How to Manage the Legal Risks of Global Telecommuting Arrangements

Don’t let digital nomads expose you to liability under a foreign country’s law.

Chances are that some employees who are now telecommuting are doing so from outside Canada. They could be part of a breed of what are called “digital nomads” who benefit from the freedom technology gives them to move from place to place. So, what’s the big deal, you may think. As long as they’re getting the job done, why should I care whether they’re doing it from Toronto, Thailand or Timbuktu?

In fact, you should care about where your telecommuters live. What many employers—and even lawyers—fail to recognize is how employing digital nomads who work abroad could have drastic legal consequences for both you and the employee. The danger is that the digital nomad arrangement may cause your organization to become subject to the tax, payroll and employment laws of the host country. Just imagine finding out that your organization is a Chinese or French company and is in a whole heap of trouble for not paying income tax in those countries. Here’s a briefing on the risks and HR policies you need to manage them.

Profile of the Digital Nomad

Digital nomads are typically well educated, highly skilled and digitally savvy, according to a study from consulting firms Emergent Research and MBO Partners. Because of their digital and internet skills, they tend to be concentrated in high-demand, tech-oriented occupations like IT, computer programming, web design, creative fields, engineering and digital and traditional marketing. While digital nomads have been around for a while, the pandemic dramatically expanded their numbers. Previously, most digital nomads were independent contractors, freelancers and self-employed; but since 2020, millions of people holding traditional jobs have also joined their ranks.

While digital nomad arrangements come in many varieties, the biggest risks come from employees who have been telecommuting within the same jurisdiction as the employer company that later want to move abroad and continue telecommuting from a foreign country. **Example:** A Vancouver tech start-up has allowed a software engineer to telecommute out of her suburban Vancouver home since the pandemic began. Her husband gets transferred to his firm’s Frankfurt office. The engineer wants to accompany him, but the startup doesn’t have any offices in Germany. So, she decides to continue her current telecommuting arrangement from her new home in Frankfurt. There are 2 possibilities:

- The engineer gets the start-up's permission to telecommute from Germany; or
- She moves to Germany without telling anybody at the firm.

In either case, the arrangement could expose the start-up to liability under German laws. This risk is something companies almost always overlook, even when the telecommuter notifies them of the move abroad.

Strategic Pointer: If you have a brick-and-mortar business in the host country, you can defuse legal risks by putting the telecommuter on the local business' payroll for the duration of the stay and switching him back to the home company's payroll when he returns. Unfortunately, this isn't an option for the vast majority of employers that don't have affiliates or branches abroad.

The 3 Ways Digital Nomad Arrangements Can Get You Into Legal Trouble

Every nation on earth has adopted laws and regulations governing how business and employment is conducted within its borders. Of course, you don't have to worry about these laws unless you actually do business in those countries. And if you don't have an office or site in the country, you might assume that you're in the clear. The problem is that the presence of a telecommuter under your employ may be enough to establish a business presence subjecting you to the host country's laws, even if you're located only in Canada. Enforcement officials in the host country may seek to prosecute you for violations under 3 sets of laws:

1. Tax Laws

Pitfall: A nation's corporate and income tax laws generally apply to companies that have a "permanent establishment" (PE) in the country. When a company comes into the country and starts doing business, it must:

- Register the local branch or subsidiary to do business in the country;
- Get a local-country taxpayer identification number; and
- File annual corporate tax returns.

Having a long-term employment relationship with a telecommuter who's present in the country could make your company a PE under local laws. And doing business without registering as a PE could result in significant tax penalties that extend not just to your local but worldwide income.

Solution: The longer and more strategic a telecommuting relationship, the greater the risks of your company's being deemed a PE that must register. Be aware of this and consider hiring a local lawyer to analyze the risks based on the local tax law definition of "doing business" triggering PE registration requirements. If the assessment concludes that there is a risk, you have 2 basic options:

- **Option 1:** Bite the bullet and register a local corporate presence and migrate the telecommuter to a new in-country payroll, using the new in-country taxpayer identification number and a local payroll provider; and
- **Option 2:** Rather than investing the money and time to register, companies may decide to risk non-compliance, gambling that they won't get caught or that the foreign government won't have the will or resources necessary to bring a legal action against a company in Canada for failing to obey local laws.

2. Payroll Laws

Pitfall: Having a telecommuter who works abroad may make the host country the “place of employment” under local payroll laws. **Result:** In addition to your Canadian payroll duties, you could be subject to withholding, remittance, recordkeeping, reporting, employment insurance and other employer payroll mandates under local law.

