

International Secondments

cross-border
considerations

Spring 2023

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Employment

Employment

Employers with a global business often look to relocate staff temporarily over the course of their employment. This will most commonly be done either by a secondment arrangement, or by relocating the employee onto a local contract if the transfer is to be more permanent.



There are a number of issues to consider if either bringing staff into the UK, or re-locating them from the UK to another jurisdiction. For the purposes of this briefing, we have described the original employer as the "employer", the transferring employee as the "seconded" and the organisation the secondeed is working in as the "host". If an employer is looking to permanently re-locate an employee, then they should be placed on a local contract from the outset, rather than a secondment arrangement.

Employment issues

In a secondment arrangement, the secondeed remains employed by the employer but arrangements need to be made with the host in terms of day to day management of the secondeed and how certain costs will be met. Some key points to consider when there is an international secondment are:

1. What immigration issues are there? What permits/visa will be required?
2. What additional terms of employment will the secondeed need and what local employment issues may arise? What relocation expenses will the secondeed be offered – housing allowance, school fees, flights home? Will additional benefits, such as medical cover be required?
3. What are the tax implications of the secondment?
4. What is the duration of the secondment? Is it for a specific period/project or indefinite?
5. What will happen at the end of the secondment?

Employment, cont

Terms of Employment

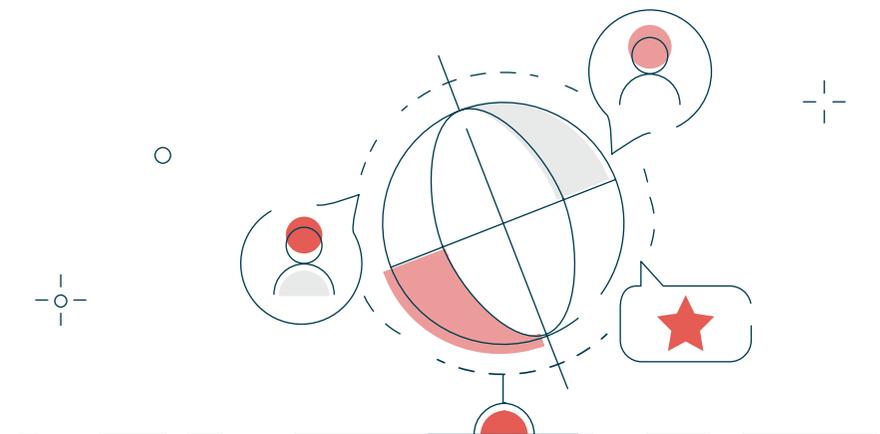
The starting point is to review the existing terms of the secondee's employment contract. Consequential changes may be required with the approval of the secondee. This should be reasonably straightforward on the basis that the secondment has been agreed in principle. Some terms that are likely to need updating include:

- **Duties of the secondee:** a new job description setting out the main duties and responsibilities of the secondee will be helpful.
- **Contact:** the employer may want to maintain contact during the secondment and may want the secondee to still attend certain meetings or team events.
- The host is likely to want to ensure it does not become the "employer", so certain management issues, such as disciplinaries may still need to be referred back to the employer to be dealt with.
- There needs to be agreement on who approves leave, assesses performance, and how to raise a grievance.
- Usually the employer will continue to pay wages of the secondee. The host may reimburse some or all of these costs.
- **Confidentiality and post termination restrictions:** Both the host and the employer will have concerns in relation to confidentiality and restrictions. The employer may have sufficient protection from existing provisions, but may want protection against the host employing the secondee directly at the end of the secondment period.
- **Duration and termination:** The duration of the agreement should be agreed in advance. It might be for a fixed term, or for the duration of a specific project.
- The secondee will want to know what happens at the end of the secondment in relation to role, progression and relocation package.

Choice of law and jurisdiction

Whilst it is helpful to include an express choice of law clause in the secondee's contract so that the employer can specify which law they wish to govern the contract, it is important to remember that where there are local mandatory employment provisions, these cannot be overridden by any contractual agreement. It is therefore essential that local advice is sought whenever relocating employees to ensure the employer is clear about what local mandatory provisions will apply.

The employer may also want to select which country's court should resolve any disputes which arise under the contract. Whilst this is beyond the scope of this briefing, it is important to remember that local legislation will also limit jurisdiction clauses in some areas – for example the European Union limits the use of exclusive jurisdiction clauses in employment contracts.



Employment, cont

Coming into the UK

Local rights: For secondees coming into the UK, there are UK based statutory rights that cannot be overridden by employment contracts governed by non UK jurisdictions. As a minimum employees seconded to the UK will have, for example, the following employment rights:

- Protection against discrimination.
- Maternity rights.
- Minimum wage and the right to paid holiday.
- A limit on working hours in some cases.
- The right not to be unfairly dismissed in certain circumstances.

