

INTERNATIONAL TELEWORK: WHAT YOU NEED TO KNOW BEFORE YOUR EMPLOYEES WORK FROM ABROAD

Thanks to the tools put in place to facilitate telework during the recent lockdowns, more and more employees wish to telework, even temporary, from a country other than France, whether for family or leisure reasons.

International telework or "full remote" (which means that an employee can work from wherever he or she wants) is thus an incentive factor for companies that want to attract and retain talents.

Nevertheless, it requires a lot of flexibility for the companies and can generate risks, particularly in terms of social, fiscal and data protection issues, which are important to know.

We have listed the main points of attention and steps to be taken into consideration before an employee of a French company carries out the activity for his employer from another country for a specific period.

I. How to formalise international telework?

In principle, telework can be introduced by means of a company agreement, a charter or by "any means" (including a simple exchange of e-mail between the employee and the employer).

Nevertheless, in the particular case of international telework, given the stakes involved, it is strongly recommended to sign an amendment to the employee's work contract to prevent all the difficulties discussed here, but also to limit the duration of telework from abroad and to provide for an automatic return of the employee to his usual place of work, at no cost for the employer.

This will also allow the other subjects usually covered by telework agreements or charters to be discussed: the provision of equipment (in connection with the securing of IT tools mentioned below), the reimbursement of expenses, the range of availability of the employee, etc.

In this respect, what about the obligation to reimburse transport costs? In principle, the employer is obliged to pay 50% of the cost of subscriptions taken out by the employee for travel by public transport/cycle between the place of work and the place of habitual residence, regardless of the geographical location of the residence. In the case of teleworking abroad for personal reasons, the question will have to be examined in greater detail, particularly with regard to the principle of equal treatment between employees.

II. Which law applies to the employment relationship?

As the employee has concluded an employment contract under French law, this law (including the applicable collective agreements) remains in any case applicable to the employment relationship.

Nevertheless, both employer and employee will also have to comply, for the duration of the telework abroad, with the mandatory provisions of the country of telework. There is no exhaustive list of mandatory provisions; however, these are mainly provisions on working time, minimum wage, dismissal, use of fixed-term contracts, health and safety, etc. In these areas, it will be necessary to find out whether there are any mandatory provisions in the country of telework, as they will apply if necessary.

Finally, it should be checked whether the country of telework does require the employer to report the presence of the employee on its soil (like the "SIPSI" declarations, even if secondment on own account is, under French law, exempted from this declaration; the situation could however be different in other countries).

III. What social security legislation applies?

Here we will discuss the case of the employee who teleworks in another EU country. For an employee who goes to a non-EU country, it would be important to analyze the bilateral agreement on the coordination of social security schemes applicable between France and the country of destination.

With regard to social security legislation (including sickness-maternity-paternity, occupational accidents and illnesses, family benefits, death insurance, unemployment insurance, retirement and supplementary pension), a distinction must be made depending on whether the teleworker performs his or her duties in one or more countries.

If the teleworker works in only one country:

- It is not clear that international telework meets the definition of secondment. Indeed, secondment corresponds to the situation in which the employee works temporarily abroad for his employer, for the time of an assignment. However, in the case of international telework, the employee does not leave France for the time of an assignment but to carry out his activity, which remains the same, from a place located abroad. If the secondment were accepted, this would allow the employee to remain affiliated to French social security legislation;
- Otherwise, the place of residence would be considered. Therefore, the applicable social security legislation would be that of the country where the telework takes place.

If the teleworker performs his duties in several countries (e.g. employee working regularly in the company's premises in France and teleworking from abroad): the teleworker will be in a pluriactivity situation. A more complex assessment of the situation will be necessary, involving in particular determining in which country the employee usually resides and whether he or she carries out a "substantial part of his or her activity" (in practice at least 25% of his or her working time and/or remuneration) in order to determine the applicable social security legislation.

To clarify the situation, the employer should request an A1 certificate which will set out the social security legislation applicable for the period of international telework.

IV. Does the employee need a visa/work permit?

Within the European Union, there are no immigration obstacles for European employees wishing to work in another country. However, care must be taken in the case of non-European employees who, even if they have a valid work permit in France, will not automatically be authorised to work in another EU country.

Otherwise, if the employee wishes to telework outside the European Union, he/she will need a visa and a work permit issued by the country he/she wishes to work from, if no exception applies. Before taking a decision, it will be necessary to check whether the country in question does not charge these procedures and the related costs to the employer. Once this verification is made and if the employer accepts the employee's request, it is recommended to stipulate in the amendment to the employee's work contract that telework from abroad is done at the employee's sole initiative and that it is therefore up to the employee to take the necessary steps to obtain a visa/work permit in the country of telework.

V. Where is the employee taxable?

Employees are in principle taxable in their country of tax residence on their worldwide income. However, the country in which the professional activity is carried out may tax the salaries received in this respect, for example through a withholding tax.

As an exception, the "temporary mission clause", which exists in most international tax treaties concluded by France, allows an employee to remain taxable in his country of tax residence, even though he is working from another country, if certain conditions are met. In particular, the employee must not stay more than 183 days in that other country.

VI. Does teleworking outside France change the employer's obligations?

In France, as in many European countries, the employer must withhold income tax, as well as social security contributions from his employees' salary.

If an employee teleworking from abroad becomes liable for income tax or social security contributions in the country of telework, his/her employer will generally have the same kind of withholding and payment obligations. The employer may therefore need to register himself in the country of telework at the relevant authorities, to file the necessary declarations and perform payments. A payslip drawn up according to the standards of the country of teleworking might also be necessary. It is therefore important to know the applicable local legislation.

VII. Can telework trigger a permanent establishment of the employer?

Having a permanent establishment in a State means having a taxable presence there.

A permanent establishment may be characterised by the mere exercise of the activity of an employee where he habitually concludes contracts or habitually plays a main role leading to the conclusion of contracts by his employer.

In this case, the employer will have to identify himself in the country where the activity is carried out and will have to pay commercial taxes there, under the risk of penalties and heavy sanctions being applicable.

The nature of the teleworker's activities abroad should therefore be carefully checked.

VIII. What are the data protection concerns of international telework?

International telework raises questions about the security, confidentiality and integrity of company data. Indeed, a public Wi-Fi connection in a hotel used by a teleworking employee does not offer the necessary security guarantees to ensure data protection.

It is therefore up to the employer to provide his employees with secure tools (computer, mobile phone, internet connection, etc.), and to control the tools of employees who use their personal equipment with his authorisation.

IX. What measures should be implemented to secure IT tools?

The employer must implement technical measures to secure IT tools (firewall, anti-virus, VPN, activity logging, etc.).

In addition, an IT charter for employees must be drawn up to set out the rules for the use of information systems, such as the rules for authentication to company accounts, security rules for updating devices, or access to workstations.



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