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LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

Cologne, 21. August 2023

Working where others holiday

Risks and side effects of "workations"

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Working abroad in vacation spots (workations), often combined with a holiday continues to grow in popularity. In order to remain competitive in the war for talent and retain existing employees, employers are more frequently implementing the concept of workations. However, this results in a number of legal challenges, particularly in terms of employment law, social insurance law, residence law and fiscal law.

Applicable employment law

When employees work from abroad, the first thing that needs to be established is what law applies. In the absence of a choice of law, the country where the work is habitually carried out is decisive (Art. 8 (2) Rome I Regulation). If the employee only temporarily carries out their work from abroad, in most cases this does not lead to a change to the country where the work is habitually carried out. Accordingly, in most scenarios German law applies despite the workation. It is therefore recommended that the applicability of German employment law is expressly agreed in a supplementary agreement to the employment contract. It should be considered, however, that even where the choice of law is contractually agreed in favour of German law, there are always mandatory legal provisions in the destination country, such as occupational health & safety laws, that apply. Furthermore, with regard to workations taken in other member states of the EU, the extent to which the minimum working conditions resulting from the national implementation of the EU Posting of Workers Directive are accounted for needs to be verified.

Social insurance law

In the EU, employees are, as a general rule, subject to social insurance contributions in the country in which they carry out their work (country of employment principle). There is, however, an exception for posted workers. If an employee carries out work for their German employer in another member state of the EU, they remain covered by the German social insurance system, provided this work is limited to a maximum of 24 months and they are not sent to replace another person (Art. 12 Regulation (EC) 883/2004). Based on prevailing legal opinion, the reason for going abroad and whether this was initiated by the employer or the employee is likely to be irrelevant.

On the other hand, if the employee is working outside of the EU, it should be verified whether Germany has concluded a Social Insurance Agreement with the respective country. In the absence of such an agreement, the expansion of

German law in accordance with section 4 of the German Social Code, Volume IV (SGB IV) applies, where the employee in the event of posting continues to be subject to social insurance contributions in Germany, provided the posting is for a limited duration. In this case, there is the risk of double taxation, however, provided the country of employment principle applies in the foreign country.

When posting employees to other member states of the EU, an A1 certificate should be applied for as soon as possible to prove the continuation of German social insurance during the time the employee is working abroad. If a Social Insurance Agreement is in place, a similar certificate is available to prove the continuation of social insurance in Germany.

Residence law and reporting obligations

If an EU citizen or an EEA national wishes to temporarily work in another member state of the EU, they do not require an entry visa or a residence permit due to the principle of freedom of movement within the EU; despite this there are reporting and registration obligations applicable in almost all member states of the EU. Here, depending on the target country, it should be verified on an individual basis whether working abroad requires registration and which reporting obligations need to be adhered to, as the precise extent of the reporting regulations may vary depending on the country.

If an employee plans a workation outside of the EU, it first needs to be verified whether the EU has concluded an agreement with the respective third country. If such an agreement has been concluded, a work permit is usually not required. However, the employer should also meet certain reporting obligations.

In the event that the employee wants to work from a third country that does not have an agreement with the EU, or is a national of a third country, the respective residence and employment law requirements must be individually checked in relation to the respective country. As a general rule, employees will require an entry visa or a residence permit that permits employment.

Fiscal law

Risk of establishing premises abroad

Employers who allow their employees to work from abroad may run the risk of establishing premises abroad. This would mean that the company would be required to pay tax on its income both in Germany and in the foreign country. The period after which the establishment of premises is required depends on the respective foreign fiscal law, whereby the duration of foreign operations typically play a significant role. Consulting a fiscal law expert in the target country is essential.

Income tax law risks for employees

Employees are also at risk of double taxation. While, as a general rule, income is taxed in the country where the employee has their permanent or usual place of residence (domicile principle), when exercising employment abroad regularly, the right of taxation of the country in which the work is carried out is triggered (location where the work is performed principle). The associated risk of double taxation is counteracted by the 183 day rule contained in most Double Taxation Agreements. The right of taxation then remains with the country of domicile if the employee works abroad for less than 183 days in a 12 month period.

Practical guidance

If employers wish to allow their employees to take workations, certain principles for the approval of workations should be developed in advance in order to reduce the associated legal risks and the administrative burden as much as possible. Restricting the duration of the workation, for example, should be considered as well as restricting workations to EU and EEA countries, or countries where the legal requirements have already been verified.

In addition, the conditions and details of the planned workation should be regulated in a supplementary agreement to the employment contract with the respective employee. This agreement should regulate, for example, the applicability of German law, any assumption of costs, the conclusion of foreign health insurance and the right to end working abroad, in order to avoid disputes.

Considering the many legal risks, the practice of workations being tolerated that has arisen in many companies in the meantime is urgently advised against, especially in fields where remote working is widespread and the actual country in which employees are working is unknown by employers. For this reason employees are in part arbitrarily making decisions to work from abroad or employers indirectly permitting working from abroad, without officially approving it, however. In addition to the legal risks already stated, this practice may involve fines for infringing reporting obligations and negative consequences for accident insurance protection of the employee, as some employer liability insurance associations require notification of foreign travel.

The fact remains that even though workations can be an effective tool for employee recruitment and retention, employers would be well advised, however, to investigate/regulate the many legal aspects of workations in good time.

Note
This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Pia Pracht by email to ppracht@goerg.de or by phone +49 221 33660 524. For further information about the author visit our website www.goerg.com.

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