

# What to do about "Global COVID Nomads"

and Other Wandering Workers  
Who Telecommute from Abroad  
for Personal Reasons

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Technology facilitates remote work in ways that, years ago, just were not possible. Take telecommuting. These days, all kinds of jobs that had to be performed at an employer site are now performed remotely. Some call center workers, for example, now work from home using home telephones — no brick-and-mortar call center needed. Some secretaries now telecommute using laptops and the internet. Some teachers now teach remotely using laptops and video links. There are architects, doctors, lawyers and judges who, these days, use the internet and video to transmit blueprints, diagnose patients, and try lawsuits from home.

The COVID-19 pandemic hit in early 2020 and immediately set off enormous disruptions across workforces worldwide, like hours cuts, furloughs and layoffs. At that point, the work-from-home trend that had been growing steadily for years just exploded. Millions of on-site workers around the world shifted, overnight, to telecommuting.

The instant worldwide transformation to ubiquitous work-from-home inevitably sparked novel logistical problems and sticky legal challenges. Among the more complex is the singular phenomenon that came to be called "global covid nomads," the small percentage — but enormous worldwide number — of employees that COVID-19 transformed into telecommuters who then slipped away to work from new homes in foreign countries.

Of course, even "domestic covid nomads" cause compliance issues when they get away and start working in some new state, province or municipality.<sup>1</sup> But a *global covid nomad*, by definition, triggers *international* legal challenges. These challenges can be particularly tough to rectify, even hard to spot. Indeed, often the very first challenge with a global covid nomad (or other international "wandering worker") is the immediate supervisor who sees nothing amiss and simply figures: *Why not just let this valued employee move overseas, if he wants to? He's working remotely anyway — where he lives is none of our business.*

Our discussion here unpacks the legal issues around global covid nomads and international wandering workers, with the goal of devising strategies for structuring these relationships legally. Our discussion breaks into four parts: (A) a taxonomy of international telecommuters; (B) legal issues and risk assessment; (C) five compliant structures for long-term or indefinite-term international telecommuting, and (D) strategies for keeping short-term international telecommuting short.

<sup>1</sup> Domestic covid nomads (domestic wandering workers) present their own challenges, but less intractable than those that a global covid nomad triggers. Our discussion here addresses only international — not domestic — wandering workers.

## Part A: A taxonomy of international telecommuters

While global covid nomads got most the attention during the pandemic, when it comes to legal compliance, HR strategy and employment structure, a global covid nomad is positioned just like any other cross-border telecommuter or wandering worker — any employee who, whether or not because of COVID-19, works from a home in one country for an employer in another. To confront the legal issues in international telecommuting, to devise workable HR strategies, and to structure compliant cross-border arrangements, employers should begin by understanding what kind of cross-border telecommuter is at issue. "Step one," therefore, is just classifying the relevant arrangement, identifying the type of cross-border telecommuter. There are different ways to classify various types of cross-border telecommuter; one "taxonomy" is to organize them into these five "species":

1. **Overseas local telecommuter:** A multinational employer operates and employs staff in a number of countries worldwide. It has a brick-and-mortar site in a country abroad that employs staff locally, overseas. But the overseas operation also employs local in-country telecommuters working from home, payrolled on the local in-country payroll.
  - » **Example:** Imagine a Newark-based pharmaceutical company has a research-and-development laboratory in Zurich with dozens of on-site workers plus a couple of local Swiss workers on work-from-home arrangements.
2. **Expatriate telecommuter:** A worker an employer dispatches ("expatriates") to work in a foreign country important to the employer's business operations, but where the employer has no brick-and-mortar office, so the expatriate must telecommute.
  - » **Example:** Imagine an emerging New York City fashion brand has customers and annual fashion shows in Paris, but no Paris office. It assigns an American to move to Paris to oversee the French business from a rented Paris apartment.
3. **Foreign-hire telecommuter:** An employer identifies a job candidate living in a foreign country where the employer has no brick-and-mortar workplace. The employer hires this candidate to telecommute/work from home locally, in-country.
  - » **Example:** Imagine a start-up Seattle tech company identifies a programmer in Poland whom it hires to work from home, remotely, in a suburb of Warsaw.



4. **Self-directed international-traveler telecommuter:** A worker had been local, working in the employer's local home jurisdiction (either working at the employer site or telecommuting from home locally). But now, for personal reasons, that worker wants to go overseas and telecommute from a foreign country — and the employer agrees.

» **Example:** Imagine a Chicago consulting company has a valued consultant whose wife is being transferred to Belgium. The husband has to move, too, for family/personal reasons — this is the so-called "trailing spouse" scenario. The husband's Chicago employer is willing to keep him on, telecommuting from the new home in Belgium. (A separate, even more common scenario is the employee originally from overseas who now has to return, to care for a sick relative back in the native country.)

5. **Stealth self-directed international-traveler telecommuter:** A telecommuter had been local, working from home in the same jurisdiction as the employer. But at some point, for personal reasons, the telecommuter slipped off overseas and started working from a foreign country — unbeknownst to the employer.

» **Example:** Imagine a Napa Valley vineyard employs an accountant who, when hired, had lived in San Francisco. The vineyard let the accountant work from home, to avoid the long commute. But for personal reasons, the accountant at some point moved to Vancouver, without telling anyone at work.

All five kinds of international telecommuter require attention as to legal compliance, HR strategy, and employment structure. In addressing global covid nomads, our focus here is mostly on *self-directed* international telecommuters, or what might be called international wandering workers — those who had originally worked for their employer in a home country (either on the employer's site or telecommuting from a local residence) but who later, for personal reasons, moved abroad. While a global covid nomad might fall into any of our "taxonomy's" five categories, most are wandering workers falling in the fourth and fifth categories, self-directed international-traveler telecommuters and *stealth* self-directed international-traveler telecommuters.



## Part B: Legal issues and risk assessment

We mentioned that the immediate supervisor of a global covid nomad (or other self-directed international wandering worker) may fail even to see an issue — figuring, in essence: *This worker is going to telecommute, anyway. So what if he goes off to work overseas for a while? Either way, he's not going to work at our site. Where he lives is none of our business.* This approach blinds the employer to vital compliance issues. Like it or not, international wandering workers pull their employers into cross-border employment relationships. And cross-border employment relationships inevitably trigger nuanced legal challenges.

Legally compliant employers contemplating international telecommuting sometimes jump to the conclusion that the legal issues to check for arise under home-country law. For example, if a telecommuter in Kansas City asks to move abroad and start working for a while from Munich, Germany, the employer might reflexively check with its Missouri employment lawyer and Missouri payroll processing team. If it does, it might get the answer "*All clear.*" The employer here asked the right question, but asked the wrong people. In international telecommuting, the toughest legal issues tend to arise under *host-country* law, where the telecommuter works. If a telecommuter working for a Kansas City employer goes to live in and telecommute from Munich, then the trickiest legal issues will inevitably arise under German (not U.S. or Missouri) law.<sup>2</sup> It works the same way in reverse: A German telecommuter who "inpatriates" to Kansas City to telecommute from there for a German employer triggers important legal issues under United States federal and state law, not as much under German law.

In analyzing legal compliance in an international telecommuting situation, always focus primarily on the payroll mandates and employment law challenges of the international telecommuter's overseas *host-country*, not the employer's home country (even understanding the employer would almost always prefer to anchor the choice-of-law analysis to the home country). Consider: (1) using an available host-country payroll; (2) three high hurdles under host-country law; (3) three low hurdles under host-country law; and (4) risk of enforcement.

