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For more information, please contact:

Susan Eandi
+1 650 856 5554
susan.f.eandi@bakernet.com

Ute Krudewagen
+1 650 856 5577
ute.krudewagen@bakernet.com

The Challenges of Global Telecommuters

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By Susan Eandi and Ute Krudewagen

The old adage that "law does not keep up with technology" is nowhere more true than in the ever-evolving world of telework. Increasing advances in technology provides new opportunities for companies to creatively engage employees, changing the landscape of how companies employ people, who they employ and where the employee works.

Teleworkers are often thought of as employees or independent contractors working from wherever their clients or their lives take them. Within this broad definition of teleworkers is a group of workers commonly referred to as "telecommuters." While telecommuting and telework are often used interchangeably, generally, a telecommuter is an employee performing work away from the employer's premises (usually at home) on a regular basis. By some estimates, there are more than 137 million telecommuters around the world. It is difficult enough to manage the various employment, tax and corporate issues implicated by telecommuters within a specific jurisdiction, but this challenge is exacerbated when taken globally and across legal disciplines.

On a very basic level, telecommuters can be broken down into two categories: "in-country telecommuters" and "cross-border telecommuters." In-country telecommuters are typically those who telecommute to an employer in their home jurisdiction (for instance, a Dutch employee of a Dutch company telecommuting from his home in the Netherlands). Cross-border telecommuters are those who telecommute to an employer outside their home jurisdiction (e.g., a Korean employee working from his home in Korea for a U.S. employer). Obviously, there can be themes and variations of these categories, such as employees who work from various locations in multiple jurisdictions as they move from client site to client site, employees who follow their spouses who may be reassigned for periods of time (the "trailing spouse") or employees who find creative inspiration from traveling the world as they work, but these fall outside the more narrow definition of telecommuters.

There are some recurring themes in the complex area of telecommuting, which once recognized can guide a multi-national employer.

First, employers engaging these global telecommuters should determine what labor and employment laws apply to these workers. For example, with very few exceptions, virtually all provisions of a country's Labor or Civil Code or similar statute applicable to regular employees also apply to telecommuters, thus imposing vacation and leave requirements, requirements to provide other mandatory employee benefits, as well as protections from termination of employment, just to name a few. In addition, various jurisdictions' labor laws include specific statutory provisions addressing telecommuters (such as Mexico, the Netherlands or Poland), while in other jurisdictions there may be a separate statute solely focused on telecommuters. There are collective bargaining agreements solely applicable to telecommuters in some jurisdictions. An example is the French Interprofessional National Agreement on Telecommuting ("télétravail") of June 19, 2005, which has been extended by the French Labor Ministry to apply to every employee engaged in telecommuting. In the European Union, in 2006 various business and labor groups have adopted the so-called "Framework Agreement on Telework," which is generally non-binding, but has been implemented in various EU member states.

After determining the applicable labor and employment laws, another threshold question employers face is whether employees can demand to telecommute, or whether the employer can require an employee to telecommute. On the one hand, while telecommuting can constitute a reasonable accommodation of a disabled employee internationally (as in the U.S.), with few exceptions, employees do not have a right to telecommute. In the U.K., however, an employee with a minimum of 26 weeks' service who is the parent or guardian of a child under 6 can apply for flexible working arrangements, including telecommuting; while the employer is not required to agree to the request, it must deal with the application in accordance with a statutory procedure. On the other hand, given the absence of at-will employment internationally, an employer typically cannot unilaterally amend the terms and conditions of employment of an ongoing non-U.S. employee to require telecommuting, although the employer could make telecommuting a condition of employment for a new hire.

Global telecommuting raises many issues familiar to U.S. employers, including questions on tools/infrastructure that must be provided, health and safety, wage and hour compliance, data privacy, confidentiality/proprietary information, and employee monitoring. For instance, many jurisdictions have specific rules requiring the employer to provide certain tools or infrastructure to telecommuters. An Italian or Vietnamese employer must provide the employee with all necessary tools to work from home, and a French employer must even reimburse the employee for the costs linked to the employee's home office (such as rent, insurance, tax, electricity, etc.).

