Employing workers overseas: Key employment related considerations

This briefing note has been commissioned by NHS Employers in response to questions raised to them from NHS workforce leaders about the legalities and practicalities of overseas remote working arrangements.

The increasing desire from employees to have greater flexibility on when and where they work means that a number of UK employers are now considering whether they should extend and support more agile and flexible work arrangements to include remote working outside the UK. NHS organisations are also having to contend with staffing shortages and are looking further afield for talent, including the recruitment of teams based overseas. Before agreeing any international remote working arrangements, consideration needs to be given to many issues including complex matters such as data protection, immigration and tax.

This briefing note is designed to raise awareness of the considerations NHS organisations should factor into their decision-making process before agreeing to employees working internationally, whether: (1) such requests to work overseas are from currently employed UK-based NHS staff; or (2) the UK-based NHS organisation is looking to recruit and engage staff to work overseas on a permanent basis. It is important for these issues to be understood so as to avoid unplanned and unbudgeted liabilities and additional compliance and reporting obligations in overseas locations.

This note should not be relied upon as advice for specific cases. Given the complexities involved, it is essential that advice is sought on a case-by-case basis in respect of overseas working.

Part 1 – General Issues and Data Protection

1. Contract of employment

1.1. The first point to consider is the employee's written employment contract. Under section 1 of the Employment Rights Act 1996, it is necessary for employers to set out, in the particulars of employment, certain key provisions, including the 'place of work' of the employee. For any other individuals who may have been permitted to work overseas during the pandemic, where it has been made clear that any adjustment to workplace is temporary, and is not a permanent change to the terms and conditions of employment, the employee's contractual place of work will remain within the UK and any failure to return to the UK, where instructed to do so, will be a breach of that term.

1.2. Where an NHS organisation is considering allowing employees to work overseas on a permanent basis, we suggest that the place of work clause should be amended to refer to their overseas address, by agreement with the individual. However, there are significant issues to consider with such a permanent change, which we set out in further detail below.

1.3. Under section 1 of the Employment Rights Act 1996, the employer is also required to make reference, in the written contract, to the employee's normal working hours and days. Consideration will need to be given to this requirement, bearing in mind the time differences between the UK and the country of the employee's place of work overseas. Also, consideration will need to be given to whether the individual will be required and/or able to take leave on the usual statutory holidays in the UK (the location of the relevant NHS employer) or the remote location.

1.4. For overseas workers, it would be beneficial to include a clause in the contract which provides that the contract may be terminated by the NHS organisation in circumstances where working overseas is unsuccessful. Such termination would always be a last resort following consultation and the search for suitable alternative employment.

2. Employment rights

2.1. The statutory employment rights of each individual permitted to work overseas will vary, according to the legislation in that particular jurisdiction, as amended from time to time. An employee who is permanently based in Germany, for example, is likely to benefit from any rights under German employment law (in the same way as non UK nationals who are based in the UK have unfair dismissal rights and the right not to be discriminated against, for example) and this principle will apply in all other jurisdictions. There may be statutory rights in the jurisdiction where the employee works as regards matters such as minimum rates of pay, paid holidays and rights on termination, of which the NHS organisation will need to be aware. Organisations should also be aware that it is likely that any employment related dispute (other than a breach of contract claim) would need to be determined by the labour courts of that country and not the UK employment tribunal.

2.2. The extent of the statutory rights or any additional obligations the NHS organisation may have in a jurisdiction is something we recommend they seek local legal advice about. There will, therefore, be a cost to the organisation in seeking such advice although it may be possible to agree with the employee that this cost will be the responsibility of the employee or that a contribution will be made towards it. Ordinarily, we recommend that any offer of employment for someone based overseas is conditional on the employee contributing or paying for this advice.

3. Pension

We recommend that NHS organisations seek (and the employee is recommended to seek) general advice from NHS Pensions on the options available to the employee and employer as regards pensions. Pensions law is a complex area and it is also recommended that specific pensions advice, based on each employee's specific set of circumstances, is sought.

4. Expenses

One point for an NHS organisation to consider is the impact on travel expenses claims where it permits employees to work overseas. Your local expenses policy should be reviewed in order to establish whether an employee could claim that there is a contractual right that their travel expenses are reimbursed when they are required to return to the UK for work related reasons. Organisations may wish to amend the policy to clarify the position for workers who choose to live overseas.

Data Protection

5. Data protection – summary

5.1. There is no absolute barrier to staff members working overseas from a data protection perspective. However, various potential data protection issues and risks can arise where a worker works remotely from overseas, and where personal data is transferred between the organisation and the worker. The precise relationship between the organisation and the worker (for instance, whether they are directly employed) has a bearing on the technical legal measures that need to be put in place to support the transfer of data, and so data protection issues interact with the approach taken to employment and tax considerations set out below. Irrespective of the legal issues, there is also a reputational dimension: the loss of health data overseas 'looks worse' than the loss of the data in the UK.

5.2. Our advice, from a data protection perspective, is that if you want to allow staff to work overseas, you should implement appropriate safeguards, including:

(a) Develop a policy which confirms how and what data may be made available, and in what circumstances;

(b) Make sure your IT infrastructure is geared towards ensuring data is not localised in the foreign country (i.e. you use VPNs, remote access, etc. rather than data being stored on local computers);

(c) Conduct a data transfer risk assessment in relation to the countries staff may be working in, taking account of whether or not there are any particular risks associated with those specific countries (such as laws which allow third party access to the data), the nature of the worker's work, the sensitivity of the data, the risks associated with data going missing overseas and how long the worker plans to be in the overseas country;

(d) Consider the employment/engagement relationship with the staff member. This may need to take account of broader issues covered elsewhere in this advice. If the individual is not directly employed by a UK based organisation, the requirement for further assessment and additional measures to be in place is more definite;

(e) Consider including specific data protection requirements in the contracts of staff working overseas, based on the ICO's international data transfer agreement, even if such clauses are not required to make the transfer lawful from the ICO's perspective;

(f) Inform data subjects whose personal data will be processed overseas of this fact through the updating of privacy statements, and proactively making individuals aware of those changes;

(g) Update business continuity arrangements and give consideration to technical support, such as when an overseas employee's computer breaks affecting their ability to do their job properly or safely, consider how you would provide them with technical support.

Further detailed advice is set out below.

6. Data protection: general obligations

6.1. Organisations are under general obligations to ensure that the data they handle is processed fairly, lawfully and transparently. They are also required to ensure that data is processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures. These obligations apply irrespective of where in the world data is being processed.

6.2. Assessing whether there are appropriate security measures in place requires consideration of the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of individuals. The fact and circumstances of accessing data overseas is an element of the security assessment and the measures that an organisation puts in place to secure data would need to reflect access by staff overseas. This means that, irrespective of consideration of the more specific legal requirements around 'International Transfers', organisations considering allowing staff to work overseas should:

(a) have a policy concerning staff working overseas, including practical arrangements;

(b) analyse what staff will be working on overseas;

(c) assess where they will be working (both in terms of geography and workspace);

(d) consider what security measures are in place to protect IT systems overseas and whether there are any increased threats or risks from staff working internationally; and

(e) document the risk assessment and measures in place, so as to satisfy the accountability requirements of the UK GDPR.