Post termination restrictions (PTRs): Whilst PTRs are not governed by statutory provisions in the UK, the courts will not enforce PTRs purported to be governed by the law of a country that allows PTRs significantly wider than the UK would allow. This is to ensure organisations cannot get round the protections afforded by the UK courts by choosing a jurisdiction that allows the employer far more extensive post termination protection than in the UK.

Some elements of the contract may however legitimately be governed by a non-UK jurisdiction, for example, some bonus schemes and contractual rights may be governed by the law of another country.

Seconded from the UK

Employees seconded out of the UK may acquire rights under local jurisdictions that the contract of employment cannot override. These will need to be considered on a case by case basis, but should not be overlooked.



Immigration

Immigration

Coming into the UK

Individuals who are coming to the UK to undertake employment or any form of productive work must have a UK visa which allows them to do this. The most appropriate visa type will depend on both the secondee's and the host's circumstances but most UK work visas will require the secondee to have a skilled job offer from a licensed UK sponsor. Only certain roles are eligible for sponsorship and there are minimum salary thresholds which must be met.

Most UK work visas restrict the holder to only carrying out a specific role with a specific sponsor. In most cases, permission from UK Visas and Immigration must be sought before the secondee can change role or sponsor.

UK employers who are licensed by the Home Office to sponsor migrant workers must comply with a number of reporting and record-keeping obligations. UK hosts must therefore ensure they have robust HR systems in place to enable them to meet these requirements, both before they apply for a licence and for the duration of it.

The secondee must apply for their UK visa from overseas (usually from their country of origin or long-term residence) and cannot generally enter the UK on their visa more than 14 days before they are due to commence work in the UK.

There are also a number of UK visa categories which permit the holder to work but do not require sponsorship from a UK employer. Therefore, it is important to discuss the secondee's particular circumstances with them at the outset to determine the most suitable visa route available. Most UK visa routes also permit a lead applicant to bring a dependant partner and/or children under 18 to the UK with them. Dependants will need to make their own visa applications at the same time as, or after, the main applicant.

Seconded from the UK

Employees moving abroad for work will need to ensure they have the requisite immigration permission for whichever jurisdiction they are moving to. Employers should therefore seek advice from an appropriately qualified lawyer in the relevant country. This should be done well in advance of the employee's planned move as visa applications can take time to process and some countries operate quotas or resident labour market test requirements which need to be factored into the application timeframe.

UK employers should note that, post-Brexit, UK employees will need an appropriate visa to work in an EU or EEA country or Switzerland. The rules for each country will be slightly different but most will require the UK employee to have a job offer from an employer in that country before they can apply for a work visa.



Tax

Tax, cont

Payroll tax

The employer should check what PAYE (Pay As You Earn - the UK's payroll tax system) requirements apply to the secondee. The employer must operate PAYE if they have a presence (eg an office or establishment) in the UK. This may be the case even if no other UK tax obligations fall on the employer, and if the employer pays the secondee from outside the UK. A UK "host employer" can also have PAYE obligations even if it is not paying the secondee.

Before the secondee arrives in the UK, the employer should consider if the arrangements are such that it may qualify for certain employment tax reliefs that can reduce the cost of the secondment, particularly if the secondment is for less than 24 months. Where the secondee works both in the UK and overseas, they may qualify for "overseas workday relief", which is one of the grounds for making a "Section 690 application" asking HMRC to direct that PAYE would only apply to the proportion of the secondee's earnings that relate to their UK duties. Without a section 690 direction, PAYE would apply to all earnings, even if they relate to overseas work.

Social security

Employers should consider social security liabilities in addition to payroll taxes. If the employer has a presence in the UK (bearing in mind EU employers can be deemed to have a UK presence) and the secondee is resident, present and ordinarily resident in the UK, the employer may be liable to pay UK National Insurance contributions ("NICs") on the secondee's earnings and benefits. Many jurisdictions have agreements with the UK which prevent social security payments being due in the UK. For example:

- **Secondees from the US:** The employer should obtain a certificate from the IRS to prevent them being liable to pay NICs in the UK where the secondment is for up to 5 years.

- **Secondees from the EU or Switzerland:** Where a secondment is for less than 24 months, the arrangement should qualify for an exemption from UK NICs such that the secondee will continue to make contributions in their "home" jurisdiction. In this case, an application should be made in advance to the home jurisdiction's authorities for a document A1 to evidence continuing coverage.



Tax, cont

Permanent establishment

Depending on the nature of the secondee's work, it is possible that a secondment could create a permanent establishment in the UK and trigger UK corporation tax and/or VAT obligations for the non-UK employer. The nature of the secondee's work should be considered. For example, a permanent establishment for UK corporation tax may be created if the secondee will habitually conclude contracts binding on the non-UK employer, or if a branch/office of the non-UK employer is created in the UK. Also, the terms of any relevant double taxation treaty should be checked, as specific rules may apply to the employer's jurisdiction.

