

International workforces: Are you using an Employer of Record?

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The use of an Employer of Record (EOR) is now more commonplace thanks to the rise of international remote working.

What is an Employer of Record, and does using one mitigate all risk?

Many EOR organisations were set up to help companies with their global expansion plans. The major selling point is that an EOR does away with the need for immediately establishing a branch or subsidiary in the new country, along with the associated compliance burdens. Instead of sinking time and money into a new location that ultimately doesn't prove viable, companies can use an EOR to act as the local employer in terms of hiring and paying employees.

An EOR will also take on other employment-related obligations in the local country, such as payroll management, benefits, and HR. Importantly, it is the client company that retains responsibility for the day-to-day work and performance management of the employees hired on its behalf by the EOR.

Over time, EORs have expanded their operations. EOR organisations now help to facilitate arrangements for employees who are hired to work remotely, or for those UK employees who are now able to work remotely and want to relocate internationally.

EOR arrangements can be part of the portfolio to help employers to mitigate compliance risk, but this mitigation is not absolute. Depending on the roles undertaken by the EOR and the length of time the arrangement between it and the client company lasts, there can be obligations that need additional consideration.

Permanent establishment

A potential risk relates to the creation of a permanent establishment (PE) for local tax purposes. Under the laws of many countries, a PE is either:

- a fixed place of business through which the business is carried on (eg offices, a factory or, in some cases, the home office of a remote worker); or
- an agent acting on behalf of another company, with authority that it habitually exercises to do business on behalf of that company (eg negotiating contracts). Such an agent is called a 'dependent agent'.

It is possible that an employee's presence in the host country could create a PE, even if it's the EOR that holds the direct employment relationship with the employee.

A UK company with a PE in another country could find that its profits are potentially taxable in both countries. This would mean that, despite having no legal employees in the host country, the UK company could still have a compliance obligation there (eg profit attribution, local corporate filings).

Therefore, in addition to ensuring that all employment-related compliance obligations are being met, it is vital to ensure that a PE is not inadvertently created.

What happens if the employee has UK workdays?

Income tax and National Insurance

Individuals undertaking work in the UK, even if for just one day, may trigger a UK income tax or National Insurance obligation. When it comes to income tax, there are many countries with which the UK has a double tax treaty to ensure that individuals are not taxed twice on their income, however, where there is a possibility that the client company is the economic employer, and/or where costs are borne, it may be that such a treaty cannot be relied on to provide tax relief for the employee.

There may also be an obligation for additional UK National Insurance reporting:

- If the individual is coming from a country with which there is a reciprocal agreement, a certificate may be required to confirm that it is local social security that's due and not UK National Insurance. It should be confirmed with the EOR that this obligation is being met.
- If the individual is coming from a non-agreement country, the UK has domestic exemptions (the so-called '52-week rule'), but caution should be taken that the conditions of this domestic exemption are being met (eg the individual is sent to work in the UK for a time by the foreign employer and continues to work for that employer when in the UK).

Payroll

The UK operates a withholding regime whereby there is a PAYE (pay as you earn) obligation for individuals working in the UK for the UK employer. As mentioned above, while the HR and payroll setup can be managed by the EOR, it's the client company that retains control of day-to-day work.

This means that, while debate continues and HMRC guidance remains unclear, it may be difficult to argue that the UK company is not the host employer were an individual to have UK workdays. Therefore there is a risk that a UK payroll obligation may still be present.

There are options to mitigate some of this compliance burden, such as HMRC's Appendix 8 regime, but they depend on the length of time that the individual spends working in the UK and the nature of their duties. Each case would need to be managed on its own merits.

Immigration

Business visitors to the UK often do not need a work permit if they are deemed to be a 'business traveller'.

This usually means that the visitor is undertaking permitted activities such as attending meetings or conferences, making site visits, or receiving training. The visitor is likely to need a work permit if they are doing anything more directly related to day-to-day business functions like providing goods or services, or selling directly to the UK public.

Bear in mind that it's the client company, not the EOR, that retains management responsibility, so additional care should be taken that employees travelling to the UK for work have the right visa to cover the activities they'll be expected to perform.

Employment law

While the EOR organisation is the employee's legal employer, the risk remains that the employee has legal protections from the client company.

This is especially so given that the client company retains the management responsibility for the employee, including for the employee's performance. The fact that the EOR is the employer may not mitigate claims made against the client company. Knowing the details of the EOR contract and the individual employee's rights under it is essential, as is taking suitable independent legal advice.

When should you take additional advice?

The EOR setup can be a key part of expanding into an overseas location or allowing an employee to temporarily relocate. EORs can allow for the quick hiring of employees, and provide a degree of protection from many of the immediate compliance obligations that come with establishing operations abroad.

We've focused on some of the main risks here, but would highlight that this list is not exhaustive. Other risks to consider include:

- whether equity is provided to EOR employees;
- IP ownership;
- IT security; and

- GDPR.

Importantly, we would recommend that further advice be sought when these relationships become longer-term, or these employees are required to travel internationally. If you would like further information or have any queries about using EORs please contact [Joanne Webber](#) and [James Smith](#).