7. International data transfers – specific issues

7.1. As well as the general requirements above, which apply irrespective of where and how data is processed (but do need to be further considered in the context of International Transfers), there are also particular requirements within the UK GDPR which may limit or prohibit data transfers overseas, as well as provisions/mechanisms that enable such transfers, provided that the necessary technical and contractual safeguards are put in place. Organisations considering allowing staff to work overseas will need to assess:

(a) whether these specific restrictions/measures apply in the context of the individual working overseas. This requires consideration of the employment/engagement relationship with the worker in question. In summary, the ICO regards direct employment relationships with the UK based organisation as outside the scope of these specific requirements, but if the individual is a contractor or outsourced (including employed by an overseas subsidiary or agent), then the restrictions will apply; and

(b) if the restrictions do apply, what measures need to be put in place to make the transfer of data to the worker lawful.

7.2. In order to consider whether a specific worker, or more generally, specific roles or teams within an organisation, can or should work overseas, you will need to consider the following matters:

(a) whether the information being transferred contains 'personal data';

(b) whether the data flow amounts to an International Transfer (including whether the individual is directly employed by the UK based organisation);

(c) if the data flow is an International Transfer, whether the country (jurisdiction) from which the employee will be working has an 'adequate' or 'safe' data protection regime as determined by the UK and/or EU;

(d) if the country is not considered 'adequate' from a data protection perspective, whether any other legal safeguards, such as entering into an enhanced contract with the worker in respect of data flows, reflecting standard data protection clauses recognised or issued in accordance with the UK data protection regime, would be required/beneficial; and

(e) what mechanisms should be put in place to ensure that the technical systems for the tunnelling of data are secure, and that no data is being stored / cached locally overseas.

7.3. Organisations will need to comply with proportionate due diligence as to how data is actually being processed overseas. This would include undertaking relevant checks for any employees working overseas, including data security checks, such as system testing of any laptops taken overseas, and audits. Historically, the NHS as a whole has been averse to transferring data overseas.

8. Does the transfer include personal data?

8.1. The UK GDPR only applies to the processing of 'personal data', which is any data that relates to an identified or an identifiable living individual, which allows you to distinguish them from other individuals. This could include information as simple as a name or other less obvious identifiers, such as an identification number or IP address. It also includes information about individuals who can be indirectly identified when that information is combined with other information you either already hold or could access from elsewhere.

8.2. The UK GDPR also makes provision for the processing of 'special categories of personal data', which includes health data. These are considered to be more sensitive and can only be processed in more limited circumstances.

8.3. Most roles within NHS organisations will involve some processing of personal data, and many roles will involve some processing of special categories of personal data.

9. Does the transfer constitute an 'International Transfer' which requires further specific considerations set out in the UK GDPR?

9.1. Chapter V of the UK GDPR restricts data transfers to countries outside the UK, unless safeguards are in place which ensure that the level of data protection afforded to individuals by the UK legislation is not undermined. These safeguards include, as set out in the UK GDPR:

(a) the UK has issued regulations confirming that the country to which the data is being transferred ensures an adequate level of protection for the data subject's rights and freedoms (an 'adequacy regulation' or 'adequacy decision'); or

(b) appropriate safeguards are in place, such as an international data transfer agreement (IDTA);

(c) an organisation has in place 'binding corporate rules' approved by the ICO. These are generally put in place where an organisation is a multinational group with subsidiaries in different countries;

(d) if none of the above apply, one of the specific derogations set out in Article 49 of the UK GDPR is satisfied, such as: (i) the data subject has provided explicit consent to the proposed transfer after being informed of any potential risks; (ii) the transfer is necessary for the performance of a contract with the data subject; or (iii) the transfer is necessary to establish, exercise or defend legal claims.

9.2. The ICO has recently confirmed that it does not regard sending data to an employee (or making data available to an employee) overseas as an international transfer. In its updated guidance[1], it specifically sets out that "*if you are sending personal data to someone employed by you or by your company or organisation, this is not a restricted transfer. The transfer restrictions only apply if you are sending personal data outside your company or organisation.*"

9.3. However, the ICO's guidance conversely states that an International Transfer occurs where the receiver is legally distinct from the sender, as a separate company, organisation or individual. This includes transfers to another company within the same corporate group, or non-employed contactors. In these cases additional specific measures, as set out below, will need to be put in place.

9.4. It is unclear on what basis the ICO's differentiated guidance in paragraphs 9.2 and 9.3 is given – there may be no difference practically between how an employee or a contractor working overseas accesses data, but the ICO's view is that only the latter is an international transfer which is subject to restrictions in data protection law

[1] International transfers after the UK exit from the EU Implementation Period | ICO

necessitating further measures being put in place. By reference to the legislation, we are not sure the ICO's guidance is correct (because the legislation talks about 'transfers to third countries' without any qualification as to whether that is to another entity), but their guidance does reduce the risk of enforcement action if a complaint is made about how data is being processed overseas by direct employees. For the reasons set out above and below, however, we do still recommend that organisations take steps to consider and address the risks that are posed by allowing data and systems to be accessible to directly-employed staff overseas. Further measures definitely need to be put in place for any workers who are not directly employed by the UK-based organisation.

9.5. The primary reason behind the UK GDPR requirement for appropriate safeguards is that data may be accessible to governments and third parties (telecoms companies, etc.) in countries without adequate data protection standards, and that this risks contravening the data protection rights and expectations of individuals whose data is being processed. As well as the possibility of enforcement action, individuals whose data is processed in a manner which is non-compliant with data protection legislation could bring a claim against an organisation that transferred data without appropriate safeguards in place.

9.6. Depending on how data is accessed by overseas workers, this may also affect how secure that data is, and the extent to which it is being 'transferred'. If workers were accessing data through servers in the UK via a VPN (without locally saving data), this would be more secure, for example, than if any local copies of the data are made in the foreign country, including storage on devices held by the staff member, where the risks are more significant.

9.7. Even if the data is being accessed via a VPN, it is our view that from a legal compliance perspective it would be prudent to consider that all data made available to staff working overseas has been internationally transferred. EU guidance is that remote access still constitutes a transfer.[2]

9.8. In determining what processes, procedures and safeguards are necessary in order to ensure compliance with data protection law, the first step is to identify all relevant data flows. Internal records should be kept of when and where workers are working overseas and the types of data they have access to.

10. International data transfers: is there an adequacy decision in place?

10.1. For each worker potentially working overseas you will need to determine whether the country / jurisdiction to which the information is being transferred is one which is subject to an adequacy decision. The countries that the UK identifies as such include the European Economic Area (EEA), and other countries that are regarded by the European Union (EU) as 'adequate'.[3] We recommend that organisations keep a watching brief in this regard as the ICO is currently developing proposals around adopting a more 'risk-based' approach to granting UK adequacy decisions to other jurisdictions.

10.2. No further steps are required for the transfer of data to/from the EEA or other adequate countries. However, you may wish to consider undertaking due diligence checks to ensure that the worker is using secure networks, and that (as far as possible) they are working in an appropriate environment (this is also true, of course, of staff working remotely in the UK). This ties to the general security requirements set out in section 6 above.

10.3. You should also consider ensuring the security of systems for those employees who are working internationally through arrangements such as secure log in / two factor authentication, automatic log-out after inactivity and logging the data that has been accessed by anyone working overseas, some of which you may already have in place more generally.

