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Asset Manager Checklist: Global Mobility

What should be on your radar?

July 2021

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Introduction

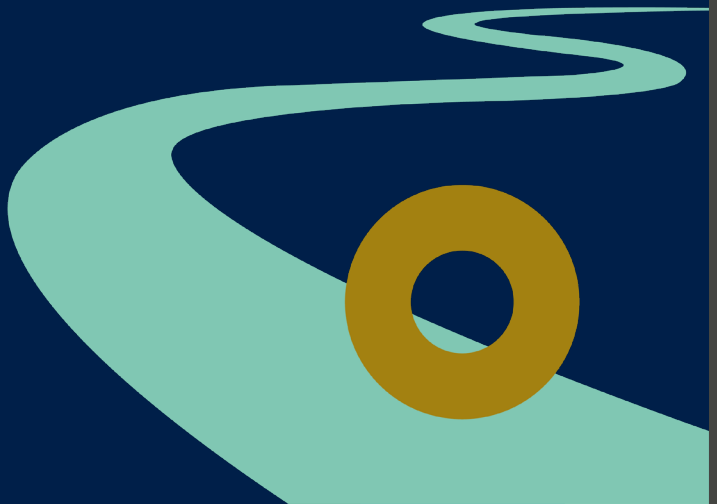
As a result of the Covid-19 pandemic, asset managers have found that many members of their workforce (of varying degrees of seniority) have been working for an extended period from abroad, rather than in the UK office. Post-Covid, some of these individuals have expressed a wish to spend all of their time, or a proportion of their time, working from abroad. Asset managers are, therefore, actively considering their policies as to what will be permitted in terms of home working and working from abroad in the future.

This briefing includes a helpful checklist of the key tax and social security, employment law, immigration and regulatory implications that asset managers should be aware of before making any decisions.

How we can help

We are currently assisting asset manager clients with many of the matters identified in this checklist. Some are now establishing new entities or branches overseas to act as a 'hub' to contract with overseas home workers, whilst others are setting policies based on what they consider to be the acceptable legal parameters for employees and partners working abroad.

If you require any assistance, please do not hesitate to contact us – our contact details are further below.



Issue	Introduction	What does this mean for asset managers?
Permanent establishment	If an individual works abroad on behalf of an entity in another country (including a fund entity), the individual's activities abroad could result in the entity having a permanent establishment (taxable presence) in that foreign country. In the case of an entity that is a partnership, this could result in all the partners in the partnership having a permanent establishment. There are two types of permanent establishment: • the "dependent agent" type –where a dependent agent acting on behalf of the entity has, and habitually exercises, in the foreign country an authority to conclude contracts in the name of the entity. • the "fixed place of business" type – where the business of the entity is carried on, wholly or partly, from a fixed place of business in the foreign country. The existence of a permanent establishment could result in the entity (or the partners in the case of a partnership) having a filing obligation in the foreign country as well as a proportion of the entity's / partners' profits being subject to tax in that foreign country.	If a permanent establishment is to be prevented, asset managers should consider implementing clear "rules of the road" to set out what activities can be conducted abroad, where those activities should be carried out and how many days can be spent working abroad. For those individuals who want to spend a significant portion of their time working abroad, preventing a permanent establishment may be difficult, particularly if the individual works from the same place when abroad (e.g. a home office). OECD guidance provides that a home office could constitute a permanent establishment if it is used on a continuous basis for carrying on business activities for an entity and it is clear from the facts and circumstances that the entity has required the individual to use that location to carry on the entity's business (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office). Before allowing individuals to work from abroad, we would recommend that asset managers: • check the permanent establishment position in the relevant foreign country (note that whilst many countries follow OECD guidance when determining whether a permanent establishment exists, others take a more aggressive approach); • check fund documentation and investor side letters to determine the asset manager's obligations regarding preventing the creation of permanent establishments.
Payroll	When an employee moves abroad but their employment remains with their UK employer, the UK employer needs to consider whether: 1. it will continue to have any UK payroll obligations in respect of the employee; and 2. whether it, or the employee, will have any payroll obligations in the overseas jurisdiction.	When an employee moves from the UK to another jurisdiction there may be a period of time when they remain UK resident for tax purposes. A UK employer might therefore have to continue to account for income tax under PAYE (and will also have to pay UK NICs through PAYE if the employee remains within the UK's social security system – see below). The UK employer might also have withholding obligations in the overseas jurisdiction and should take advice on whether it has to engage a payroll agent. To prevent the same income being subject to tax twice, it is possible to agree with HMRC for the UK PAYE liability to be reduced by any foreign tax deducted.