### 1. Using an available host-country payroll

By definition, a multinational organization operates in more than one country, and so, presumably, employs staff in more than one country. Sometimes it happens that a multinational employs a wandering worker who sets off to work in a country where the employer already has, up-and-running, a local operation and payroll. Or else, at least, the employer has a sister company or affiliate within its corporate group that operates and payrolls staff in the wandering worker's destination country.

In this scenario it is usually fairly easy, and usually fully legally compliant, just to migrate the wandering worker onto the employer's own host-country payroll. Problem solved. If, later, this worker returns home, then at that point the telecommuter just migrates back onto the original (home country) payroll.

Therefore, our discussion here about self-directed international telecommuters presupposes a wandering worker who goes off to some country where the employer does *not* already do business, has *no* corporate presence and has *no* affiliate running an in-country payroll. But the point is: Before embarking on the analysis that follows, first check whether there is an easy short-cut — check whether the employer happens to run a payroll in the host country and can just migrate the international wandering worker onto the local payroll. The rest of our discussion assumes that is not possible.

### 2. Three high hurdles under host-country law

We said that self-directed international telecommuters (wandering workers like global covid nomads) trigger some tough legal issues, and that those issues tend not to implicate the employer's home-country laws. Rather, the legal hurdles here tend to arise under the laws of the host country where the telecommuter goes off to work. Specifically, three high hurdles arise under host-country law: (i) "Permanent establishment," (ii) "payroll mandates," and (iii) local employment laws.

<sup>2</sup> The few *home-country* law issues to consider in a cross-border telecommuting scenario tend to be straightforward. Some home-country payroll adjustments might be possible, and certain features of home-country employment law might reach overseas, "extraterritorially." But those issues tend not to pose much of a hurdle to international telecommuting, even if it goes on for several years. Home country tax and social security authorities are unlikely to complain if an employer keeps an overseas telecommuter on home-country payroll, and keeps on making home-country payroll reports, withholdings and contributions.

i. **Permanent establishment ("PE"):** The first host-country law challenge to employing an international wandering worker is the so-called "permanent establishment" (PE) issue. In probably all countries on Earth, when a foreign company comes in and starts "doing business" (as that concept is defined under local law), local law requires the foreign company to: register to do business — that is, register a local corporate branch or subsidiary; get a local-country taxpayer identification number; and file annual corporate tax returns (even if the foreign company does not generate taxable revenue and so does not owe tax money, the local tax authority does not know that until it sees the company's annual local corporate tax return). The legal issue of corporate law and corporate tax law here is called PE; a foreign company that starts doing business in some new country without registering a local corporate presence is said to trigger an illegal PE. Corporate tax lawyers take this issue quite seriously. An unregistered PE can have catastrophic tax consequences, such as where a local country taxes unregistered PEs on their worldwide income.

PE is an issue of *corporate law and corporate tax law*, whereas an international wandering worker is an employee who presumably triggers *employment law* issues. But the wandering worker now works for the employer company in a new country. Especially if the worker is full time, that could trigger a PE. By employing a staffer in this country, perhaps the company is now "doing business" there.

When employing a wandering worker in a foreign country where the employer is not registered to do business, an initial priority is to analyze PE risk. Shore up a defensible position that this telecommuter working remotely in this host country on these terms does not trigger a PE. Then take steps to support that position. PE analysis in the international telecommuter context turns on a few variables. Consider:

- » **Host country definition of "doing business" and PE trigger:** PE thresholds differ by country. In China, employing someone in-country for over six months might instantly trigger a PE, but in Switzerland, employing a single telecommuter working remotely on non-Swiss matters may be quite unlikely to trigger a PE.
- » **Agents and offices:** PE can get triggered by in-country agents and local brick-and-mortar offices. Be sure the international wandering worker has no agency authority to bind the employer to local contracts and never holds out the local at-home office address as a company business address.
- » **Local projects and tasks:** PE risk rises sharply where an in-country telecommuter engages with the local host-country economy. Where possible, prevent an international wandering worker from working on local (host-country) projects. Keep the worker from taking an initiative to launch in-country customer support, marketing or recruiting efforts.
- » **Scale:** PE analysis looks to all a company's tentacles reaching into in the relevant country, so honestly account for the full scale of the company's in-country operations. For example, maybe a single telecommuter in India might not trigger an India PE (or the similar India-law concept of an "exchange control" violation) — but PE analysis inevitably gets tougher if the company has not one, but two, five, a dozen, or twenty or more employees telecommuting from India. Or maybe the organization happens to have other projects going on in India, in addition to the international telecommuter, like an Indian call center or Indian customers.

Where PE analysis compels a finding that, yes, the employer organization does indeed trigger a host-country PE, then register a local corporate presence. Next, migrate the telecommuter to a new in-country payroll, using the new in-country taxpayer identification number and a local payroll provider. This step is cumbersome, but — fortunately — doing it resolves most of the other issues we discuss below.

ii. **Payroll mandates on employers:** The second host-country law challenge to employing an international telecommuter is "payroll mandate" laws. In the United States, state and federal laws require most all American employers, even individuals employing housekeepers and nannies, to comply with what we might call payroll mandates — laws requiring the employer to make federal and state income tax payroll reports and withholdings, social security contributions and withholdings, worker compensation payments, and unemployment insurance payments, as to employee pay. United States payroll mandates

are criminal laws; an employer that violates them can commit a federal felony subject to five years in federal prison.<sup>3</sup> Not surprisingly, legally compliant American employers take payroll mandates seriously. An entire business sector, payroll providers and payroll accountants, has emerged to help employers comply.

United States payroll mandate laws attach by the employee's "place of employment," rather than the employer's place of payroll. If, say, a Canadian or French or Indian employer employs a wandering worker or other international telecommuter who, for whatever reason, works from a home in, say, Milwaukee or Minneapolis or Miami, then American federal and state payroll mandate laws reach the Canadian, French or Indian employer. A Canadian, French or Indian employer breaks American federal and state laws if it payrolls a worker who is based in Milwaukee, Minneapolis or Miami on an "offshore" — Canada, France, India — payroll.

Now, flip the scenario and imagine a company in Milwaukee, Minneapolis or Miami employs a wandering worker (or any type of international telecommuter) in Canada, France or India. Like the United States, most all countries impose their own payroll mandates on employers. In this example, as soon as an international telecommuter winds up, for whatever reason, living and working in Canada, France or India, the American employer needs to comply with Canada's, France's or India's payroll mandates. Non-compliance might be a crime.

» **Exceptional countries:** This said, there are some exceptional countries — for example, China, Ecuador, Guatemala, Japan, Thailand and arguably the UK — that, helpfully, shut off their payroll mandate laws *for those foreign employers that do not trigger an in-country PE*. But these countries are the exception, not the rule; most countries, including of course the United States, do not except foreign employers (even employers of wandering workers) from their payroll mandate laws.

A common mistake here is the employer that requires a wandering worker to agree to pay host-country income taxes and social security charges, treating that as a license to ignore host-country payroll mandates. That approach is usually not compliant, because payroll mandates on employers are non-delegable duties. Even if a wandering worker actually were to pay all host-country income taxes and social security charges — something often unlikely to happen — that would not necessarily extinguish the employer's obligation to heed payroll mandates (although it could reduce the employer's liability later, if charged with failing to comply). Remember, this point works the same way in the United States: American employers cannot flout U.S. state and federal payroll mandates by paying workers in cash or on an "offshore payroll," even if staff agree to pay their own income taxes and social security charges.