[2] edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf (europa.eu)

[3] An updated list of countries subject to an adequacy decision can be found here: International transfers after the UK exit from the EU Implementation Period | ICO

11. International data transfers: appropriate legal safeguards where there is no adequacy decision

11.1. Whether you need additional safeguards in place when transferring data to a worker overseas, in a country not subject to an adequacy decision, will be fact specific.

11.2. Given the ICO's guidance that transfers to staff working abroad are not subject to the restrictions in the UK GDPR, it seems unlikely that the ICO would take enforcement action against an organisation that followed their guidance. However, there is also a conceivable risk of (bigger) claims against an organisation which lost data overseas.

11.3. As the ICO's guidance also states that "*individuals risk losing the protection of the UK data protection laws if their personal data is transferred outside of the UK*", we recommend putting in place additional safeguards in circumstances where personal data may be transferred to direct employees working overseas in countries without an adequacy finding, and such measures will certainly need to be put in place with any workers (or entities engaging them) who are not directly employed by the UK based organisation.

11.4. The most obvious safeguard would be to put in place standard data protection contract clauses (as per Article 46(2)(d) of the UK GDPR), which are recognised or issued in line with the UK data protection regime. The UK originally adopted the EU's standard contractual clauses (SCCs) for this purpose following its exit from the EU, and the ICO subsequently produced its own slightly amended version of the SCCs for use in contracts between controllers and processors. Since then, the ICO has produced an updated set of model clauses which are UK specific, known as the IDTA.

11.5. Before deciding whether to use the IDTA and allow overseas transfers, we recommend undertaking a risk analysis in terms of workers (particularly those who are not directly employed) located in jurisdictions not subject to an adequacy decision.

11.6. One of the conclusions from the 2020 case of Schrems II[4] was that, in addition to actually putting in place 'on paper' contractual safeguards when transferring data internationally, account also needs to be taken of the data protection laws in the country in question, and the risks posed to any data transfer. Following this decision, the ICO updated its guidance around international data transfers to specifically include a requirement to undertake a transfer impact assessment before any safeguards are relied on to make a restricted transfer. It provides that "*you must be satisfied that the data subjects of the transferred data continue to have a level of protection essentially equivalent to that under the UK data protection regime*".

11.7. The ICO has now produced an "*international transfer risk assessment*". This requires consideration both of the data that is flowing, and of the "*law or practice of the third country*", with a focus on whether those laws and practices undermine the safeguard you intend to put in place, for example because public authorities in the recipient country are allowed access to data held for surveillance purposes, particularly where legislation governing that access is "*ambiguous or not publicly available*". The ICO's international transfer risk assessment, sets out that you should consider:

(a) whether the IDTA will be enforceable in the recipient country, "*as this goes to the heart of what it means to put in place contractual protections*"; and

(b) whether the law of the recipient country might conflict with the IDTA protections, such as because it allows third party access to the data being transferred for surveillance purposes.

11.8. We would therefore recommend that a transfer risk assessment should be completed for each new proposed transfer to an overseas worker. The ICO's guidance provides some direction as to how to conduct these assessments, and as at the date of this note, the ICO is due to publish further guidance on this issue.

11.9. These transfer risk assessments should be 'live' documents, which are regularly reviewed to consider any developments in the third country which could affect your initial assessment and decision.

11.10. If, following your risk assessment, you are satisfied that the recipient country's local laws do not undermine the protections of the UK GDPR, we would suggest including a version of the IDTA, or provisions contained within

[4] *Data Protection Commissioner v Facebook Ireland and Max Schrems* (Case C-311/18; 16 July 2020)

it, within any addendum to the directly employed staff member's contract which permits them to work overseas. Such measures would need to be put in place in contracts with third parties (e.g. individual contractors or companies, including subsidiaries, which employ or engage their own workers overseas).

12. Data transfers: Binding Corporate Rules

12.1. Binding Corporate Rules are a mechanism intended for use by multinational corporate groups, groups of undertakings or a group of enterprises engaged in a joint economic activity such as franchises, joint ventures or professional partnerships. They therefore are unlikely to be relevant to most NHS organisations with small numbers of workers overseas, and outside the scope of this note.

13. Ad hoc transfers where there are no other mechanisms in place to facilitate the transfer

13.1. There are various context-specific 'derogations' (exemptions) from the restrictions on international transfers set out in Article 49 of the UK GDPR. The application of these can be complex and is beyond the scope of this note, and further advice should be taken if your organisation wishes to rely on them routinely.

14. Data transfers: ensuring that technical systems minimise risk

14.1. The use of secure networks and virtual machines (so minimal data is stored in the country in which it is accessed) is a key security measure that provides a further safeguard for data being transferred internationally, whether that's to countries which are deemed 'adequate' or not.

14.2. In respect of further supplementary measures, there are a number of technical and organisational/governance measures that can be undertaken to bolster protection, these include:

(a) Encryption: Strong, state of the art, encryption in transit and at rest can help to provide an adequate level of data protection. Such encryption would only be a supplementary measure if the cryptographic keys are retained solely by the employer organisation in the UK.

(b) Pseudonymisation/data minimisation: ideally only the minimum amount of information necessary should be available to staff working overseas. If it is possible to achieve pseudonymisation (i.e. removing obvious identifiers such as names from records available to overseas workers, and the additional details are not available to them) whilst still being able to carry out their job role, this should be considered.

14.3. Ultimately, it will be for your organisation to decide overall whether the protections it has in place are appropriate, based on what information you want to transfer, to whom, where, how and why.

15. Other data protection and governance considerations

15.1. Alongside the technical and legal protections described above, a comprehensive approach to data protection generally, and international transfers specifically, would also include organisational governance mechanisms to enhance data protection. Relevant measures should include:

(a) internal policies and standard operating procedures based on UK GDPR requirements;

(b) undertaking a 'data protection impact assessment' which considers any privacy risks associated with services being provided by staff working overseas – ideally this would be tailored to the specific arrangements of each new request to work overseas;

(c) updating the privacy statements of the data subjects whose data will be accessed overseas, to acknowledge this international data transfer, and proactively making them aware of this change (it is a requirement under the transparency obligations in the UK GDPR to inform data subjects if their personal data will be transferred outside the UK, whether the recipient country is subject to an adequacy decision and, if not, what safeguards are in place to protect their data);

(d) updating your record of processing activities to include information about what data is being accessed overseas (under the UK GDPR, organisations must maintain a record of processing activities, which must

include details of personal data transfers to countries outside the UK, the identification of the country in question and what safeguards are in place);

(e) updating business continuity arrangements and giving consideration to technical support – if a staff member is working overseas and their computer stops working, how would you make technical support available to them to enable them to carry out their job? This factor alone may limit what overseas working your organisation is willing to permit;

(f) adopting strict data access and confidentiality policies to bolster the security around international data transfers. These should be based around the principle that individuals should only gain access to the information or systems necessary to undertake their duties;

(g) undertaking penetration testing and business continuity simulations;

(h) imposing contractual sanctions for any breaches of data protection requirements; and

(i) keeping policies and arrangements under regular review.

