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LABOR & EMPLOYMENT

Working from home

Global compliance obligations in the brave new world

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As companies embrace the next normal, the usual office setup has come under scrutiny. Due to various issues such as employee health and safety concerns, fear about company liability, or simply a desire to save costs, companies increasingly are considering whether to extend mandatory work-from-home arrangements imposed by governments during shelter and quarantine orders to longer-term (or even permanent) arrangements for their global workforce. This is especially common in jurisdictions in which multinationals only have a small headcount and the benefits of cutting overhead costs may outweigh the need for a physical satellite office.

While going remote can offer benefits, it also means that companies must evaluate work-from-home requirements internationally. Local laws vary significantly from jurisdiction to jurisdiction, so there is no one-size-fits-all approach. Below we provide an overview of key issues and offer some practical tips for companies to consider in the international employment context.

(1) Individual employee notice, consultation and consent obligations

As the U.S. concept of “at-will” employment does not apply internationally, most countries deem

the employee’s place of work an essential term and condition of employment that can only be changed with employee consent. Some jurisdictions permit unilateral changes with prior notice (e.g., if 90 days’ notice is provided, most Canadian provinces will permit a unilateral change). Others may permit unilateral changes with prior notice if the employment contract allows for a change in work location (e.g., the U.K., provided the change is reasonable). However, in many countries changing an employee’s place of work can typically require express employee consent. Thus, while employees may be working from home due to government rules during the COVID-19 pandemic, making such temporary arrangements permanent could trigger new individual employee notice, consultation and consent obligations.

Employers are encouraged to carefully review local legal requirements to implement a mandatory work-from-home arrangement on a country-by-country basis and to check the employee’s employment agreement terms and any applicable local collective bargaining agreements. In addition, in countries where employee consent is required, employers should consider developing a strategy to address any employees who may refuse to consent. In some instances, it may be possible to move to a hot desking arrangement (where multiple employees use a single physical work station during different

time periods) without the need to obtain employee consent, but this can still depend on language in the employment agreement and may need to be balanced against health and safety considerations. Since failure to consent typically will not constitute grounds for employment termination and may result in claims by employees, employers are urged to proceed cautiously when considering changes.

In certain countries where employee consent is required, it can be obtained in a simple addendum to the employment agreement. In others (e.g., France and Italy), a formal home office agreement may be necessary. Further for some other countries (e.g., Denmark and Norway), even though a formal agreement to work from home on a temporary basis may not be necessary, if the proposal is to be permanent, an agreement with each individual employee may be required. In any event, a home office agreement or policy often can be helpful to outline employer and employee obligations, health and safety compliance, core times during which employees must be available, working time tracking requirements, expense reimbursement, and other issues to avoid confusion or misunderstanding.

(2) Collective group consultation obligations

Companies are also urged to consider if any consultation obligations with collective employee

groups (such as works councils, unions, employee forums) may apply.

If the company has a collective group in the jurisdiction, it likely will have consultation rights about the change of work. Accordingly, employers are encouraged to carefully review local collective group consultation obligations when implementing a mandatory work from home arrangement, bearing in mind the rationale for and permanency of the proposal. For example, if the rationale for home-working is the permanent closure of the physical office space, this could trigger consultation obligations with local collective employee groups — for example, consultation rights in the case of a French works council or CSE or co-determination rights for a German works council.

(3) Reimbursement obligations

The extent to which home office costs may need to be reimbursed likely will differ significantly from country to country (or even by state or province). In some countries, there is no strict legal requirement to provide tools or equipment to the employee (e.g., Ireland or Singapore), although there may be a general expectation of reimbursement if employees are required to work from home (especially if the employees traditionally have worked in the office and the proposed change is to be permanent). In other countries, although there may be no strict

legal requirement to provide tools or equipment to the employee by law, applicable CBAs may impose such a requirement.

Most countries require reimbursement of reasonable costs associated with work from home; however, reimbursement rules can differ widely. Some jurisdictions (e.g., France and Germany) typically require reimbursement of costs related to the home office setup and maintenance (e.g., tools, internet access), although it may be feasible to agree on a monthly allowance to cover these costs. In other countries (e.g., Switzerland), employers may even need to contribute towards an employee's housing costs if an employee is required to work from home in the absence of a suitable workplace. Whether such rent reimbursement rules apply during the COVID-19 pandemic has been a subject of press attention and debate. Other jurisdictions have less specific requirements, but can require reimbursement of costs for the employee to perform his or her services from home (e.g., Australia and Brazil).

In some countries (e.g., Italy), special ergonomic equipment such as chairs and desks may need to be provided at the employee's request. As a general rule, however, this level of equipment is not usually required absent special circumstances (e.g., to accommodate an employee with a disability).

(4) Health and safety obligations

Health and safety compliance is another key consideration. The employer's health and safety obligations do not end when employees work from home. Some countries may require the employer to engage a specialist health and

safety officer to assess the home office's compliance with applicable health and safety laws (e.g., Spain). In other jurisdictions the employee can conduct his or her own health and safety assessment by completing a questionnaire provided by the employer.

In many countries, even if there is no mandatory requirement by law, employers may want to consider conducting an inspection to ensure compliance with local health and safety laws (at least through an employee self-assessment). In the absence of a requirement to inspect the employee's home office and procedural rules, an informal inspection by way of a video conference or similar may be appropriate (and even advisable in light of social distancing requirements). Employers are advised to review local rules and customs. For example, it may be necessary for the inspection to be carried out by a trained individual with specific health and safety credentials.

Companies are also urged to review their applicable insurance policies to confirm whether they cover employees working from home and any requirements (e.g., inspections as a condition of coverage).

Other quirky health and safety requirements can pop up in some jurisdictions. Some of these may be triggered by headcount thresholds and have important local nuances, even within similar regions. For instance, in the Nordic region, Danish companies with more than nine employees must establish a workplace environment committee with a representative who is protected against dismissal. If the employees fail to select a representative, the employer is required to appoint one. By contrast, in Norway, employers with 20 or more employees are only required to set

up a working environment committee if the employees request it. In Sweden, companies with at least five employees must appoint a safety representative; however, if employees are teleworking, the home office is deemed to be a separate workplace for the purpose of this requirement. Therefore, in the case of a permanent office closure, an employer with over five employees may be able to avoid triggering the requirement for a safety representative if all of their employee's homes are deemed to be separate workplaces. As another regional example, in Colombia, employees must report to their Labor Risks Manager the labor activities that are being carried from the employee's home.

(5) Employees working from jurisdictions without corporate presence

Finally, if employees relocate to a different country (i.e., other than their original jurisdiction of work) to work remotely from home, this likely will trigger additional challenges. For instance, the company may have a difficult time withholding income tax and social

charges in the jurisdiction where the employee works from their home base. Such an arrangement may also create corporate and tax (permanent establishment) risks in that jurisdiction, trigger local employment and data privacy laws, violate local immigration rules, etc. Accordingly, employers are urged to review any employee request to work from a different country (or, in jurisdictions with provincial rules such as Canada and China, a different state or province) in which the company has no corporate presence. In such cases, employers may want to consult with employment, tax and immigration counsel before agreeing to the arrangement. Employers should also bear in mind local COVID-19 rules and restrictions which can result in employees getting stranded abroad.

In our experience, all of these challenges are manageable with advance planning and a strategy that takes into account local legal and best practice requirements, including any relevant COVID-19 emergency legislation (and bearing in mind that the position may change as the legal landscape is so dynamic). ■

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