

# Remote Work Without Borders–But Not Necessarily Without Tax Consequences: OECD Guidance For A Post-Pandemic World



Remote work is now a permanent feature of the global business landscape. Employees can perform their jobs from homes or holiday rentals located in entirely different countries from their employer’s headquarters. This flexibility is great for talent retention—but it raises important tax questions. In this article, we consider one such question: Can a remote employee working from another country, whether on a full-time or hybrid basis, create a tax nexus in the country for the employer?

A common principle of international tax treaties is that a person who is a resident of one treaty jurisdiction (the home country) but who carries on business in another treaty jurisdiction (the host country) is subject to income tax in the host country only in respect of business profits attributable to a “permanent establishment” (or a PE) situated in the host country. Under these treaties, a PE is generally defined as a fixed place of business through which the person carries on their business. This generally includes physical establishments with a certain level of permanence, such as a branch, office, factory or mine. Notably absent from most treaties are specific rules governing whether and when a home office or other work location in the control of a remote employee may constitute a PE of an employer in another jurisdiction.

The *Organization for Economic Co-operation and Development* (the OECD) has recently issued welcome guidance on cross-border work from home or other remote work arrangements where the employee has a degree of control over the place of work (such as a second home, holiday rental, the home of a relative, etc.), including when remote work does, or does not, create a PE under tax treaties.

## **What is a Permanent Establishment?**

A permanent establishment generally means a taxable presence in a country sufficient to allow that country to tax business profits attributable to that presence. Under most treaties, a PE can arise in two main ways:

- Fixed place of business PE—a physical location through which the business of the person is carried on; or
- Dependent agent PE—an agent of a person in the country who habitually concludes contracts on behalf of that person.

Remote employees can raise concerns under both tests.

## Remote Work and the “Fixed Place of Business” Test

The OECD recognizes that a home office presents a unique situation as this location is generally under the control of the employee, rather than the employer and generally cannot be accessed by other personnel.

The OECD affirms that the mere fact that a place is used by an employee to carry out activities related to the business of their employer should not lead to the automatic conclusion that that place is a PE. Whether the place constitutes a place of business of the employer will depend on the facts and circumstances of each case. Although not applicable in all circumstances, where the employer does not otherwise have physical premises in a jurisdiction, the OECD effectively set out two key indicators:

1. Does the employee work from a home office in the jurisdiction for at least 50% of their total working time over any 12-month period?
2. If “yes” to #1, is there a commercial reason for the employee being in that jurisdiction?

If the answer to both questions is “yes”, the employer likely has a PE in the jurisdiction from which the remote employee works.

If the employee’s work in the jurisdiction is intermittent or incidental, such that the 50% threshold above is not satisfied, no PE should, according to the OECD, generally exist. An example of this kind of situation is where an employee who regularly works in the employer’s jurisdiction performs services while renting a holiday home in another jurisdiction for a mere 3 months. The rationale for this position is that the employer’s business activities, carried on by the employee in another jurisdiction, must be undertaken on a continuous basis during an extended period of time in order to constitute a place of business of the employer.

Where, however, the 50% threshold is satisfied, the second indicator must be evaluated, considering all facts and circumstances. Generally, a commercial reason for an employee being in a jurisdiction will exist where the physical presence of the employee in the jurisdiction itself facilitates the carrying on of the employer’s business, such as where there are people or resources in that jurisdiction to which the employer needs access for the performance of its business activities. In evaluating this prong of the test, the OECD makes several important observations as to when a commercial reason for an employee being in a jurisdiction is likely to exist:

- where the employee directly engages with customers, suppliers, associated businesses or other persons on behalf of the employer and that engagement is facilitated by the employee being located in that particular jurisdiction;
- where the circumstances are such that, if the employee’s home in the jurisdiction was not available, the employer would make use of other premises in the jurisdiction (such as an office rented by the employer); or
- where any of the following activities take place and are facilitated by an employee’s physical presence in the jurisdiction: meetings between the employee and customers of the employer; cultivation of a new customer base or identification of business opportunities; identification of new suppliers or managing relationships and contractual arrangements with suppliers; real-time interaction with customers or suppliers in different time zone(s) (e.g., providing call center services, or virtual IT support or medical services); access to business-relevant expertise that is used in the conduct of the employer’s activities; collaboration with other businesses; performance of

services for customers or clients located in the employee's jurisdiction where such services require the physical presence of employees or other personnel of the employer in that jurisdiction; or interaction with employees and other personnel of the employer or of associated entities.

In addition to the foregoing, where the employee is the only person, or the primary person, conducting the business of the employer, different considerations arise and there is a higher likelihood of a home office or remote location PE.

In contrast, where there is no commercial reason for undertaking the activities related to the employer's business from the employee's jurisdiction, the employee's home office or other remote location controlled by the employee should not constitute a PE for the employer unless other facts and circumstances indicate otherwise. The OECD provides the following examples of situations where a PE should generally not exist:

- where an employer allows an employee to work from home (or another location controlled by the employee) solely to obtain that employee's services (i.e., to accommodate the employee) or to reduce costs, and not for any other business reason; or
- where an employer permits work from home (or another location controlled by the employee) solely to reduce costs (for example, reduced expenditure on office space).

## **Remote Work and Contractual Authority**

Even where a PE is avoided by virtue of the above analysis, it will be critical that a remote employee in a different jurisdiction does not have or habitually exercise the ability to contract on behalf of the employer while physically present in that other jurisdiction. This contractual authority will generally result in the employer having a PE under most tax treaties.

## **Practical Steps for Employers**

Companies with remote international employees should consider proactive risk management to minimize the chance of creating a PE in foreign jurisdictions. At a minimum, such steps should include the following:

### **Establish Remote Work Rules and Policies**

The OECD recognizes that formal contractual arrangements between an employee and an employer (such as employment agreements and workplace policies) may be of practical assistance in assessing whether a remote work arrangement gives rise to the employer having a PE in a foreign jurisdiction by virtue of the employee's services from that jurisdiction, so long as such arrangements correspond with the actual conduct of the employee.

To guard against a remote work arrangement giving rise to a PE for the employer, such employment agreements or policies should clarify whether employees may work from other countries other than their country of hire and if yes, mandate that the employer's pre-approval, at its discretion, is required (even for temporary arrangements) and specify any other requirements for such work, including duration limits and restrictions on the employee's ability to enter into contracts on the employer's behalf or exercise client-facing roles while in another jurisdiction.

The employer should also schedule periodic check-ins and maintain regular communication with their employees working remotely, including to ensure the

employer's remote work rules and policies are being followed.

### **Document the Employee's Choice**

If an employee is permitted to relocate to another jurisdiction then, to the extent possible, the employer should maintain records showing the relocation was driven by the employee's personal decision and for personal reasons, not business purposes.

### **Conclusion**

While neither domestic law nor a treaty provision, the OECD commentary is a helpful tool in the application of various bilateral tax treaties and provides welcome guidance and clarity on the topic of home office or other employee-controlled location PEs in cross-border employment. Whether and to what extent the Canada Revenue Agency or other taxing authorities adopt the OECD commentary in their own published administrative policies remains to be seen and taxpayers should be mindful that the tax authorities may take a different view on the factors outlined above or set out additional ones.

As cross-border remote work becomes routine, businesses should treat PE risk as a core element of global workforce planning, not merely an afterthought. The Bennett Jones tax and employment groups have extensive experience in nuanced PE determinations and would be pleased to work with you in developing practices and policies to prevent costly surprises.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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