

September 2021

Paradigm

President's Podium:

New Milestones

**A New World:
Emerging from the COVID-19
Pandemic to Changed Workplaces,
Shifting Legal Practices and
New Friends**

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Selwyn Black leads the business law group at Carroll & O'Dea. His practice includes advising on a variety of issues for businesses, including acquisitions and disposals, new and joint ventures, contracts and employment arrangements, international supply and distributorship arrangements and associated disputes and regulatory issues.

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Remote Working in a Cross-Border World: Key Legal Considerations

The COVID-19 pandemic has demonstrated the opportunities and challenges of remote working. As travel has been limited, we are seeing increased work and collaboration across borders.

According to the latest World Economic Forum's "Future of Jobs"¹ Report, published in October 2020, 80 percent of employers are expanding their use of remote work and 44 percent of employees are able to conduct their work remotely. This article highlights the key legal considerations employers must contemplate when facilitating remote working for their employees across international borders.

It is also important to note that the determination of who is an employee (as opposed to a contractor) will be determined differently in different countries, and may disregard the description in the contract, so the questions for a cross border engagement may not be resolved by describing the relationship as a contracting rather than employment arrangement.

Labor Laws (including minimum conditions and protections, leave rights, protection from discrimination, dispute process)

Generally, the applicable labor laws for an employee will be the laws in the jurisdiction to which their work is most "sufficiently connected." Where the jurisdiction of the employee's residence and the company's operations are the same (for example, both operate from the same state), there is little contention and the mutual jurisdiction applies. However, the answer is less clear when there are multiple states to consider. For example, an employee residing in

Singapore may be providing services to multiple states on a regional or global basis.

While expressing a clear governing jurisdiction clause is highly recommended (even for the purpose of assisting any future discussions or dispute resolution), it does not necessarily fix the employee to that jurisdiction for all purposes. For example, in Australia, if an employment relationship is deemed as having "sufficient connection" with Australia, the federal labor legislation (*Fair Work Act 2009* (Cth))² is deemed to apply irrespective of what may have been stated in contract. This "sufficient connection" test can be applicable to employees that are non-resident to Australia.

This question was explored in *Fair Work Ombudsman v Valuair Limited (No 2)* [2014] FCA 759³ in the Federal Court of Australia. In this case, there was a dispute on whether the employment of Thai and Singaporean aircraft crew, who spent substantial time working and traveling on Australian aircraft within Australia, was sufficiently connected to Australia.

The Court held that there was no sufficient connection and cited a number of factors, including the fact that the employers of the aircraft were foreign corporations, the cabin crew was not resident in Australia and that the employment contracts were made outside of Australia and were regulated by the laws of Thailand or Singapore respectively. Further, the cabin crew were paid wages and assessed on taxes outside of Australia.

In another case in the Federal Circuit Court of Australia, *Holmes v Balance Water Inc. & Ors* (No 2) [2015] FCCA 1093, the Court held that the place in which work was performed was not critical in determining

a sufficient connection.⁴ The Court also stressed that the employment relationship must be linked sufficiently with Australia, not just the employee or employer.⁵

Even though the mentioned cases are from Australia, the key principles of "sufficient connection" should still be carefully considered for any employment arrangement where there is a cross-border element involved. From these cases, it is clear there is no sweeping criteria that can be used and a multitude of factors must be considered.

Once the applicable country has been identified, it is also appropriate to check which International Labor Organization (ILO) conventions it is a party to. Those conventions include topics such as freedom of association, right to organize, collective bargaining, forced labor, protection of children and young persons, discrimination and equal remuneration.

Workers' Health and Safety and Workers' Compensation

Another key area to consider is employee wellbeing and safety. Employers have an obligation (or in some jurisdictions, a duty of care) to ensure that their employees have a safe working environment. In Australia, this obligation extends to the environments of employees working remotely. Through consultation with employees, companies should provide guidance on what is a safe work environment or provide workplace assessments of the employee's remote situation. Companies should still require their employees to learn and comply with good ergonomic practices, mental health resources and proper hazard assessment.⁶



While taking these reasonable steps, companies must also consider what their obligations are to employees in the event that their employee has a work-related incident remotely. In Australia all companies are required to take out workers' compensation insurance to cover themselves and their workers.

Companies should check whether their employer's liability insurance includes coverage for remote and cross border workers.

Taxation Laws

Even before the pandemic, the taxation of globally mobile employees was complex. Companies need to first consider the tax residency status of the employee. While this will be subject to various considerations (in Australia, there are four key statutory tests used)⁷, often, the state from which an employee sources its income will be the state where they are assessed for personal tax on that income.

In most jurisdictions, employers will also have the responsibility for withholding the personal income tax of the employee directly from their salary.


It is important to check whether there are any applicable international Double Tax Agreements (DTAs)⁸. Where applicable, DTAs may ensure that an employee is not taxed in both the state of their residence and the state in which their employment is sufficiently connected. As the conditions and wording may vary between each DTA, it is important that it is reviewed carefully in the particular context.

Beyond the personal income tax of the employees, companies must consider other taxes it may need to pay by virtue of employing employees. These may include payroll taxes, taxes for non-cash benefits and social security contributions.⁹ For example, in Australia, there is a Superannuation Guarantee requirement for employers to pay a percentage of an employee's wages into a specified retirement fund.

Conclusion

Remote working, while of great benefit in gaining access to the best talent and opportunities, does not come without its issues. Beyond tackling logistic and administrative concerns, companies must consider the various legal, compliance and tax implications which may occur.

As a general rule of thumb, the law of the country that the employment is deemed most connected to, should be the starting point for all discussions. However, as discussed above, the interplay of other national laws and international treaties should also be considered.

It is pivotal that both parties undertake careful consideration and obtain appropriate legal and taxation advice prior to formalising any international remote working arrangements for their employees. 

1 WEF economic report

2 FWA Act

3 jade.io/j/?a=outline&id=339032

4 jade.io/article/406376, 132

5 jade.io/article/406376, 131

6 safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/general-industry-information/working-home "What must I do when workers are working from home?"

7 ato.gov.au/Individuals/coming-to-australia-or-going-overseas/Your-tax-residency/#Residencytests

8 ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Residency-and-source-of-income/#Effectofadoubletaxagreementsonemployment

9 Labour and employment 2021, Getting the Deal Through (Taxation of Employees) section for each country