16. Failing to comply with international data transfer requirements

16.1. Inappropriately sending personal data outside the UK to a country that does not provide an adequate level of data protection is a breach of the UK GDPR. The consequences of such a breach may be:

(a) enforcement action. The ICO has the power to investigate organisations, issue warnings and reprimands, enforce compliance (through enforcement notices), as well as impose administrative fines. This may be triggered through a significant data breach reported to the ICO or a complaint from a data subject. In the case of directly employed staff, the risk should be relatively low given the ICO's current guidance that transfers overseas to employees are not considered international data transfers for the purposes of the UK GDPR, but for non-employed staff the risk is more pronounced;

(b) data subject claims. Data subjects have the right to bring a civil claim against you where they consider that their data protection rights have been infringed because their data was not processed in line with the legislation, which could lead to the payment of damages, on top of potentially significant legal costs;

(c) reputational damage. Enforcement notices and administrative fines are published by the ICO on their website. They may also be picked up by the media if they are particularly serious or topical. In a worst case scenario, this type of publicity can alter the public's opinion of your organisation, diminish their trust and cause other reputational damage.

16.2. A particular risk associated with transferring personal data to employees overseas is the unauthorised access of that data by a third party. This could be because of local laws in that third country (such as ones that allow access to public bodies for surveillance purposes) or cyber-attacks by malicious third parties. Although you will never be able to eradicate these risks entirely, the advice above is designed to minimise these risks as far as possible.

Part 2 – Immigration and Permission to Work

1. Summary

The purpose of this section is to provide some general guidance surrounding entry to and working in the UK for those who are not either UK nationals, have the Right of Abode, or settled in the UK (*i.e.* those to whom Indefinite Leave to Remain has been granted). However, it is not exhaustive and it should only be treated as a general guide. UK Immigration and Nationality matters involve considerable detail and complication and no-one should take action based solely on this note as individual circumstances can vary enormously. Further advice and assistance should be sought. Where NHS organisations engage staff overseas and will request that they return/visit to carry out work in the UK, they will need to consider whether such staff are free to enter the UK for this purpose.

2. Who is free to enter the UK for any reason, including employment?

2.1. The people on the list below are permitted to work in the UK but some of them will still be subject to time limits and require visas or other documentation before entering. This list is not exhaustive.

a. **British citizens** – have the entitlement to do any work or self-employment they wish in the UK. There are several types of British nationality to whom this does not apply, including British Overseas Territories Citizen, British Overseas Citizen, British Subject, British Protected Person and British National (Overseas) – although see below regarding members of the last group resident in Hong Kong. Dual nationals wanting to live and work in the UK should always enter using their current British passport.

b. Those who have the **Right of Abode ('RoA')** – having RoA permits living and working in the UK without any immigration restrictions. Most British citizens have RoA in the UK (see above for those to whom it doesn't apply) and some Commonwealth citizens may have this. British citizens will usually use their passports as evidence of having RoA and some others may apply for a Certificate of Entitlement to be affixed in their overseas passport. This must be applied for before travel to the UK and the application process is not dissimilar from applying for a UK entry clearance or visa.

c. **People who have been granted Settlement** (often referred to as 'indefinite leave to remain', 'ILR', 'settled status' or 'permanent residence') – this group has no restrictions on living and working in the UK and may undertake any work or self-employment. There is no expiry date but status can be lost if a continuous period is spent outside the UK (two years for those who were granted Settlement/ILR or five years for those granted settled status under the EU route). On each re-entry to the UK, the Immigration Officer will seek to be satisfied that the entrant had settled status when they last left, has not been away for more than two/five years (as applicable), is seeking entry as a returning resident and is eligible to return with settled status.

d. **Irish citizens** – Even though the UK is no longer part of Europe/the EEA, citizens of the Republic of Ireland still have unrestricted permission to live and work in the UK.

e. **Spouses/dependants of British citizens and those who are settled in the UK** – dependants who have applied for and entered with the appropriate visas are permitted to take any work they wish or be

self-employed. Visas are generally only issued to children who have not yet reached their 18th birthday but, once issued, the status continues, even though they may turn 18 while holding that status.

f. **British Nationals Overseas ("BNOs") from Hong Kong** – who hold a BNO passport and are ordinarily resident in Hong Kong. A visa can be applied for in Hong Kong before travelling, or (as is often preferred) the individual can travel to the UK as a visitor and switch status in-country. Note that there is a restriction on taking work as a professional sportsperson or sports coach.

g. **Commonwealth citizens with UK Ancestry status** – this can be applied for by eligible Commonwealth citizens with a least one British citizen grandparent who was born in the UK (or in Southern Ireland (now the Republic of Ireland) before 31st March 1922). An application for the appropriate entry clearance or visa must be made before travelling. Any type of work and self-employment is permitted. There will be a time limit but this category does lead to settlement and, providing conditions are met, extensions and obtaining ILR is generally straightforward.

h. **European Union Settlement Scheme ('EUSS')** – EU citizens who had established a right of residence in the UK before 31st December 2020 and have been granted 'settled' or 'pre-settled' status under the EUSS are free to take any work or be self-employed.

2.2. Those on this second list are also permitted to work in the UK but are likely to have additional restrictions.

i. Younger people with entry clearances / visas issued under the Youth Mobility Scheme ('YMS') – this category is for individuals aged 18 to 30 who are nationals of the countries listed below. They can work, study or be self-employed (although cannot work as a professional sportsperson or sports coach). Visas are typically granted for a period of two years. Note that, for some countries there is a ballot process and/or a cap on the number of visas that can be issued. Applicants may only apply for this visa once and it cannot be extended, however, YMS visa holders may apply to switch in-country to the Skilled Worker category, subject to meeting the relevant criteria.

Australia	Canada	Hong Kong
Iceland	India	Japan
Monaco	New Zealand	Republic of Korea
San Marino	Taiwan	

Also eligible are British Overseas Citizens, British Overseas Territories Citizens & British Nationals (Overseas)

j. **Those who have been sponsored by employers who hold a licence to sponsor migrants** – such visa holders are only permitted to work for the entity that has sponsored them and must only do the work permitted.

k. **Students** – certain eligible students *i.e.* those studying for a full-time degree level qualification are permitted to work for a maximum of 20 hours per week during term-time and full-time outside term-time (university/college vacation). They are not permitted to be self-employed, be doctors/dentists in training or work as professional sportspeople or sports coaches.

l. **High Potential Individual** – this is a new category introduced on 30th May 2022. People who have graduated from a Home Office list of the 50 top ranking global universities, within the past five years, may be eligible to apply to come to the UK for two years (or three, if they have a PhD or other doctoral qualification) to work, after which they are permitted to switch into sponsored categories, which may lead to settlement in due course. The list of universities and further guidance can be found here: https://www.gov.uk/high-potential-individual-visa

m. **Temporary Work – Government Authorised Exchange Visa** – this category has replaced the 'Tier 5' visa and enables eligible individuals to come to the UK to obtain short term work experience or training as well as to undertake research or a fellowship. Sponsorship is required from one of the Home Office pre-approved overarching sponsors. It can be used by doctors coming for training, for up to two years, as part of the Commonwealth Scholarships and Fellowships Plan run by the Association of Commonwealth Universities. It can also be used by post-graduate medical graduates to undertake a

fixed period of training or development in the UK, normally within the NHS. There are a number of schemes and arrangements sponsored or administered by the medical royal colleges, as well as similar organisations for the training of overseas doctors. The Medical Training Initiative has a two-year limit and is administered/sponsored by the Academy of Medical Royal Colleges. Placements are temporary and require the approval of the employer and the local post-graduate dean of the relevant medical royal college. There is also an opportunity for overseas fellows, where accreditation has been received from the General Medical Council and approved by the Royal College of Surgeons of Edinburgh International Medical Graduate Sponsorship Scheme, with the NHS Highland acting as the umbrella Sponsor. Given the wide range of this category, specific advice should be taken before using it. Further detailed guidance and a list of the schemes and sponsors can be found here: Immigration Rules - Immigration Rules Appendix Government Authorised Exchange schemes - Guidance - GOV.UK (www.gov.uk)

n. **Spouses and dependants of most holders of working visas, or of those in the UK as investors or students** – conditions may apply. They are not permitted to work as professional sportspeople or sports coaches but can be self-employed or set up companies / be directors.

