Remote working

Key considerations for Germany when employees are working from abroad

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Legal implications

In case that an employee in Germany seeks to work from abroad, the question arises which employment law will apply. For Germany as a member state of the European Union, the Rome I Regulation (Regulation of the European Parliament and of the Council No. 593/2008) is relevant in this regard.

According to the Rome I Regulation, the employer and the employee can generally determine by mutual agreement the law applicable to their contractual relationship (choice of law). Thus, it can be agreed that German law shall continue to apply when the employee will be working from abroad.

However, despite the choice of law, certain provisions from the respective local employment law which are beneficial to the employee may be mandatorily applicable to the employment relationship. In fact, according to the Rome I Regulation, the choice of law must not have the effect of depriving the employee of the protection afforded by mandatory provisions of the law of the country where or from where the employee usually works in order to perform the obligations from the employment agreement. Therefore, if an employee mainly works from abroad for a German employer, German law, if chosen by the parties, will generally apply to the employment relationship. However, employee-protecting provisions from the local law which cannot be modified by agreement and which are more beneficial to the employee than the corresponding provisions of German law are to be applied mandatorily. As a result, it is possible that both German and local regulations will be applicable to an employment relationship and there is a general risk that, for example, the protection against dismissal provided for by the local legislation (or a specific part of this legislation, as the case may be) has to be applied – if such legislation is deemed to be more beneficial to the employee than the corresponding German legislation.

Also, an employee working from abroad can generally bring foreign proceedings against the German employer. Particularly, according to the Brussels Ia Regulation (Regulation of the European Parliament and of the Council No. 1215/2012), the employee can file a suit against the German employer before the competent court of the respective member state of the European Union where or from where the employee usually works in order to perform the contractual obligations. Such proceedings to be initiated in the respective member state of the European Union may only be excluded by an effective international choice of forum agreement which needs to be concluded by the employee and the employer after the dispute has arisen.

In the absence of a choice of law, the applicable employment law is determined according to objective criteria as defined in the Rome I Regulation. Accordingly, in the first place, the law of the country where or from where the employee usually works in order to fulfil the employment agreement shall apply.

Tax implications

It is essential for the employer to consider the legal situation with regard to social security and taxes before an employee's request to work from abroad is granted.

Concerning social security, the actual place of employment is in general decisive in order to determine the applicable law. This means that working from abroad implies the risk that German social security law will not apply.

Regarding an employment within the European Union, the provisions of the Regulation on the coordination of social security systems (Regulation of the European Parliament and of the Council No. 883/2004) are relevant for Germany. Particularly, an EU citizen working in another member state of the European Union is subject to the social security law of the respective state of employment.

However, exceptions may occur according to the provisions of the aforementioned Regulation on the coordination of social security systems. If an employee usually carries out the work for a German employer in two or more member states of the European Union, the social security law of the member state of residence will apply if the employee performs a significant part of the activity in this respective state. Thus, German social security law will apply if an employee who regularly works from abroad (still) resides in Germany and carries out a significant part of the activity in Germany. According to the rules of the Regulation on implementing the Regulation on the coordination of social security systems (Regulation of the European Parliament and of the Council No. 987/2009), it is generally required for performing a significant part of the activity in one member state of the European Union that at least 25 percent of the activity are carried out in this country.

Outside the scope of application of the European Regulations mentioned before, it is essential to determine whether there is a social security agreement between the state the employee requests to work from and the Federal Republic of Germany. If this is the case, the applicable law has to be determined pursuant to the provisions of such social security agreement. If no social security agreement exists, German social security law will not be applicable if the employee works from abroad and does not work in Germany at all.

Whereas the place of work is generally the essential criterion for the applicable social security law, the place of residence is relevant for the applicable payroll tax law.

According to German tax law, individuals who have their domicile or habitual residence in Germany are subject to income tax in Germany. Therefore, if an employee works exclusively from abroad and has no domicile or habitual residence in Germany, this employee will not be subject to payroll tax in Germany.

However, if the employee works partly from abroad and partly in Germany and is resident in one of the two countries, this employee may be limitedly taxable for income tax purposes according to German tax law, i. e. only with regard to the remuneration for the activity actually performed in Germany. Basically, in such case, it will be necessary to determine which state has the right of taxation (also partly, as the case may be), according to the rules

of the respective double taxation agreement between the Federal Republic of Germany and the other state (if existent).

Finally, there is generally a risk for the German company that working from abroad may create a permanent establishment for tax purposes in the foreign jurisdiction. Particularly, an employee working from abroad may be regarded as a permanent deputy according to the rules of the foreign jurisdiction. If there is a double taxation agreement between Germany and the other state, the definitions of the permanent establishment and of the permanent deputy contained therein will apply. According to the double taxation agreements, a permanent deputy will in general exist if the employee habitually concludes agreements for the company when carrying out the activities for the company in the foreign country. If these requirements are met, the company will in general be treated according to the applicable double taxation agreement as if it had a permanent establishment in the respective country for all the activities performed by the employee for the company in this country. As a consequence, the profits allocated to the permanent deputy will be subject to taxation in the foreign jurisdiction. Furthermore, in the event that the German tax authorities do not accept the existence of a permanent establishment of the German company abroad, a double taxation of the profits allocated to the permanent deputy will be likely to occur.

Immigration implications

Every EU citizen has the right to stay and to work in the member states of the European Union, the other states of the European Economic Area (Iceland, Liechtenstein, Norway) and in Switzerland without any further conditions (free movement of workers). This means that an employee who is an EU citizen can work for a German employer from abroad within the area as described before without any further requirements regarding immigration topics.

For working remotely from outside the area as described before, it is essential for the German employer to assess the legal situation with regard to immigration requirements and particularly to determine whether an entry visa is necessary and how it can be obtained and if a residence permit and a work permit are needed and how they can be obtained.

Any other considerations

According to new legislation in Germany, if a company intends to establish a remote working policy, the company's works council (if existent) must generally be involved. The works council's co-determination rights only relate to the content of a remote working policy. The works council does not have any right of initiative as to whether a remote working policy shall be introduced or not. Thus, the works council cannot force the employer to introduce a remote working policy in the company. The decision whether a remote working policy is introduced or not is only taken by the employer.

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