Health and safety is another concern. For example, a Dutch employer must conduct a risk evaluation of the employee's home working situation, in line with the Dutch Working Conditions Act. Compliance with stringent working hour requirements is yet another challenge. There is administrative guidance in Japan that may release the employer from its obligation to manage a telecommuting employee's working hours, and telecommuters may be deemed excluded employees under the Israeli Rest Law whose working hours can not and do not have to be managed. In most jurisdictions, however, it is up to the employer to prove compliance with applicable wage and hour laws, which can be difficult with a telecommuting employee.

The employer also needs to ensure that it complies with applicable data privacy laws, while securing its confidential and proprietary information. For instance, a French employer must comply with the data protection rules by the French data protection authority and take measures to ensure the protection of data, whether or not the employee is working from home or at the employer's premises. Similarly, a U.K. employee must ensure compliance with the various data protection principles under the Data Protection Act 1998, including the requirement to take appropriate technical and organizational measures against unauthorized or unlawful processing of data or accidental loss or destruction. Employee monitoring poses another challenge.

In addition to the issues faced when managing in-country telecommuters are further challenges for those telecommuting across borders.

Employers engaging cross-border telecommuters will need to determine whether the labor and employment laws of the employee's jurisdiction (i. e., his/her home office), or the employer's jurisdiction, or both, apply. Typically, employees are entitled to the protections of the labor and employment laws of their home location. For instance, under the Rome Convention, which is applicable in the EU member states, employees are entitled to the protections of the mandatory rules of their home location, regardless of the choice of law. A highly mobile global telecommuter, who may be working from various jurisdictions during his/her career, could be entitled to protections from each of those jurisdictions.

For a cross-border telecommuter, it is crucial for the employer to ensure compliance with applicable payroll requirements. This includes the requirement to withhold individual income taxes and social security payments in the relevant jurisdiction(s). Any applicable double taxation and social security totalization agreements will also need to be reviewed for all jurisdictions at issue. Many jurisdictions also have certain mandatory benefits (such as pension plans), or the employer may wish to offer other optional benefits, which may be difficult to implement in a cross-border telecommuting situation.

Compliance with applicable immigration laws may be another stumbling block, as may stringent cross-border data transfer requirements, such

as under the EU Data Privacy Directive. Permanent establishment tax exposure, as well as possible violations of applicable doing business laws, will also need to be considered. For instance, in some jurisdictions (such as Brazil) employers may be prohibited from engaging an employee in a foreign jurisdiction without corporate presence.

Finally, for both in-country and cross-border telecommuters, implementation of the relationship itself raises specific issues.

For example, some countries require registration of telecommuting arrangements. In Mexico, there is a requirement (albeit to date not implemented) for the employer to register at the Employer Registry of Work at Home; in Spain, Social Security registration account numbers are assigned per province. In virtually all non-U.S. jurisdictions, employee consent will be required to implement a telecommuting arrangement, typically as part of the employment agreement (which under the EU Information Directive, must indicate the employee's place of work). For more comprehensive telecommuting programs, a policy is typically recommended and may need to be implemented in accordance with specific requirements (for instance, as part of the company's work rules or internal regulations). If the employer has a works council, union or employee representative body, notification and or consultation is typically required, as specifically set forth, for instance, in the French National Agreement on Telecommuting. Insurances may need to be taken out, such as in Belgium, where the employer must provide insurance against occupational accidents, which should be sufficiently broad to cover the employee working from home.

Technology will not wait for the law to catch up. Similarly, companies seeking to take advantage of opportunities presented by advances in technology to harness global talent will not wait. As the pace of business moves more and more companies onto the global stage, employers engaging global telecommuters face cutting-edge legal challenges that can be successfully managed by thoughtful planning.

Susan Eandi and Ute Krudewagen are partners in the global employment practice group of Baker & McKenzie's Palo Alto office.

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