3. Visiting the UK for business purposes

3.1. The UK allows both tourist and business visitors to enter the UK for a maximum period of six months, from the date of arrival. Many nationalities can travel to the UK visa free, while others are classified as 'visa nationals' and must apply for a visit visa in advance of travel. The current list of visa nationals can be found here: https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-visitor-visa-national-list In most instances a visit visa will be applied for from the country where the applicant is ordinarily and legally resident, however, they can be applied for from any country where the applicant is physically present, provided that they are there lawfully. The processing of visit visas can take between two and five weeks.

3.2. Visitors must be able to satisfy the Immigration Officer on arrival that they:

a. will leave the UK at the end of their visit; *and*

b. will not live in the UK for extended periods through frequent or successive visits, or make the UK their main home; *and*

c. are genuinely seeking entry or stay for a purpose that is permitted under the Visitor rules; *and*

d. will not undertake any prohibited activities such as work in the UK which include:

   i. taking employment in the UK;

   ii. doing work for an organisation or business in the UK;

   iii. running a business as a self-employed person;

   iv. doing a work placement or internship;

   v. direct selling to the public; *or*

   vi. providing goods and services; *and*

e. have sufficient funds to cover all reasonable costs in relation to their visit without working or accessing public funds, including the cost of the return or onward journey, any costs relating to their dependants, and the cost of planned activities; a*nd*

f. that the intended business visit will fall within the 'permitted activities', such as attending meetings, conferences, seminars, interviews, *etc*. There is no specific limit on the number of meetings that may be attended but ideally these should be pre-arranged and they must fall within the parameters of regular conference or permissible business activities. Each visit should be assessed on an individual basis and it is crucial to ensure that the proposed activities will not cross the line into what could be considered non-permissible productive work. More details on what activities are permitted as a business visitor can be found here: https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-visitor-permitted-activities).

3.3. In order to obtain a business visit visa, the applicant must provide evidence of being invited by the host (UK business) through a letter of invitation, detailing the reasons for and duration of the visit. Although the purpose of visa nationals obtaining their visa in advance means that their intentions have already been scrutinised, they still need to be prepared to answer these questions. Letters of invitation should usually be kept relatively short and to the point, outlining key meetings and providing a point of contact and for multiple visits. Where there are to be multiple visits a fresh letter may be required each time – but it is important to take advice on individual circumstances.

3.4. Where a visa national requires a visa to come as a visitor, it will either be single or multiple entry - usually the latter. The individual should ensure they know and understand what the conditions are and that they monitor the expiry date of the visa.

3.5. Certain business visitors can visit the UK for a 'Permitted Paid Engagement'. This visit visa category is for experts in their field, who are coming to the UK to undertake specific paid engagements for up to one month. More details can be found here: https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-v-visitor

4. Visits to the UK by those who have a contract with a UK employer

4.1. Having a contract with a UK employer does not in itself necessitate having an entitlement or permission to work in the UK. If all the work to be performed under the contract is to be done outside the UK, then no immigration permission of any kind is needed (unless, of course, it is a requirement for wherever the individual is based, where this is not in their home country).

4.2. Essentially, the position for visiting the UK for those who have a UK employment contract is the same as for anyone else. However, there is the additional practical element to consider as an Immigration Officer, when examining the visitor on arrival, is likely to ask additional questions to ensure that the visitor will stay within the parameters of permitted activities and will not undertake productive work. This occurs less frequently now that many entrants use automatic 'e-gates' at entry points but visitors in such a position still need to be prepared. This means that the person concerned must fully understand their immigration position and what they are and are not permitted to do in the UK and be prepared to answer the Immigration Officer's questions clearly and concisely. They need to be ready to explain what they will be doing in the UK, where they will be staying and when they will be leaving. They should also be ready to produce return tickets and have the contact details for someone the Immigration Officer can call to verify the details. It may also be advisable to carry a letter or other evidence but this should be prepared after taking advice on the circumstances to ensure it is appropriate. Please see the Home Office guidance referred to above.

4.3. A further consideration is that, for the duration of their visit, the individual may actually need to suspend some or all of their usual day to day activities, where those activities would be considered as productive work benefitting a UK entity.

4.4. While a visitor can stay for up to six months on each entry to the UK, making frequent or successive visits to the UK can result in an Immigration Officer looking more carefully at whether the visitor is, in effect, living in the UK or making the UK their main home. When considering whether to permit or refuse entry the Immigration Officer will look at:

a. the purpose of the visit and intended length of stay stated;

b. the number of visits made over the past 12 months, including the length of stay on each occasion, the time elapsed since the last visit and whether this amounts to the individual spending more time in the UK than in their home country;

c. the purpose of return trips to the applicant's home country and whether these are used only to seek re-entry to the UK;

d. the links the individual has with their home country or ordinary country of residence – considering especially any long-term commitments and where the applicant is registered for tax purposes;

e. evidence the UK is *de facto* the person's main place of residence, for example:

i. if they have registered with a general practitioner (GP);

ii. if they send their children to UK schools; *or*

iii. there are issues with the history of previous applications/stays, for example if the visitor has previously overstayed.

4.5. Thus, in general, there is nothing to stop an individual with a UK employment contract coming into the UK for the same meetings and other permissible activities as anyone else but they do need to be very careful to ensure they do not step outside the permitted parameters (even if this means not doing some of the activities normally undertaken), are prepared for interview by an Immigration Officer and are carrying the appropriate evidence.

5. Obtaining permission to work in the UK

5.1. For those who wish to come to the UK for employment but who are not permitted to work already by falling into one of the categories listed above, there are some options to consider but these need to be looked at carefully on an individual basis. If there are no options for the individual based on their personal eligibility, the main way in which work permission derives is through being sponsored under the Points-Based System for Migration into the UK, for which there needs to be an employer with a licence to sponsor migrants. Many NHS entities and those who provide services to NHS entities are licenced and the list of sponsors, with the details of the relevant categories covered by the licence, can be checked here: https://www.gov.uk/government/publications/register-of-licensed-sponsors-workers Do note, however, that if an entity does not appear, that doesn't necessarily mean that they are not covered by a licence as sometimes groups of related entities are covered under one name, with only the 'lead' applicant being shown on the register.