» **Social security totalization agreements are a partial but not full "fix":** The United States is party to 30 bilateral "social security totalization agreements," treaty-like agreements that let U.S. employers pay into the U.S. social security system for American taxpayer staff working in one of the 30 countries.<sup>4</sup> Under these agreements, an employer making U.S. social security payments can get a so-called "certificate of coverage" that shuts off the obligation to pay into the host country's social security system, for that employee. But social security totalization agreement certificates of coverage are only a partial fix to the payroll mandate problem, because they do not shut off the employer obligation, under host-country law, to report and contribute on payroll to the host-country *income tax authority*.<sup>5</sup>

iii. **Local employment law:** The third host-country law challenge to employing an international telecommuter is complying with local employment laws. All countries impose employment protection laws — wage/hour laws, leave/time-off laws, workplace health/safety laws, discrimination/harassment laws, dismissal/severance laws and the like.

3 29 U.S.C. § 7202 ("Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, *be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution*") (emphasis added).

4 The 30 treaty-like "social security totalization agreements" to which the United States is a party appear at [https://www.ssa.gov/international/agreements\\_overview.html](https://www.ssa.gov/international/agreements_overview.html).

5 That is: Social security payroll obligations are separate from income tax payroll obligations; at most, social security totalization agreements address only social security, not employer income tax payroll reporting and contributions.

- » **Telecommuting-specific laws:** Indeed, an international telecommuter sometimes goes off to a host country that imposes an employment law that affirmatively regulates telecommuting. For example, Mexico's Federal Labor Law<sup>6</sup> requires that labor inspectors verify that telecommuters — employees who work from home — register with Mexico's "Register of Employers." Employers that fail to register home workers are subject to a fine. Costa Rica requires an employer register "home workers" in the "sealed and authorized book" at Costa Rica's "Office of Salaries of the Minister of Work and Social Security."<sup>7</sup>

The employer of an international wandering worker inevitably wants its own home country employment law regime to trump overseas employment laws; the employer hopes to attach its own jurisdiction's employment law to the wandering worker and use it to ward off the application of foreign law. But unfortunately it rarely works that way. Most countries' employment protection laws apply by force of public policy. Employees, even inpatriate international wandering workers who telecommute, cannot enforceably opt out. After a wandering worker relocates to a foreign country and starts working from there, a choice-of-home-country-employment-law clause tends to be unenforceable to block the mandatory application of host-country employment protection laws.<sup>8</sup>

This system frustrates U.S. employers, but they should appreciate that the United States imposes it, too — an inpatriate to America, even a telecommuting wandering worker, enjoys the protections of American wage/hour, health/safety and other American worker protections. The inpatriate cannot enforceably opt out. Similarly, when an American telecommuter relocates to (say) a European country that caps hours worked in a week and grants a generous paid-vacation benefit, European "labor protection" laws likely confer on the American telecommuter an unwaivable package of legal rights.<sup>9</sup>

### 3. *Three low hurdles under host-country law*

Permanent establishment, payroll mandates, and local employment laws are just the three most important legal challenges under host-country law that an international wandering worker (or other overseas telecommuter) might trigger. There are others. Chiefly, three other host-country law issues often surface in discussions of international telecommuters and global covid nomads. Fortunately, these three other issues tend to be less difficult, because in real-world enforcement scenarios they tend to pose less employer risk. The three less-significant challenges under host-country law are: Immigration status, employee personal taxes, and workplace health/safety and "duty of care."

- **Immigration status:** Some international wandering workers like global covid nomads are citizens of foreign countries returning to telecommute in their native lands. That scenario raises no host-country immigration or visa problem if the telecommuter is already a host-country citizen.<sup>10</sup> However, many international telecommuters are not citizens of their destination host countries, and may not get a right to work locally. International telecommuters who go off to work in nations where they are not citizens usually need a legal authorization to work, more than just a tourist visa. One scenario is the "trailing spouse" moving abroad to follow family who gets a host-country *residence* visa that fails to confer permission to *work*.

6 Art. 330, sec. I.

7 Costa Rica Labor Code 2016 (effective July 25, 2017), art. 110. "Home worker" as defined in art. 109 seems to address domestic servants but the terms of art. 109 seem to include home-working telecommuters.

8 There are some few exceptions to this general rule against the enforceability of an employee's choice-of-foreign-law clause — Communist countries (China, Vietnam); some legal doctrines in some Arab countries; and certain interpretations of law in Malaysia or Indonesia. But the exceptions are rare.

9 In Europe, a choice-of-law clause in an employment agreement "may not...have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article" (in essence, that means the choice-of-law clause cannot "shut off" host-country employment protection laws). Regulation no. 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 8(1).

10 Here we are addressing host-country visa/work permit/immigration issues. A separate issue we are not addressing is the international telecommuter who is not a citizen of the home-country place-of-employment (that is, the country where a given employee started working for the current employer) who leaves the home country to telecommute from abroad, and — while telecommuting from abroad — loses home-country visa/work-permit/immigration/"green card" status. That can be a big problem, but it is outside the scope of our discussion here on outbound international wandering workers: It is a domestic immigration law issue under local home-country immigration law.



An international wandering worker who does not have legal host-country work status is, by definition an "undocumented worker" (formerly called an "illegal alien"), and may be committing a crime.<sup>11</sup> The employer might be reluctant to tolerate this, although the practical risk of a cross-border immigration challenge against an overseas employer may be quite low. Self-directed international telecommuters like wandering workers and global covid nomads should warrant or represent to their employers that they enjoy right-to-work (right-to-telecommute-for-pay) status in the host country.

This said, international wandering workers who work abroad without legal immigration status are, themselves, the primary offenders. Even where the host country imposes an "I-9-equivalent" law<sup>12</sup> that purports to penalize employers for employing "undocumented workers," there may be little or no host-country case law precedent enforcing its local "I-9-equivalent" rule against *foreign* employers with no in-country assets, no in-country corporate presence, and that do not trigger a local PE. Possibly as a legal matter and almost certainly as a practical matter — but check local case law, to verify — a foreign employer that does not trigger a PE in a host country might face little if any real-world risk, in that country, of an immigration law challenge. This, of course, cannot be said for the "undocumented" or illegally working telecommuting employee, *personally*.

- **Employee personal taxes:** An employee who moves to a new country while continuing to earn income from an employer abroad probably triggers personal income tax filing and payment obligations in the host country. The host-country tax authority will probably consider the wandering worker's income from the (overseas) employer to be "sourced" locally — after all, the telecommuter earns this income by working locally, at an in-country address. For example, someone who telecommutes an entire tax year from a home in Cleveland for an Italian employer owes U.S. federal and Ohio state income tax; similarly, an Ohioan who moves to Rome and telecommutes an entire tax year for a Cleveland employer surely must file and pay Italian personal income tax.

But personal income tax obligations are a wandering worker's own responsibility — not the employer's. In the United States, for example, employers almost never police whether their workers file a 1040 on April 15, even though failure to file is a crime, and even though the worker earns income from the employer as reported via the employer's taxpayer identification number and W-2. Personal income tax is personal business. Violations are personal. Indeed, workers in trouble with government tax agencies often do not even want their employers to know, much less get involved.