Social security	A key issue when a worker relocates is the social security system to which they (and their employer where relevant) must make contributions and what benefits they will receive. This will depend on the social security rules of that country and whether or not the UK has some form of agreement on social security coordination with it. Other relevant factors are whether the worker is on a short-term secondment from the UK or a longer assignment and whether they will remain engaged by the UK entity or will be employed by an entity in the overseas country.	If a worker relocates from the UK to a **country in the EU, *the default position*** is that social security contributions will be calculated and paid where the work is done (i.e. in the relevant EU country). A UK employer will also have to pay employer contributions in the EU country as if they had a place of busines there. In some countries the employee can agree to act as agent for the employer in order to account for the employer contributions due. However, it is more customary to engage a third party payroll provider or agent. ***Special rules*** apply to individuals sent to **an EU country** on short term assignments of less than two years (known as 'detached' workers), as well as to individuals who work both in the UK and one or more EU countries at the same time (known as 'frontier' workers). Provided certain conditions are met, such individuals can remain within the UK social security system (a form A1 needs to be obtained from HMRC). Outside the EU, similar rules apply in **countries with which the UK has a bilateral social security agreement (for example the USA)** although these vary so the terms of the agreement need to be checked. For **countries outside the EU and with which the UK does not currently have a social security agreement,** the rules of each jurisdiction need to be checked as it is possible that the worker (and also their employer where relevant) will have social security liabilities both in the UK and in the overseas jurisdiction for a period of time.
Carried interest	If carried interest holders spend a significant portion of their time working from abroad, their carried interest may be taxed in the relevant foreign country. Whilst the taxation of carried interest is often the responsibility of the individual carry holder, employers may also need to operate payroll and pay local employer social security. This is because in a number of countries, if less than market value is paid for the carried interest at the time of acquisition, the difference between the amount paid and the market value can be treated as employment income. Some countries also tax carry returns as employment income.	Some countries have special regimes for the taxation of carried interest; however, there are often strict conditions that apply which may be difficult to satisfy. In order to limit any employer tax and payroll exposure, asset managers should check the local position as regards the taxation of carried interest before allowing Executives to work from abroad.

Employment law	An individual working in another jurisdiction may acquire employment rights in that jurisdiction, such as minimum holiday entitlements and other benefits, or certain protections around dismissal. This could be the case whether they remain engaged by the UK entity or are engaged by an entity in the overseas country, and whether they are engaged as a member or employee. Different countries also have different rules about post-termination restrictive covenants, including restrictions on working for a competitor, setting up in competition or soliciting investors, clients or colleagues once the member or employee has left.	Local advice should be sought on the employment protections in the relevant jurisdiction, so that these can be built into the contractual documentation. Consideration should also be given to the impact of working abroad on any post-termination restrictive covenants in the individual's employment contract or membership documentation. It is important to get the contractual documentation right at the outset, not only to set expectations around pay and benefits but also how and in what circumstances the overseas working arrangement might be brought to an end.
Immigration	Depending on the worker's nationality, they are likely to need a visa to work in another jurisdiction. This is likely to be the case regardless of the length of time the individual is working overseas – visa requirements depend on what the worker will be doing rather than the length of the stay. Further, depending on their nationality and UK immigration status, significant time spent outside the UK could have implications for the individual's UK status and any future applications they may wish to make.	Asset managers should consider the visa requirements in the jurisdiction the individual will be working in. Following the end of the Brexit transition period, visa requirements apply to UK nationals working in the EU and vice versa. While the visa rules vary from country to country, generally speaking, only short business trips to attend face to face meetings, conduct negotiations or undertake training can be undertaken without a visa. Time spent in the Schengen area by UK passport holders (whether for work or pleasure) are also subject to strict time limits of no more than 90 days in each 180 days on a rolling basis meaning travel will need to be tracked for teams which can be highly mobile (e.g. investor relations; senior deal professionals). Where an individual is an EU national with status in the UK under the EU settlement scheme or is a non-EU national with a UK work visa, the implications of extended absences on their UK immigration status should be taken into consideration. Individuals may need to track and monitor absences as well as ensure relevant applications are submitted to protect UK status.

Regulatory and Licensing

The key issue from a regulatory and licensing perspective will be to determine whether the relevant individuals are treated as performing licensable activities from or in the relevant EEA Member State. Where a licensable activity is being performed, firms will need to ascertain if there are any exemptions or whether any pre-existing licenses can be re-purposed to provide regulatory coverage for the activities performed by the individuals. In some cases, a new licensed firm may need to be established (obtaining a new regulatory licence can be a complex process with a significant lead time depending on the jurisdiction).

The specific questions on the Compliance Officer's checklist to tease out the potential regulatory issues in this area are:

1. **What activities will the relevant individuals be performing?**

It is important to determine both the nature and regulatory status of the activities which will be perfomed at an early stage as this may impact the exemptions available (e.g. investment professionals whose role is primarily advisory may have more flexibility as opposed to, for example, a trader). Clearly the seniority (and whether the relevant individuals have a function under the UK's Senior Managers and Certification Regime) will also be relevant to this analysis.

2. **Are there any local exemptions or precautions that can be taken to keep the relevant individuals outside the regulatory perimeter?**

Although certain exemptions under European financial services legislation should, in theory, be available across Europe, there can be variations from country to country and a local survey (tailored to the firm's fact pattern) may need to be undertaken to ascertain differences in practice between jurisdictions. Reliance on exemptions and local interpretations may increase operational and compliance complexity and asset managers may want to consider implementing clear "rules of the road" so that relevant individual stay on the right side of the regulatory perimeter. Firms will likely want these "rules of the road" to be designed in a way that allows for future flexibility and, as far as possible, uniformity as between different jurisdictions.

3. **What if a licence is required?**

If a licence is required, firms will need to assess the best means to achieve that. For some groups who have already established alternative investment fund managers or investment firms in the EU as part of their Brexit planning, they may be able to establish a branch in the relevant location (or add further top-ups to their regulatory permissions) to enable them to cover the activities performed by the relevant individuals.

Where a new firm is required, this will may not be a straightforward process and will often have a significant lead time. Other difficulties, including satisfying the requisite substance and nexus requirements and different local approaches to pay regulation, may pose further challenges. On the other hand, for firms looking to expand their continental presence, setting up a new licensed firm could present opportunities.

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