5.2. Details regarding eligibility for and obtaining a licence are outside the scope of this guidance, as are the details regarding eligibility and the process for sponsoring specific individuals. However, for each person to be sponsored, there will be a number of criteria to be met, both at the first stage, which involves the employing entity assigning a Certificate of Sponsorship and the second, which involves the individual obtaining an entry clearance / visa or (where appropriate) applying for further leave to remain in the UK. Each licensed sponsor is required to be knowledgeable regarding the appropriate use of their licence and the sponsorship of each individual required to work in the UK. Many, although not all, will retain immigration advisers to assist them with this. Not all jobs are suitable for sponsorship and the SOC (Standard Occupation Classification) code must be identified, together with its associated minimum salary threshold. Other salary thresholds and criteria also apply.

5.3. Below is some further information on the two categories likely to be of most interest to NHS and associated employing entities.

5.3.1. Skilled Workers / Health & Care Workers

a. The job on offer must be at NVQ Level 3 or above.

b. As at the date of publication, all jobs in health services, as well as public health managers and directors, are on the list of 'Shortage Occupations'. The list also includes senior care workers and certain laboratory technicians. The full list, as at the date of publication, can be found here: https://www.gov.uk/government/publications/skilled-worker-visa-shortage-occupations/skilled-worker-visa-shortage-occupations

c. The job the individual is being sponsored for must have an eligible SOC code and meet the relevant required minimum salary thresholds. Note that these thresholds are reduced for SOC codes on the shortage occupation list.

d. Health and Care workers can be sponsored for up to five years, after which the individual (and their dependants) may have the option to settle in the UK (obtain ILR).

e. Note that the application costs are much lower than the standard Skilled Worker sponsorship; the visa application fee is lower and there is no NHS surcharge for Health and Care workers. The Immigration Skills Charge is lower where the employing entity is a charity or a small to medium-size business (as defined by the Companies Act 2006)

5.3.2. Graduate Visa (for post-graduate students)

a. This is a new category that allows certain graduates from UK universities to apply for further leave to remain in the UK to live and work, without requiring sponsorship and with no restrictions, for at least two years after completing the course / being eligible for graduation - and possibly up to three years for certain students with a PhD or other doctoral qualification.

b. Self-employment and setting up a company and/or serving as a company director are permitted but they may not work as a professional sports person or sports coach.

c. Switching from this category to sponsorship is permitted.

The information contained in this section is for general information only, does not cover every possible route into the UK for work/other purposes and is subject to change on little or no notice. No liability can be accepted for action taken based on its content. Advice must always be sought in specific cases.

Part 3 – Tax and Social Security Issues Arising from International Remote Working

Tax and Social Security

1. UK employer obligations and risk

1.1. The starting point in determining the tax and social security consequences of an international remote working arrangement is to gather all the facts about the individual and the work to be performed in the overseas location. This fact gathering stage is important as the assessment of the tax position can change significantly if the circumstance or fact pattern changes. The employer will need to gather the following information for the tax assessment:

(a) How will the individual be engaged by the UK employer? Will this be via a UK employment contract or an agency? If through an agency, is the agency based in the UK or overseas?

(b) How much time is the employee planning on spending in the overseas location? How much of this time will be spent working in the overseas location versus non-workdays?

(c) What is the anticipated duration of this arrangement? Weeks, months or permanent?

(d) What is their job title and what role does the employee undertake? What duties will be performed in the overseas location and what (if any) will continue to be performed in the UK?

(e) If the duties are to be split between the UK and the overseas location, are these duties ancillary and subordinate to their main duties performed in the UK? Or is the nature of the duties the same whether performed in the UK or in the overseas location?

(f) In which location does the employee have their home? If they have permanent homes in both, in which location would you consider their strongest personal and economic connections to lie?

(g) What is their nationality? Do they have more than one passport?

1.2. Once the above information has been gathered this will then be used to assess whether the employee working in the overseas location creates a taxable presence in that location for their UK employer as well as any payroll, employment tax and social security obligations. The tax and social security position will be determined based on where that employee performs their employment duties. It is not impacted by the currency the employee is paid. The social security position is not impacted by, and the tax position is not normally impacted by, the location of the bank account into which salary is paid.

1.3. The first step in the assessment is to consider whether the employee working in the overseas location will create a taxable presence, known as a Permanent Establishment ("PE"), for the UK employer in that overseas location.

2. Overseas taxing rights

2.1. Local tax authorities seek to tax all profits arising in their jurisdiction. Where a non-resident organisation creates profits in a local jurisdiction without having a legal entity recorded in that country, the local tax authority can only collect taxes on that income if the non-resident has a PE in that country.

2.2. What constitutes local profits can be wider than just profits derived from local contracts and often requires an analysis of the activities undertaken in a country to ascertain if these contribute towards creating profits.

2.3. How the profits are calculated is a separate analysis based on the transfer pricing principles. Non-resident companies must self-assess if they have local income and then self-assess whether they have a PE in the relevant jurisdiction in order to satisfy their obligations under the local tax laws. If they do have a PE, there is a requirement to report this to the local tax authorities in order to pay over taxes that are due.

3. What is a Permanent Establishment?

3.1. Each territory will have its own domestic provisions on what constitutes a PE. Where the local jurisdiction has a Double Tax Treaty ("DTT") with the UK, the DTT definition of a PE should override domestic law. The majority of UK DTTs follow the Organization for Economic Co-operation and Development (OECD) Model Income Tax Treaty and, accordingly, we have referred to that treaty and the supporting OECD commentary which provides guidance on the definition of a PE.

3.2. Under the OECD guidelines, a non-resident company has a PE in the relevant country if:

- it has a fixed place of business there through which the business of the company is wholly or partly carried on; or
- an agent acting on behalf of the organisation has and habitually exercises their authority to do business on behalf of the company (as long as that agent is not of independent status acting in the ordinary course of their business),

3.3. It is important to note that some countries adopt an additional PE, called a services PE, which is normally triggered by personnel simply working in country for a number of days. The OECD guidelines do not make much reference to such a PE, however, nevertheless many developing countries operate this type of PE.

3.4. As mentioned above, if there is a DTT between the two relevant territories, the treaty definition will override the domestic law. This provides a measure of consistency between territories and increases the ability of taxpayers to assess the potential for their activities to create a local PE.

3.5. If there is no DTT between two territories, the position will depend on the domestic provisions of the other territory, which generally increases the risk of determining that a local PE arises.

3.6. Action 7 of the Base Erosion and Profit Shifting (BEPS) Project, a report published by the OECD, introduced further rules regarding PEs, including the following:

- artificial avoidance of a PE status through commissionaire arrangements and similar strategies;
- artificial avoidance of PE status through the specific activity exemptions;
- fragmentation of activities between closely related parties; and
- splitting of contracts.

3.7. The rules were subsequently incorporated into DTTs by way of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS ("MLI").

3.8. In order for a DTT to include these additional rules, both jurisdictions have to agree to the changes. The UK has only agreed to the fragmentation of activities rule and hence these changes are not included in the DTTs the UK has with any other country.

4. When can a Permanent Establishment arise?

4.1. For the purposes of this analysis, we have assumed that the NHS organisations are subject to tax in foreign jurisdictions. However, we note that a number of health service bodies are exempt from tax in the UK. As such, it should be reviewed whether there is corresponding legislation that could potentially serve to exempt the NHS organisations from tax in the relevant overseas jurisdictions.