By contrast, in the *expatriate assignment* context, for obvious reasons, employers often provide international tax equalization and international tax return preparation services. But those expatriate benefits do not apply to a *self-directed* international telecommuter (a wandering worker like a global covid nomad) who moves abroad for personal reasons. In short, host-country personal income tax obligations should be a huge concern for international wandering workers themselves, personally, but tend to be irrelevant to their employers.

This said, though, some employers may decide to alert their wandering workers to possible personal income tax liabilities overseas, reluctant to be implicated in employees' overseas personal income tax frauds. Also, an international wandering worker who *does* file and pay host-country personal income tax and social charges might reduce the employer's exposure to a payroll claim.<sup>13</sup> The telecommuter's host-country tax and social payments are unlikely to provide a defense to a charge that the employer failed to report and withhold on payroll, but as a damages-accounting measure, a host-country court might *set off* the wandering worker's local tax and social payments, subtracting them from the employer's liability for failure to withhold.

- **Workplace health/safety and "duty of care":** Law in all countries requires employers to protect workplace health and safety. And law everywhere can hold an employer liable for workers' on-the-job personal injuries. Also, an employer that

<sup>11</sup> Telecommuting for a *foreign* employer may not be a defense to no-valid-work-permit charge.

<sup>12</sup> By "I-9 equivalent" law, we mean a law that imposes responsibilities and penalties on the employer of a so-called "illegal alien" or "undocumented worker." As to U.S I-9 law, see <https://www.uscis.gov/i-9>.

<sup>13</sup> See sub-section above, "Payroll mandates on employers."

dispatches staff overseas on expatriate assignments and international business trips must heed the "duty of care" — courts hold employers liable for expatriates' and business travelers' overseas-sustained injuries.

But an employer's exposure to either occupational health/safety charges or personal injury/"duty of care" claims is probably remote in the context of a self-directed international telecommuter (wandering worker or global covid nomad) who sets off, for personal reasons, to work abroad. An injured wandering worker is not situated like either a worker injured at an employer work site or an expatriate or business traveler injured while overseas on an actual work assignment. Rather, injured wandering workers are more like workers hurt while on vacation. When workers get hurt on vacation — even if they had been keeping up with emails and doing some work remotely during vacation — the employer is unlikely to lose an occupational health/safety charge or personal injury/"duty of care" claim.<sup>14</sup>

Little if any real-world case law authority seems to hold employers responsible for either occupational health/safety violations or duty-of-care/personal injury claims in the context of self-directed international telecommuters (wandering workers like global covid nomads). A number of good reasons explain why this scenario seems to pose *little* employer risk:

- » the wandering worker, alone, chose to travel to the country where the injury occurred (being overseas, in the first place, was not a work assignment; indeed, it actually inconvenienced the employer)
- » the employer had neither access to nor control over the foreign premises where the wandering worker worked, so the employer could neither monitor nor remedy any unsafe workplace conditions
- » the injury likely happened while the wandering worker was not actively doing a work task (telecommuters injured abroad usually suffer the injury during down-time away from the computer)
- » home-country occupational health and safety law does not reach abroad extraterritorially and home-country worker compensation (workplace injury) systems tend not to cover employees based overseas
- » the wandering worker's employer is likely beyond the reach or jurisdiction of host-country occupational health/safety laws and host-country government workers' compensation/social benefits agencies
- » an international wandering worker who sues the employer for personal injuries — either in a host- or home-country civil court — will almost surely be unable to meet the burden to prove that employer negligence caused the injury (the wandering worker alone set off to the foreign country, putting himself in harm's way)

#### 4. *Risk of enforcement*

Having discussed the legal challenges, big and small, that self-directed international telecommuters (wandering workers like global covid nomads) can trigger under law of a foreign host country, a skeptical employer back in the home country will want to understand *risk*. Even if an international telecommuting arrangement does violate a foreign country's local law, overseas enforcers and overseas courts might not be able to reach an employer in another country (say, the United States) that has no assets or PE in the forum jurisdiction. An aggressive employer might wonder: *Even if our overseas telecommuting arrangements violate civil and criminal laws in foreign countries where we have no assets — so what? Can't we just sit back and take the approach: "Come and get us — if you can"?*<sup>15</sup>

International telecommuting certainly does throw up significant litigation hurdles for a local (host country) claimant prosecuting a claim against a foreign employer — whether the local claimant be an ex-employee telecommuter in the local country<sup>16</sup> or a host-country government tax, social security or employment agency. The challenges here are matters of civil procedure, not substantive employer legal defenses on the merits. But they are significant. A local host-country claimant that goes into a local host-country court to prosecute local-law employment or tax (PE) infractions chases an adversary with no

<sup>14</sup> This said, the analysis may differ as to scenarios in the COVID-19 context, as to employees violating travel restrictions.

<sup>15</sup> Obviously this discussion here addresses an employer's own possible strategy, not a legal practitioner recommendation.

<sup>16</sup> An actively working overseas telecommuter is unlikely to sue the employer in court, so here, in discussing enforcement, we assume the telecommuter has "offboarded" and is now an ex-employee.

local address, no local corporate presence, and no local assets to seize. That claimant must: (1) assert personal jurisdiction over a foreign defendant, (2) serve process internationally, (3) get a default judgment,<sup>17</sup> and then (4) enforce it against (collect it from) the overseas adversary.

Indeed, a host-country claimant (ex-employee or government agency) certainly would need a complex strategy, as well as time and money, to win and collect a claim against the foreign employer in this context — establish jurisdiction, serve process, win, and collect a judgment across borders. Maybe the judgment amount would just be too low to justify international enforcement action. Cross-border enforcement of judgments is inevitably slow, expensive and complex. Outcomes are uncertain. In many contexts, the hurdles here might dissuade a local host-country claimant in an international telecommuting dispute from asserting a claim in the first place.

But even so, there are several reasons why an employer of an overseas telecommuter might be reluctant to embrace the litigation defense strategy of *"come and get us — if you can"*:

- **Compliance imperative and criminal conduct:** The *"come and get us — if you can"* strategy is obviously unavailable to an organization that has promulgated a "full legal compliance" policy, that has issued a code of ethics or of corporate social responsibility with a full-compliance stance, or that has an internal "Compliance" department charged with full legal compliance. Indeed, the compliance imperative can be particularly urgent here, in the international wandering worker context, because (as mentioned) an employer that flouts a foreign country's payroll mandates can be guilty of a *crime*.
- **Other host-country interests:** The *"come and get us — if you can"* strategy opens a Pandora's box of new problems if, beyond the individual overseas telecommuter, the organization or its affiliates happen to have other entanglements, business interests, operations or staff in the host country.
- **Future ventures in the host country:** If, in the future, the organization or its affiliates will later decide to enter the host-country market, then an old unsatisfied (default) judgment will likely surface and urgently have to be satisfied — plus interest.
- **Home-country litigation:** The *"come and get us — if you can"* strategy all but invites a savvy and aggressive claimant to come to the defendant's home country and sue the employer on its home turf (as long as home-country choice-of-law principles allow a claim invoking substantive host-country law).

## Part C: Five compliant structures for long-term or indefinite-term international telecommuting

We have now flushed out the legal challenges — three big and three not-so-big — that can arise under the laws of a foreign host country when a self-directed international telecommuter (a wandering worker like a global covid nomad) starts working there. Now the question becomes: *How does an employer structure an international telecommuting arrangement so it complies with applicable law, or at least is not too risky?*

When structuring any wandering worker's overseas work arrangement, begin by quantifying how much time the worker will work in a given single foreign country. Either the international telecommuting sojourn will end up being long-term, or else it will end up being short-term. But which it will end up being is not always clear, at the outset.

