK company will have an obligation to operate and pay Spanish social security as though it has a place of business in Spain. This will require the UK company to register with the Spanish authorities, which could be a complex process. Whereas the headline rates of social security (generally 6.35% for employees and 31.4% or more for employers) appear high, the monthly earnings base is capped, so this may be largely an administrative inconvenience (rather than an additional cost) in this case.

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4

**What would we expect to be the tax and social security implications if Christine instead spent 3 months each winter only working remotely from Spain?**

- If Christine instead only spent 3 months each winter in Spain (and retained a UK home, in which she lived for the remainder of the year), she would likely remain resident and treaty resident in the UK;
- In that case, as she would be employed in the UK (in a UK role) and spending no more than 183 days in Spain in any rolling 12-month period beginning or ending in the (calendar) fiscal year, we would not expect her employment income to be taxable in Spain and she would remain fully taxable (and subject to PAYE) in the UK;
- From a social security perspective, with a regular annual pattern of work in Spain, she should also be regarded as a multi-state worker. In this case she would likely be regarded as habitually resident in the UK (rather than Spain) but should be spending less than 25% of her overall working time in Spain in any case, so social security should also continue to be due in the UK only. An alternative approach could be to view each winter trip as a one-off period of overseas remote work, and separate certification under Article 12 could be obtained. This should give the same overall result (ie only UK NIC payable) but would remove any ambiguity in situations where the habitual residence position is not clear.
- Whereas the tax and social security position should be unaffected by this arrangement, there are clearly other factors that an employer needs to consider.

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