4.2. As mentioned in Section 3.3 above, a PE will be created in a treaty country in the following circumstances:

(a) Fixed place of business – An enterprise has a fixed place of business in another territory through which its business is wholly or partly carried on by employees or other personnel dependent on the entity. The place of business must be fixed (e.g., an office although this could also include a home office) and

therefore have a degree of permanence. However, the activities of an enterprise will not constitute a PE if the activities it performs in the other territory are “preparatory” or “auxiliary” in character. “Preparatory” can be defined as “serving or carrying out in preparation” and “auxiliary” as “aiding” or “supporting” activities and must be considered in the context of the business to be carried on.

(b) Dependent agent – An enterprise may be deemed to have a PE in another territory if a person (an individual or a company) is acting on its behalf in the other territory and habitually concluding contracts or plays a substantial role in the negotiation of such contracts. Such persons are referred to as being “dependent agents” of the enterprise concerned but do not include independent agents, who are legally and economically independent from the entity and acting for it in the ordinary course of their own business. However, a person that is acting exclusively or almost exclusively on behalf of the entity is unlikely to be considered independent.

(c) Services – Some territories/DTTs also provide for a “Services PE” where an enterprise may be deemed to have a PE in another territory if it performs services in that territory through employees or other personnel engaged by the entity over a specified length of time (generally 183 days or more for a 12-month period). This is more commonly seen in developing economies (e.g., Asia, Africa or Latin America).

4.3. The COVID-19 pandemic has resulted in significant disruption to international travel and business operations, including the locations of directors, employees and other individuals. Many local tax authorities issued guidance as to whether the relocation of employees created a PE. For the period the COVID-19 restrictions were in place, reference should be made to each local tax authority’s guidance.

4.4. Examples:

- A PA employed by the NHS organisation has been working temporarily from Spain (this could cover a situation where working in Spain is part of an agreement by the NHS organisation to work flexibly). Their potential to constitute a Spanish PE of the NHS organisation would depend on a variety of factors, including the following:
    - A place/space of work made available for the PA in Spain, e.g. an office or the premises of an associated company to work out of, would constitute a fixed place of business of the NHS organisation.
    - If no place/space is made available to the PA whilst working in Spain, they may resort to working from their private residence. The question then becomes whether a private residence can constitute a place of business.
    - A place of business turns on whether the premises are at the disposal of the employer. Very little guidance has been issued as to when an employer has a right of disposal over a private residence. The OECD guidance is limited. However, the following commentary is of use:
        - whether the office is a room or substantial area in the employee's home used exclusively for the employer's business;
        - whether the employee is required to provide an office as a condition of employment i.e., what does the contract of employment say;
        - whether the employer pays reasonable rent for the use of an office, which is a room or area set aside in the employee’s home, that is maintained and controlled by the employer and is accessible to other individuals employed by or doing business with the employer;
        - whether the employer pays for supplies, maintenance and office equipment costs (e.g., telephone, computer, fax machine);
        - whether the employee has a local e-mail address;
        - whether the office is advertised by telephone listings, business signs, inclusion in sales or product advertising, etc., to indicate its presence; and
        - whether the employee's residence is commercially registered as a place of the employer's business, and for local property tax purposes, as appropriate.

- For the private residence of the PA to constitute a place of business, it would have to be fixed i.e. there has to be a degree of permanency. There is no definition of the word “fixed”, however the OECD guidelines suggest that a period of less than 6 months would not be considered as fixed.
- Satisfying many of the above conditions would lower the risk of the PA’s home being treated as a place of business of the NHS organisation because their ability to use the home would be restricted and its presence at the home would be intermittent or incidental.
- If the employee wishes to relocate for personal reasons, this would support the view that no PE existed for the employer.
- Unless the PA has authority to conclude sales contracts that bind the NHS organisation, the dependent agent PE would not be relevant.
- The UK/Spanish DTT does not include a services PE.

- Should the NHS organisation consider recruiting consultant teams outside the UK in, for example, the Netherlands.
  - The UK/Netherlands DTT includes the fixed place of business PE and the dependent agent PE but not the Services PE.
  - Whether a fixed place of business arises will depend on what arrangements are in place regarding the physical place where the consultants will perform their duties.
  - A dependent agent PE will arise if the consultants have the authority to negotiate and conclude contracts in the Netherlands, which binds the NHS organisation.

5. Obligations and implications of a Permanent Establishment

5.1. Generally, the existence of a PE in any jurisdiction will trigger the requirement to operate local payroll and statutory deductions, irrespective of the amount of time any individual spends in the relevant country.

5.2. The corporate tax filing obligations will largely depend on the structure of the enterprise and how the overseas jurisdiction treats the non-resident. However, it is likely that there will be a requirement to register in the relevant country for corporation tax and file corporate tax returns in that jurisdiction.

5.3. On the basis the NHS organisations are not liable to UK corporation tax, which will have to be confirmed, there should be no UK corporation tax consequences of having an overseas PE.

5.4. If the NHS organisations are liable to UK corporation tax, consideration will have to be given whether the NHS organisations are eligible to make an election to exempt the PE from taxation in the UK, thereby exempting any profits attributable to the PE from corporation tax in the UK.

5.5. If an election to exempt the PE from corporation tax in the UK is not made and the NHS organisation is liable to UK corporation tax, profits arising from the activities of the PE will be taxed in the UK. Tax credit relief under the relevant DTT may be available. However, this will need to be reviewed on a case-by-case basis.

6. Payroll obligations

6.1. As mentioned, the creation of a PE in any jurisdiction will generally trigger the requirement to operate local payroll and statutory deductions, irrespective of the amount of time any individual spends in the relevant country.

6.2. There may, however, also be occasions where an organisation determines that, whilst there is no mandatory requirement to operate a payroll, it may be beneficial to do so. For example, in cases where the administration burden falls on to the employee.

6.3. Where a non-resident individual working in a location is not eligible to claim exemption from income tax under a DTT, a payroll requirement is likely to arise.

6.4. Dependent on circumstances, employees may be paid via the UK or local payroll in the relevant jurisdiction. It is possible to operate multiple payrolls at once for a single individual, although usually they are only physically paid through one, with the other operated as a 'shadow' payroll. This shadow payroll can be used as a mechanism for the employer to meet local payroll and tax obligations whilst physically paying the employee's net pay through the UK payroll.

6.5. Alternatively, it may be more appropriate for the individual to be paid through the local payroll. In these circumstances, employees could be shadowed on the UK payroll for reasons such as UK National Insurance Contributions or pension contributions under auto-enrolment. Each instance of remote working where it has been determined that local payroll obligations arise will likely need to be considered on a case-by-case basis to determine the most suitable approach to ensure employer reporting and withholding obligations are met in all jurisdictions.

6.6. Operating a shadow payroll is often relevant where an individual is subject to tax in one jurisdiction only. Frequently with remote workers, the individual may be subject to tax in more than one jurisdiction, depending on the nature of their work and the time spent in each country performing employment duties. To determine where taxes should be paid on an individual's employment income, it is necessary to analyse the facts and circumstances relating to the individual. In some cases where there is an obligation to withhold taxes both in the UK and overseas, the issue of double taxation, or dual withholding arises.