<sup>17</sup> Any party embracing the *"come get us — if you can"* strategy in overseas litigation overtly invites the adversary to win a default judgment in a foreign court or agency.

Not surprisingly, structuring *long-term* international telecommuting is tough, while structuring *short-term* international telecommuting is simple — if it really will be short. But whether a particular wandering worker's time overseas will prove to be long-term or short-term is often unknown on the day the worker embarks. So to structure an overseas telecommuting arrangement, account for three issues:

- **True short-term international telecommuting:** True short-term international telecommuting is easy to structure, because legally it is the same as just an extended overseas working vacation trip (albeit one with more work and less vacation). Where self-directed international telecommuting is certain to last, at most, only a short period of a few weeks or a couple of months, then the employer can simply treat the arrangement as an extended overseas work trip: Authorize the short-term overseas travel, and move on.
- **Indeterminate-period international telecommuting:** The problem is that ostensibly-short-term international telecommuting often gets extended. Frequently, an international telecommuter who had promised, up front, to go work abroad for just a short period ends up postponing the return home, pushing what the boss had understood would be a short-term overseas sojourn into a long-term stay working in a foreign country. Or a problem comes up beyond the worker's control — illness, travel ban, non-renewal of a home-country visa.

A related scenario is the telecommuter uncertain from the beginning of how long the overseas telecommuting will run. This includes, for example, the wandering worker who goes abroad to care for a sick parent when even the parent's own doctor cannot predict the date the patient will recover. The worker sets off with everyone speaking optimistically of a speedy recovery and return home. Then the overseas telecommuting drags on and on. And on — no calendar return date in sight.

Where the period of overseas telecommuting is unclear up-front, the employer has only two good options: Make it definitely short-term by requiring a quick "drop-dead" short-term return, or structure it as long-term.

- **Country-hopping international telecommuting:** In deciding whether international telecommuting is short- or long-term, look to the period to be worked in a *single foreign country*. Country-hopping telecommuters present little legal challenge when they touch down only briefly in each jurisdiction. For example, imagine a newspaper employs a travel writer to spend a year on an around-the-world trip reporting on 52 countries visited — one week in each country. Even though the international telecommuting here lasts an entire year, the employer can structure this as a simple business trip, because from the point of view of each host country, the reporter passes through for just a week- — quickly enough that no one country becomes a "place of employment."

International wandering workers, then, pose real legal challenges when they will work for a *long* period in a single host country. But genuine *short-term* overseas telecommuting poses few problems. What, then, constitutes long-term overseas telecommuting?



For our purposes here, we might think of long-term overseas telecommuting as situations where workers will — or may possibly — work in a single foreign country for more than a few weeks or months.<sup>18</sup> That is, long-term international telecommuting arrangements are those where the international telecommuting will — or may possibly — be too long for the employer plausibly to characterize as a mere extended overseas working vacation.

Here in Part C we discuss how to structure international telecommuting and global covid nomad arrangements that will (or may possibly) run long-term. Then, in Part D, we will discuss strategies for keeping short-term international telecommuting arrangements short. And as part of *that* discussion, we address how long working abroad is too long to be short-term.

There are five possible ways legally to structure a long-term international telecommuter or global covid nomad arrangement: (1) local corporate registration, (2) legal offshore payrolling, (3) "leased employee," (4) friendly local-business payroll, and (5) legitimate independent contractor.

- **The non-compliance option:** In addition to these five legally compliant structures, a sixth option is just to payroll an international wandering worker on the home-country "offshore payroll," even where that violates host-country payroll mandates. By definition, though, this approach violates host-country law. It may be a crime. Certainly, lawyers will not recommend it. But some employers may get away with it.

There are pros and cons to each of the five complaint structures. None is a "magic bullet." Which of the five works best can become a process of elimination — selecting the *least impractical* choice in a given situation. In selecting, focus on complying with the PE and payroll mandate issues already discussed.<sup>19</sup> Ask: *How can we, the employer, avoid triggering a PE and deliver pay and benefits to the overseas telecommuter without violating host-country law?*

1. **Local corporate registration:** The first way to structure an international telecommuter (wandering worker or otherwise) would be for the employer to register a new corporate entity — branch or subsidiary — in the host country, thereby generating a local taxpayer identification number. Then, engage a payroll provider company or accountant and migrate the international telecommuter onto this brand-new host-country payroll. This "local corporate registration" approach is the default way to structure international telecommuting. Local host-country lawyers usually advise this approach as the only legally compliant structure.

Not surprisingly, though, the "local corporate registration" structure is usually the first option that employers of self-directed international telecommuters (wandering workers like global covid nomads) *reject*. Few companies ever agree to register, maintain, and file annual corporate tax returns for a stand-alone overseas branch or subsidiary that has the sole purpose of employing some wandering staffer who pulled the organization into this foreign country for personal convenience rather than employer business imperatives. The cost and trouble of this structure rarely justify the pay-off.

This said, we are addressing wandering workers who go off to countries where the employer has no business interests and who (at least arguably) might not trigger a host-country PE.<sup>20</sup> The utility of this "local corporate registration" option rises when other employer tentacles reach into the host country (or when the wandering worker happens to be a key employee who will, for whatever reason, inarguably trigger a host-country PE).<sup>21</sup>

18 "More than a few weeks or months" is purposefully vague, because here in Part C we address international telecommuting arrangements that are *inarguably long-term*. Next, in Part D(1), *infra*, we dig down into the time-frame issue (how long is long-term and how short is short-term?). In Part D(1) *infra* we discuss why the line between long-term and short-term overseas telecommuting is blurry — and how that plays into employers' structure and strategy choices.

19 See *supra* Part B(2).

20 *Supra* Part B(2).

21 *Supra* Part B(2).

Where an employer must acknowledge it triggers a host-country PE, local corporate registration becomes attractive. The company registers and gets a host-country taxpayer identification number. *Mirabile dictu!* — it just solved its telecommuter structure problem (now, it can just migrate the wandering worker onto its newly registered in-country entity payroll).

2. **Legal offshore payrolling:** A second way to structure an international telecommuter is to develop a viable legal position — if one exists — to insulate home-country "offshore payrolling" that simply disregards host-country payroll mandates.<sup>22</sup> This option is obviously attractive for an employer of an international telecommuter, but unfortunately it tends to be flatly illegal (we already discussed that host-country payroll mandates on employers attach by the employee's place of employment, not employer place of payroll).<sup>23</sup> Certainly, in the United States, for example, "offshore payrolling" is a federal crime — a felony.<sup>24</sup>

But we noted that there are some exceptional countries including China, Ecuador, Guatemala, Japan, Thailand and possibly the UK that, through one legal doctrine or another, confine their payroll mandates to their local employers.<sup>25</sup> In addition, other countries including Estonia and France have built government channels for compliant foreign employers that do not trigger a local PE to payroll in-country staff on a foreign (home-country) payroll, as long as the employer registers, reports and duly makes withholdings to the host-country government.

The point is that while offshore (employer home-country) payrolling that ignores host-country payroll mandates is usually illegal and is often a crime, there are some exceptional countries where this arrangement is actually legal. When an international wandering worker happens to land in one of these countries, home-country-payrolling may be an easy and compliant way to payroll.

