

Teleworking and PE risk

The question I would like to address is linked to the new work practices after the Corona crisis. I mean the new tendency in many companies of allowing staff or certain staff members to telework.

This new tendency does not raise any problem from taxation point of view if the telework takes place within the same jurisdiction. But when some members of the staff telework from a foreign country, it is likely to be more complicated because it may involve the company having a Permanent Establishment in that country and therefore having to pay taxes and having to complete administrative paperwork in that country, which any normal company would rather avoid.

My question is therefore : *Under what conditions can teleworking abroad lead to the presence of a permanent establishment?*

The definition of a PE is fairly simple: according to the OECD Treaty model, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

So the question is, does teleworking from abroad meet this definition?

In fact, for the existence of a permanent establishment, four conditions must be fulfilled simultaneously:

1. there must be a place of business, for example an office or an office space
2. This place must be 'fixed', meaning that it must have a reasonable degree of permanence
3. this installation must be at the disposition of the foreign company, which means 'made available' to the company.
4. all or part of the business of the foreign company must be carried on through this place of business.

I am not going to enter into the details of these conditions. It is obvious that an office used permanently by an employee, for instance at home, is by definition a fixed installation in which the employee is expected to contribute to the profitability of the company.

There is only one condition over which the company usually has control: it is the 3rd one: the installation must be at the disposition of the foreign enterprise, made available to the company.

And the office is only considered to be made available to the company

- if the company has in some way forced or imposed to the employee to work from home and he has no place of his own to work at the company's premises,
- or if the company has been granted the right to use this office space.

For example:

- the company itself rents an office and makes it available to the worker, employee, (in that case the company is itself the tenant of the office and is free to use it according to its own decisions)
- or the employee gets his boss to pay him a rent for the use of his workplace at home.

In these cases, the criteria of a permanent establishment are met, with all the tax consequences that this may involve.

So be careful how the issue of permanent or quasi-permanent teleworking is dealt with;

It may of course be important to think about this when drafting an employment contract.

André Bailleux
WBGJ
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