A common mistake that employers make, according to a report from law firm Littler Mendelson, is thinking that they don’t have to comply with host country payroll mandates as long as they require the telecommuter to pay host-country income taxes and social security, i.e., local CPP and OAS equivalent charges. But payroll duties can’t be delegated and you could still be liable even in the unlikely event that the telecommuter actually does pony up the money for local income taxes and social security.

Solution: One bit of good news is that there are a handful of what Littler Mendelson describes as “exceptional” countries, including the UK, China, Japan, Thailand, Guatemala and Ecuador, where payroll mandates cover only local employers. You may also be able to gain a measure of relief from liability for social security payment obligations in any of the more than 50 countries that have social security agreements with Canada (including the US, France, Germany, Japan and Australia) that basically eliminate duplicative payment obligations. **The way they work:** Employers with telecommuters in treaty countries who make Canadian CPP and OAS payments can get a “certificate of coverage” that relieves them of their duty to pay into the host country’s social security system.

Countries with Whom Canada Has Social Security Agreements

- Antigua, Austria
- Barbados, Belgium, Brazil, Bulgaria
- Chile, China, Croatia, Cyprus, Czech Republic
- Denmark, Dominican Republic
- Estonia
- Finland, France
- Germany, Greece, Grenada, Guernsey
- Hungary
- Iceland, India, Ireland, Israel, Italy
- Jamaica, Japan, Jersey
- Latvia, Lithuania, Luxembourg
- Macedonia, Malta, Mexico, Morocco
- Netherlands, Norway
- Peru, Philippines, Poland, Portugal
- Romania
- St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Serbia, Slovenia, Slovakia, South Korea, Spain, Sweden, Switzerland
- Trinidad and Tobago, Turkey
- United Kingdom, United States, Uruguay

The problem with the certificate of coverage solution is that it isn’t available in countries that don’t have a social security agreement with Canada; more significantly, it provides relief only for social security and not income tax-based payroll mandates. But it may still be possible to avoid local payroll mandates by structuring international telecommuter arrangements in a certain way. Three possibilities to discuss with your lawyer:

- Make telecommuters “leased employees” from a company in the host country that nominally hires and does payroll on the employees (there are companies like

Globalization Partners and TriNet that are set up to act as “nominal employers” in countries around the world) and then “seconds” or assigns them back to you as the “beneficial employer”.
- Ask partners, suppliers or other entities in the host country with whom you have friendly business relations to put the telecommuter on their payroll and reimbursement them for the wages, payroll taxes, withholdings and contributions they make on the telecommuter.
- Have telecommuters resign and then re-engage them as legitimately classified non-employee independent contractors or “consultants.” **Caveat:** The host country may seek reclassification to the extent the independent contractor arrangement is clearly an employment agreement in disguise.

3. Employment Laws

Pitfall: International telecommuter arrangements may also subject you to regulation under the host country’s employment laws, including:

- Employment standards laws regulating wages, hours, vacations and other terms of employment;
- Human rights, discrimination and workplace harassment laws;
- Occupational health and safety laws;
- Workers comp laws.

Solution: Local employment laws are very difficult to contract out of or lawyer around because they’re based on public policy. Exposing a telecommuter to unreasonably hazardous conditions or providing a pay below what the country regards as a minimum wage is something almost no country is willing to tolerate, including Canada. The good news is that the policy precautions outlined below should go a long way in defusing liability risks.

Use Your Telecommuting Policy to Manage Your Liability Risks

The starting point is to try to keep your global telecommuting arrangement as short as possible, ideally 3 months or less. That’s because telecommuter agreements won’t bring you under the jurisdiction of a host country if they only last for a short period. There’s no magic time period for how long an employee must be present in a foreign country to trigger the employer’s duty to comply with local laws. Instead, your strategy should be to structure a short-term overseas work arrangement so the host country never becomes the employee’s (even temporary) place of employment.

The key to executing the strategy is establishing clear ground rules in your company’s written telecommuting policies and agreements. Recognize that, as an employer, you’re in the legal position to dictate the terms of the arrangement, including the right to ban employees from telecommuting abroad. If you do grant international telecommuting privileges, be sure the policy or agreement specifies:

- The employee’s right to relocate overseas, either generally or within a broad region but without naming any particular country;
- How long the employee is allowed to stay in any one country;
- The date the employee must return to Canada, along with a statement indicating that a late return constitutes resignation of his/her employment (except where delay is due to consequences beyond the employee’s reasonable control, like a travel ban);
- The employee’s affirmation that Canada is his/her sole place of employment;
- That the place of place of employment is a fundamental term of the agreement;

- The employee’s duty to notify and get your express permission to relocate; and
- The employee’s acknowledgement that moving to a different location without notification and permission is grounds for terminating telecommuting privileges.