3. **"Leased employee":** A third way to structure international telecommuters is to set up them up as "leased employees" nominally employed by — and payrolled by — a host-country nominal employer business that issues a legal payroll and assigns or "seconds" the telecommuter right back to the "beneficial employer," the actual home-country employer. This structure is legally compliant because the "nominal employer" offers a host-country registered payrolling platform: It cuts a legal local paycheck and (presumably) ensures compliance with local employment laws.

International "professional employer organizations" (PEOs) and "employer-of-record" (EOR) companies like Globalization Partners and TriNet exist to fill this role; they serve as in-country "nominal employers" for overseas "beneficial employer" customers that lack an in-country payrolling employer presence. Also, local overseas offices of "temp agencies" like Kelley, Adecco and Manpower might provide this service.

This "leased employee" structure should be fully legally compliant; the very reason the employer involves the "nominal employer" is to ensure payroll and employment law compliance. The downside may be cost: a PEO, EOR or "temp agency" might bill 20% or so over wages plus payroll charges.

4. **Friendly local-business payroll:** A fourth way to structure international telecommuters or global covid nomads is to tap a friendly local business partner's payroll. Sometimes, an employer of an international telecommuter happens to have a friendly relationship with some unaffiliated employer company in the host country (say, a supplier or customer). Maybe the employer can convince its friendly host-country business partner to employ and "second," or else to "shadow payroll," the international telecommuter. The host-country "nominal employer," behind the scenes, payrolls the employee; the home-country employer reimburses its in-country partner, reimbursing whatever wages plus payroll taxes, withholdings and social security contributions made.

22 *Supra* Part B(2), "Payroll mandates on employers" bullet.

23 *Supra* Part B(2).

24 *Supra* note 3.

25 *Supra* Part B(2), "Payroll mandates on employers" bullet; "Exceptional countries" sub-bullet.

The downside here, in the international wandering worker context, is *availability*: The regular home-country employer rarely happens to have a business relationship with some host-country company willing to fill this role. (This "friendly local-business payroll" structure is rare in the wandering worker context but is more common in the "expatriate telecommuter" context.<sup>26</sup>)

5. **Legitimate independent contractor:** A fifth way to structure an international telecommuter is to have the employee resign, and then reengage the person as a legitimately classified non-employee independent contractor or "consultant." This structure completely sidesteps host-country payroll laws — legitimately classified independent contractors and consultants are not payroll employees, so they do not trigger payroll mandates at all, in any country.<sup>27</sup>

The downside here, in our context of self-directed international telecommuters and wandering workers, is *plausibility and legal compliance*. Obviously the challenge is supporting the legitimacy of independent contractor status when the services provider has recently been a payroll employee and continues to perform more or less the same job in the same way, only now in a new country as an ostensible "independent contractor" or "consultant." Host-country law will be skeptical. Unless there are special facts or circumstances, if a classification claim were ever to surface in the local host-country, expect local law to reject non-employee contractor classification in the wandering worker scenario. So the independent contractor structure may not be viable.



## Part D: Strategies for keeping short-term international telecommuting short

We have worked through five ways to structure compliant international telecommuting arrangements that will run *long-term* — or that start off as indefinite term but might grow to long-term. In discussing the legal and strategic challenges in play in these arrangements, we mentioned that, conversely, structuring a genuinely *short-term* international telecommuting arrangement is straightforward, fast and cheap. A worker going overseas to telecommute for just a short time is as easy to structure as an international business traveler or an employee on an overseas working vacation: There may be nothing practical to worry about (although a short-term visa might be necessary). The employer just allows the trip.

So an employer confronted with a self-directed international telecommuter (a wandering worker like a global covid nomad) might decide to allow the telecommuting overseas — but only for a short term. Even an employer reluctant or unwilling to structure *long-term* international telecommuting almost always will let a wandering worker go off overseas, if business needs allow, as long as the period abroad stays short enough that it neither triggers host-country legal challenges nor requires a special structure, accommodation or cost.

<sup>26</sup> See *supra* Part A, bullet # 2, "Expatriate telecommuter."

<sup>27</sup> *Supra* Part B(2), "Payroll mandates on employers" bullet.

So the question becomes: *How much time working abroad can still be short-term?*

Asking this question this way, though, is perhaps deceptive, because worded this way, the question implies a concrete answer — some cut-off or fixed number of days, weeks or months during which an employee can safely work abroad without triggering legal challenges in a host country. The actual analysis here, though, is more complex. We discussed that the three tough legal problems in structuring an international telecommuting arrangement are: (1) PE, (2) payroll mandates and (3) employment law protections.<sup>28</sup> Contrary to a widespread misunderstanding otherwise, the triggers for these three particular legal issues tend *not* to be safe-harbors, fixed numbers of days, or set time periods spelled out in statutes. Certainly, the triggers for these three legal issues tend *not* to work like the famous 183-day rule for personal income tax residency.<sup>29</sup> (As discussed,<sup>30</sup> an international telecommuter's personal income tax situation is mostly irrelevant to our concerns here, which makes the 183-day tax rule mostly irrelevant, too.)

If an employer demands to know some precise number of days for how long an international telecommuter can work overseas without triggering host-country legal rules, there *is* a specific answer we might offer up. But unfortunately, that specific answer is unhelpful, because it is *just one day*. Almost universally, workers (be they on-site staff or telecommuters) who transfer into a new country and start working there going forward — so-called "inpatriates" — enjoy protections of the host-country's fundamental labor rights (its local paid time off laws, wage/hour laws, health/safety laws, harassment/discrimination laws and the like) starting on their *first day worked* in-country, just as if they were local new hires. Also, host-country law usually requires an employer to payroll inpatriates, like new hires, complying with local payroll mandates starting on the *first day worked* in the jurisdiction.

For example, imagine a French auto plant hires a new assembly-line worker who will start work on a Monday, July 13. Everyone understands that, for this new employee, French payroll mandates and French employment-protection laws (say, France's mandatory paid holidays) kick in immediately, on Monday, the day before the Bastille Day holiday, July 14. But even so, everyone intuitively assumes that a foreign-based worker can pass through France — say, on a short international business trip or a working vacation — even without necessarily triggering French payroll mandates or employment-protection laws (like mandatory paid holidays). Imagine, then, that an engineer from this French auto plant's Detroit headquarters had arrived at the France plant last week on a business trip, and will keep on working there for another week or so. Here we have a Detroit-based employee who has been working at the France work site since even before the new hire will start next Monday. And yet we intuitively know that, somehow, French-law payroll mandates and employment laws (like Bastille Day as a paid day off) will immediately reach the new hire who starts on Monday, even though these laws do not likely reach the business traveler who has been working at the France site even longer than the new hire, and who continues working there now.

*How can this be?*

Obviously the difference is not a matter of time worked in-country, not some fixed number of days worked in-country. Rather than being a fixed number of days, the trigger here is a legal concept, one we might refer to as *place of employment*. In one way or another, and under one label or another, employment law regimes the world over presume that everyone with a job has some deemed place of employment or home job location.<sup>31</sup> This is effectively a conferred legal status like residence and domicile, but it applies to workers' jobs, rather than their homes.

28 These are three issues we discuss *supra* at Part B(2).

29 Residing 183 days or more in a country can trigger personal income tax residence under personal income tax law of many jurisdictions. Of course, here we are not addressing personal income tax residence.

30 *Supra* Part B(3), "Employee personal taxes" bullet.