Secondee's tax position

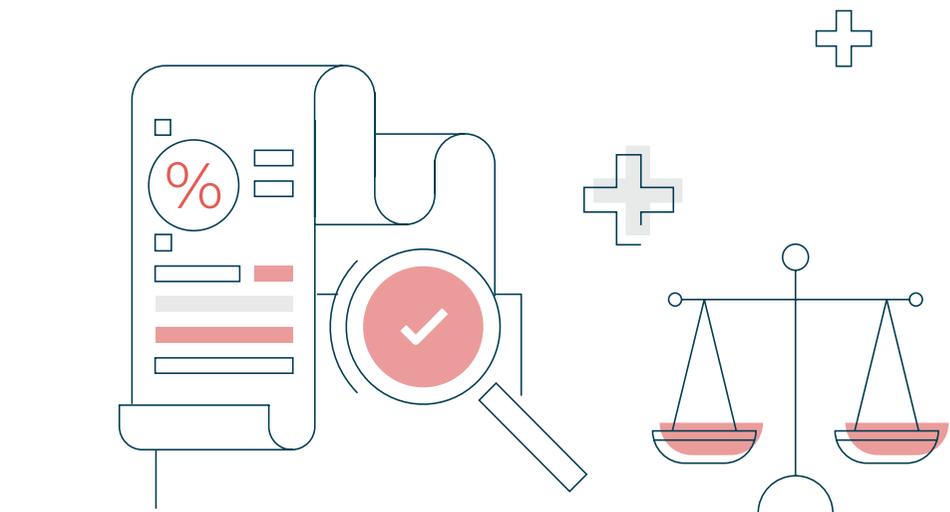
The secondee's UK tax position will depend on their tax domicile and the time that they will spend (or have already spent) in the UK. In some cases, the secondee may be taxed only on income and gains that they remit into the UK and income that relates to their UK work. Double tax treaties may also affect the employee's status. The secondee should consider whether they will need to file a UK tax return.

Some secondees may want to agree a tax equalisation or protection arrangement with their employer to ensure that they do not pay more tax during their secondment than they would pay in their home jurisdiction. They may also look to the employer to protect them from exchange rate fluctuations.

Carried Interest

The UK has a number of complex and targeted regimes relevant to assessing the tax treatment of carried interest, and interests in funds more broadly (e.g. co-investment structures).

The UK tax treatment of any carried interest held by the secondee should be considered carefully, as a secondment to the UK could trigger unexpected UK tax on carried interests.



Tax, cont

Seconded from the UK

PAYE and payroll tax

The employer needs to establish whether it is obliged to operate PAYE and/or overseas payroll tax for the secondee while they are abroad.

For shorter secondments, the secondee may remain UK tax resident. The employer would then continue to operate PAYE and make deductions in respect of all remuneration, unless an agreement is reached with HMRC.



The employer must not only consider PAYE in the UK, but it should also check if it has obligations to withhold and account for tax on the secondee's earnings to the tax authority in the host country. If there are payroll obligations both in the UK and abroad, there may be relief for double taxation and the terms of any double tax treaty should be checked. If there is relief for double tax, HMRC may take this into account in the PAYE deductions.

As noted above in the context of a secondment to the UK, employers should consider whether certain tax reliefs may be available to reduce the cost of the secondment, particularly where the secondment will last less than 24 months.

Social Security and NIC

The employer should check its obligations in the host jurisdiction. The UK has agreements with many jurisdictions whereby the employer would not be obliged to make social security deductions in the host country, subject to meeting certain conditions. The details and conditions of any such agreement should be checked. For jurisdictions covered by an agreement, and where the relevant conditions are met, the employee should obtain a certificate of continuing liability from HMRC in advance of the secondment commencing which should prevent the the employer being liable to make social security deductions in the host country.

Permanent Establishment

Depending on the nature of the secondment, the employer may create a permanent establishment in the host country for local corporation tax and/or VAT. If there is a permanent establishment in the host country, this is likely to trigger tax and filing obligations for the employer under the host country's laws. Local advice should be taken in advance of the secondment commencing, including checking the terms of any relevant double tax treaty.

Alternatives to secondment

Alternatives to secondment

Dual Contracts

This type of arrangement involves two contracts with two different entities, in two jurisdictions. Usually the two companies will be part of a wider group structure. The contracts will set out separate roles for the two companies and there will be tax implications/benefits.

In the UK such arrangements were usually tax driven and have been less attractive since the Finance Act 2014 introduced measures to reduce the use of such arrangements as a tax avoidance scheme. Where these anti-avoidance rules apply, non-UK domiciled employees are subject to UK income tax on their remuneration, rather than being taxed only on remuneration that is remitted to the UK.

Local employment

This may be appropriate if the transfer is going to be long term/permanent. Key considerations will be immigration and work permit requirements, together with local mandatory employment laws.



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