31 The concept we call here "place of employment" can go by other names and has some different versions or iterations, like, for example: "place of work" and "habitual place of work" in Europe and place of "connection" to the job, in England. Europe's [EU directive 91/533/EC](#) (1991) at art. 2(2)(b) addresses "place of work." Europe's Rome I Regulation on conflict of laws looks to which jurisdiction is "habitually" a given employee's place of "work." EU Reg. 593/2008/EC (6/17/08) at arts. 8, 21. English case law can consider which jurisdiction has the strongest "connection" to an employment relationship. *E.g., Lodge v. Dignity & Choice in Dying*, UK EAT/0252/14(2014). For our purposes here, we treat these similar concepts as "place of employment."



Someone's place of employment is usually the same jurisdiction as that person's residence or domicile, but not always — for example, think of someone living near a state or international border who crosses over, every day, to work a job on the other side. Or think of a moonlighter who lives near a state or international border and holds two jobs for two different employers, one in each jurisdiction; this person actually has two different places of employment, one for each job.<sup>32</sup>

Determining the place of employment for most workers is usually easy, uncontroversial, even inarguable. A Jacksonville restaurant chef's place of employment is Jacksonville; a Buenos Aires accountant's place of employment is Buenos Aires; a Munich factory worker's place of employment is Munich. Usually, documents in an employee's "onboarding" package — offer letter, employment agreement, payroll tax forms and the like — expressly or implicitly mention the place of employment. Indeed, law in Europe *requires* that every employer give every worker "written documents"<sup>33</sup> that set out the "place of work."<sup>34</sup>

Sometimes, though, a given worker's place of employment may be unclear, such as for so-called "peripatetic" or nomadic employees like airline crews, traveling salesmen and international tour guides. In those situations, determining place of employment can require sorting through the facts, sometimes a matter of dispute. And place of employment can change, even when both employer and employee remain the same — for example, when an employer transfers a valued employee to a different work site, going forward. Also, place of employment can change temporarily but later revert back to the original place of employment — for example, an employer transfers a valued employee to work at a different work location for a year, but later returns that employee back to the original site.

The point, for our discussion here, is that the legal concept of "place of employment" answers our question of how long a wandering worker might work abroad while still keeping the arrangement short-term without triggering host-country payroll or employment law mandates. In a word, the answer is: *There is no fixed time period; rather, the employer must structure a short-term overseas work arrangement so the host country never becomes the wandering worker's (even temporary) place of employment.*

This answer in hand, the question becomes: *How can an employer structure an international wandering worker's short-term overseas work arrangement so that the host country never becomes the worker's (even temporary) place of employment?*

There is no easy or black-and-white answer to that question. We have seen that place of employment can be a slippery concept — it can differ from a person's residence. Someone's place of employment for a given employer can change over time. And there are situations where determining someone's place of employment requires sorting through the facts, and can be a matter of dispute.

Therefore, an employer trying to structure a wandering worker's short-term overseas work arrangement in a way that minimizes legal exposure needs to be strategic. Develop a proactive strategy that accounts for both the *structural* issue here — supporting the legal position that the home country remains the sole place of employment while working overseas — and the *practical* issue — keep the overseas telecommuting genuinely short and get the worker actually to repatriate, as soon as possible. To develop that strategy, account for seven issues:

1. **Assert the upper hand:** Almost every worker's onboarding documents (offer letter, employment agreement, payroll/tax enrollments and the like) expressly or implicitly set out some specified place of employment as a fundamental term in the employment relationship. Because almost every employed person has a current place of employment, employers hold most

<sup>32</sup> As an example that makes the point clearly: Imagine a dual citizen of the U.S. and England works in Milwaukee for a Wisconsin employer, which sends her on a two-week business trip to London. Imagine that, on just one weekend during this trip, she lands a moonlighting job tending bar for a London pub. During that two-week London trip, this employee retains a Milwaukee place of employment for the Wisconsin employer and simultaneously has a London place of employment with the pub. U.S. law and payroll apply to the Milwaukee job, while English law and payroll apply to the London job — even though she works more days in London for the Wisconsin employer than for the pub.

<sup>33</sup> EU directive 91/533/EC (1991), at art. 3(1)(c).

<sup>34</sup> *Id.* at art. 2(2)(b).



of the power in negotiating international telecommuting arrangements. Few workers enjoy any express contractual right unilaterally to change their place of employment at will without employer consent.

When a would-be wandering worker comes to an employer, hat in hand, and — for personal reasons unrelated to the job — requests to telecommute from overseas, the employer can always say “no.” After all, the worker’s place of employment is what it is. The worker cannot force the employer to change it. A worker denied permission to telecommute abroad for personal reasons might not be able to do anything other than quit.<sup>35</sup>

Stated this way, this might sound obvious. But in many real-world situations it is not. Local telecommuters, especially, may think that because they enjoy a right to *live* wherever they want (a right they certainly do have, subject to immigration laws), they therefore must have a right to *telecommute* from wherever they want. But that is wrong. Telecommuters can live where they want but cannot necessarily telecommute from where they want, unless some special exception applies.<sup>36</sup> For example, an employer in, say, Providence that hires a telecommuter to work a local job from home in Rhode Island is probably<sup>37</sup> under no legal obligation whatsoever to let that telecommuter get away and start telecommuting from, say, Connecticut or Canada or China.

The practical point is that employers negotiating with would-be international wandering workers can enter the negotiation confident they hold most of the cards. The employer can assert the upper hand. The real-world problem is the wandering worker who quietly secured permission to work abroad from an immediate supervisor unfamiliar with the legal ramifications who reflexively agreed, without negotiating a compliant arrangement.

2. **Have wandering workers affirm their home country sole place of employment, and other terms:** When granting a would-be wandering worker permission to work abroad for a short term, have the worker enter a letter agreement or email agreement that sets out the terms of the overseas work arrangement. The first term to spell out should be acknowledging that the home jurisdiction is, and will remain, the telecommuter’s sole place of employment. Get the telecommuter to agree not to let the host country become a new place of employment. The telecommuter might even covenant not to contest or challenge, in the future, that the home jurisdiction is the only place of employment.

35 There are exceptions to every rule. An exception here would be if some U.S. employee could establish that a request to move to another jurisdiction amounts to mandatory “reasonable accommodation” under the U.S. Family and Medical Leave Act, Americans with Disabilities Act or other law — or if denial of the request to move amounts to actionable employment discrimination (maybe the employer had granted similar requests for others who had asked previously). Those exceptions, in the international telecommuter/global covid nomad context, are probably rare.

36 *Supra* note 35.

37 *Supra* note 35.

Then, this letter agreement or email agreement should spell out the other terms of the short-term overseas telecommuting arrangement. The telecommuter should agree, for example, to work abroad legally, with whatever necessary host-country work authorization, paying whatever necessary host-country personal income taxes.

3. **Avoid fixing any specific host country:** In granting a would-be wandering worker permission to telecommute overseas for a while (and in writing up a letter agreement or email agreement memorializing the arrangement), try to structure the overseas work so it merely lets the worker work remotely, overseas. Let the telecommuter work anywhere abroad, or at least anywhere in a given time zone or region. Avoid assigning a wandering worker to go work in a specific named country, even if everyone involved knows where the worker intends to go.

The reason for this is to shore up the employer's position that the telecommuter's host country does not become a new place of employment. If the employer itself had specified or memorialized a specific host-country destination for the telecommuter (say, "work in India," "work in China," "work in Paraguay"), someone could later argue the employer *assigned* the worker to go work in that particular country, as a new place of employment.

4. **Keep the time worked in a new host country as short as possible:** While there is no hard-and-fast operative time threshold in play here, it is easy to structure a one-month overseas telecommuting arrangement as short-term without the worker's place of employment migrating to the host country — but it is probably impossible to prevent a foreign host country from becoming the new place of employment of a wandering worker who works there a whole year. So restrict the time the international telecommuter may work in a single country, to as short a term as possible — ideally, not more than a few months.

Because the legal analysis here (place of employment) looks to time spent working in a single country, one strategy is to require the wandering worker to change countries during the overseas sojourn.<sup>38</sup> However, for obvious practical reasons, few wandering workers can commit to this.

5. **Set a fixed calendar end-date for the overseas telecommuting — and characterize a late return as resignation:** Workers who, for personal reasons, ask to telecommute overseas for short periods often get vague when asked exactly how long they will work abroad. Too often, employers let wandering workers slip away without ever nailing down exactly when they will repatriate and resume work at the regular work site, or resume telecommuting in the home jurisdiction. And so an international telecommuting arrangement set up as short-term risks spilling over to long-term.

Once abroad, presumably-short-term wandering workers are prone to exploit open-endedness in the arrangement, either by not coming back at all or else by requesting extension after extension. Circumstances change. Problems arise. Often a worker argues, in essence: *"Why can't I stay here a bit longer? My family needs me here. And besides, this arrangement has been OK with everyone for a while now. My supervisor is fine with it — only the legal and HR teams are raising issues. And if I come back, I'll still be telecommuting from home, anyway. Please, can't I just stay here?"*

In granting a wandering worker permission to work overseas for a short term, always pin down a fixed calendar end-date. Avoid authorizing overseas telecommuting even for a specific time denominated in weeks or months; rather, get the telecommuter to commit to repatriate and resume work in the home jurisdiction on (or before) a set calendar date, likely a Monday ("Monday April 11," "Monday September 3" — whatever Monday the employer and worker agree to).

When memorializing a fixed calendar repatriation date, insist that the telecommuter agree, in writing or an email, that failure to repatriate and resume work (even if telecommuting) in the home jurisdiction by or before the agreed date constitutes *resignation by job abandonment*. The worker should acknowledge that this applies regardless of how good the excuse may be for failing to repatriate on time (even if, for example, the failure is allegedly because of a travel ban, flight cancellation, losing a visa, temporary sickness, being incarcerated — whatever).<sup>39</sup>

<sup>38</sup> As discussed, the legal issue here is time worked in a single foreign country, not total time worked outside the home country. See *supra* Part C, "Country-hopping international telecommuting" bullet.

<sup>39</sup> In actually enforcing this, though, the employer should of course consider whether some exceptional circumstance applies. See *supra* note 35.

By structuring short-term international telecommuting this way, if the wandering worker misses the return date, the employer might treat the failure to repatriate on time as a resignation (at least after a few days) — the “offboarding” does not even have to be a cumbersome dismissal. Case law in most jurisdictions tends to support employers in job-abandonment disputes; applicable law often lets employers characterize a worker’s failure to show up to the designated workplace when scheduled as quitting by abandoning the job, at least after a few days of absence.<sup>40</sup>

Even if it never comes to “offboarding” a wandering worker for failing to repatriate on time, this fixed-end-date arrangement compels the employee to respect the agreed overseas-telecommuting timetable. The wandering worker now bears a heavy burden either to repatriate on time or at least be proactive about getting an employer-agreed written extension.

6. **Have the wandering worker commit to draw down an agreed minimum number of vacation days:** We are addressing here wandering workers who ask their employer, for personal reasons, to let them go work overseas. An employer granting this request is doing the employee a big favor; the overseas sojourn is likely to disrupt workflows, if only because of travel time and time-zone differences. Surely the wandering worker will experience personal down-time during the trip. So it is only fair that the worker use up some vacation or “paid time off.” The employer might condition permission to telecommute abroad for a short period on the worker agreeing to draw down at least a pre-agreed minimum number of vacation days during the trip.

Besides just getting the worker to use up accrued vacation (where the employer does not offer an unlimited PTO benefit), an important reason for doing this is to reduce the period worked in the host country, cutting down the work-time abroad and supporting the short-term nature of the international telecommuting arrangement. For example, a wandering worker who goes to telecommute from, say, Brazil for ten weeks — but who commits to draw down three weeks of vacation during that trip — should be treated as someone working in Brazil for just *seven* (not the full ten) weeks. Vacation time should subtract from the host-country work period.



<sup>40</sup> A common scenario in case law is the employee thrown in jail: Under employment law, being locked up in jail and therefore unavailable to work often constitutes job abandonment (at least after a few days’ absence); the employer tends not even to have to dismiss the absent worker. This does not change if the employee is later found not to be guilty of the criminal charge, meaning that the reason for the absence may be irrelevant. This said, *see supra* note 35.

7. **Address stealth international telecommuters proactively:** We discussed the above six issues in the context of an employer negotiating, up front, with a would-be international wandering worker seeking permission to go off and work for a short term abroad. Unfortunately, all too frequently employers encounter the much stickier situation of the *stealth international telecommuter* — a telecommuter the employer had assumed was still here working locally from a home in the employer's own jurisdiction, but who (it has now been discovered) had slipped off some time ago to work abroad. Maybe the worker has telecommuted from overseas for months, maybe a year, maybe more.

Obviously, a stealth international telecommuter presents a lot of legal risk, raising all the cross-border telecommuting law hurdles we discussed<sup>41</sup> without giving the employer any chance to clear them. Correcting a stealth international telecommuter situation can be complex and expensive. Each situation depends on its specific circumstances. In working toward a resolution, consider all the issues we discussed.

To minimize the chances of encountering stealth international telecommuters *going forward*, consider having the company human resources department build a proactive infrastructure (policy, rule, initiative) to monitor where telecommuters actually work, and to ban stealth international telecommuting entirely. In the post-COVID-19 era of widespread telecommuting, these initiatives are more vital than ever.

An employer can be aggressive here: As we discussed, employers not only have a right, but also have some legal *duties* to track their employees' places of employment. We mentioned that while telecommuters may be legally free to *move* wherever they want (subject to immigration rules), they are not necessarily free to move to a new jurisdiction and *work there* without employer permission. So consider launching a structured process that requires telecommuters to get employer permission before moving out of the jurisdiction while telecommuting.

## Conclusion

Technology has opened up all sorts of jobs to telecommuting. Working from home has become viable, even preferable, for lots of job categories across all industries — jobs that in the old days had to be worked at an employer office or job site. This trend had been accelerating on its own for years, but when the COVID-19 pandemic hit the United States in late March 2020, it exploded. Overnight, telecommuting went from the exception to the rule.

Telecommuting offers advantages (no one likes *real* commuting). But it also poses a number of challenges. Perhaps the most complex is the international "wandering worker" who slips off to telecommute from overseas, dragging the hapless employer along, into a new country entirely. In the COVID-19 pandemic, this phenomenon became widespread, spawning the so-called "global covid nomad" problem.

Wandering workers who move abroad for personal reasons pose tough challenges to their employers, mostly under the local law of the host country where they end up working. *Long-term* international telecommuting can be particularly complex and expensive; employers have five available legal structures to sort through, with the best one usually emerging in a process of elimination. Fortunately, *short-term* international telecommuting is easy to structure. But the challenge there is keeping it short, getting an international wandering worker to return home soon.

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41 *Supra* Part B.

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