7. Double taxation and dual withholding

7.1. The UK has entered into DTTs with an extensive network of countries. These treaties mitigate the risk of double taxation and generally follow the OECD Model Income Tax Treaty format, although there are some exceptions to this. Where it is determined that an individual is subject to tax withholding in two or more countries, there are certain arrangements which an employer can enter into with HMRC in order to avoid dual withholding and double taxation.

Net of foreign tax credit arrangement

7.2. If, under the terms of the relevant DTT, it is determined that the individual is treaty resident in the UK but subject to tax on their workdays performed overseas, the UK will often provide double taxation relief in the form of a foreign tax credit (FTC).

7.3. The default position is that an employee will be subject to tax in both jurisdictions. Following the end of the UK tax year, the individual would be eligible to claim a credit on their UK tax return for any taxes paid overseas on income relating to duties performed overseas. This credit would be limited to the lower of the taxes paid overseas and the UK tax calculated on any doubly taxed income and would be used to offset UK taxes due for the year.

7.4. As dual withholding can create cash flow issues, HMRC will allow employers to enter into a Net of Foreign Tax Credit arrangement whereby taxes paid overseas on income relating to duties performed overseas can be offset in the UK payroll in real time. Following the end of the tax year, the employer is required to provide a breakdown of the total foreign tax credits applied in the UK payroll versus the total taxes paid overseas and doubly taxed income. Any reconciliation which is necessary will be performed as part of the individual's self-assessment tax return.

Section 690 direction

7.5. Alternatively, if under the terms of the relevant DTT it is determined that the individual is not treaty resident in the UK, or if they are eligible for other reliefs in the UK such as Overseas Workday Relief (whereby earnings from a UK employment wholly or partly performed abroad is treated as if it were a foreign source of income), they will likely be subject to tax in the UK only on earnings insofar that they are UK sourced. Under these circumstances, the UK would have taxing rights only over the portion of the individual's employment earnings which relate to duties physically performed in the UK.

7.6. An application to operate a s690 direction can be made to HMRC by the employer. This is an agreement whereby, if approved by HMRC, the employer is obligated to withhold UK PAYE only on an estimated percentage of earnings which relate to duties which will be performed in the UK. For example, if an individual is expected to spend one week per month working in the UK with the remainder spent working overseas, it could

be agreed that UK tax will be withheld via the UK payroll on only 25% of their earnings. Any reconciliation between this estimated percentage and the actual time spent working in the UK would be performed following the end of the UK tax year, as part of the individual's self-assessment tax return.

8. Social security

8.1. Generally, social security contributions are payable in the country where employment duties are performed, with special provisions for multi-state and detached workers, as an individual should only be subject to social security in one country at any given time under the UK-EU Trade and Co-operation Agreement or one of the many reciprocal agreements the UK has with other countries. Employer contributions are generally due in the same jurisdiction as employee contributions.

Multi-state workers

8.2. Under the UK-EU Trade and Co-operation Agreement, an individual who performs more than 5% of his/her employment duties in another country is considered a multi-state worker and there is a requirement to determine where that individual is habitually resident and where he/she performs substantive work duties under the UK-EU Trade and Co-operation Agreement. In the absence of new specific guidance following the UK's departure from the EU, we continue to assume that 'substantial' in this context means 25% or more of an employee's employment duties. Whether it is the employee or employer making the request will have no effect on the status of a multi-state worker.

Detached workers

8.3. Detached worker rules apply to individuals seconded/assigned as directed by the employer (and not at the request of an employee) to work in the UK or an EU territory. An employee sent temporarily by their employer to perform work in another state will continue to be subject to the social security legislation of their home country provided that the duration of the posting doesn't exceed 24 months and they are not replacing another detached worker.

Reciprocal agreements

8.4. The UK also has a number of reciprocal agreements with countries outside of the EU. Currently, these countries include Barbados, Bermuda, Canada, Chile, Croatia, Guernsey, Isle of Man, Israel, Jamaica, Japan, Jersey, Mauritius, New Zealand, Philippines, Republics of former Yugoslavia (the Republics of Bosnia-Herzegovina, North Macedonia, Serbia, Montenegro and Kosovo), Republic of Korea (South Korea), Turkey & USA.

8.5. It is necessary to review the reciprocal agreement clauses when moving individuals between two locations but generally the reciprocal agreements ensure that an individual should only be subject to social security in one country at any given time. Generally, employees will pay social security in the country in which they work however similar to the UK/EU agreement, there are provisions in place for workers temporarily posted by their employer to one of these countries.

9. Social security – case studies

9.1. Case Study 1: Julian

Julian is a PA employed by a UK employer, who normally lives and works in the UK. During the COVID-19 pandemic, he found himself stranded in Spain whilst visiting family, unable to travel back to the UK for a period of four months and so was working exclusively from Spain during this period. Once the travel restrictions were lifted, he returned to the UK to resume his employment duties there.

Under normal circumstances, Julian's social security position would need to be reviewed in order to determine in which country social security is payable for these four months. An A1 certificate would be obtained from the relevant authority in order to prove his liability there and exempt him from contributions in the other country. On 30 March 2020 the European Commission issued guidance to Member States to confirm that an individual's social security liability should not be affected by work performed unexpectedly in another Member State as a result of the COVID-19 pandemic. As such, on the basis Julian was unexpectedly working in Spain as a result of being unable to travel back to the UK due to COVID-19 travel restrictions, this guidance means that his

social security obligations in the UK would continue for the entire period he was working in Spain and he would be exempt from contributing to the Spanish social security system, without the need to apply for an A1 certificate.

Now that restrictions have lifted, Julian has decided he enjoyed working from Spain and has made the decision to go and work there permanently as part of a flexible working arrangement. His employer does not have any entity in Spain, however, Julian's line manager has agreed that he can perform his duties remotely, from his holiday home in Spain. He will spend all of his time working from Spain.

As previously stated, the default position for social security is that you pay where you work unless a provision for a multi-state or detached worker can be applied. As Julian's employer does not have any entity in Spain, and he is choosing to work in Spain as is his own preference, he will not meet any of the conditions to be considered a detached worker. He is not a multi-state worker as he spends all of his time working in Spain. As such, social security will be due in Spain for both the employee and employer from the first day that Julian begins working in Spain following his move.

Alternatively, consider that Julian's line manager refused such a request but instead agreed that Julian could spend up to a week per month working from Spain, with the remainder of his duties being performed in the UK.

As Julian spends more than 5% of his time working in a country outside of the UK, it is necessary to determine where he is considered habitually resident. Habitual residence is not strictly defined, but generally looks at where a person lives and where they have their strongest personal connections during the relevant period. From this example, it is likely that Julian would be considered habitually resident in the UK, due to him spending most of his time in the UK where he has a home and where he has always lived and worked. As he spends at least 25% of his time working there, he is considered to be performing substantive work duties in the UK under the UK-EU Trade and Co-operation Agreement. On this basis, Julian and his employer will remain subject to social security contributions in the UK. A multi-state worker A1 certificate should be obtained from the UK authorities in order to satisfy the Spanish authorities that Julian is exempt from social security in Spain.

9.2. Case Study 2: The Dutch team

A NHS organisation recruits a team in the Netherlands to work on a project there. The team were all recruited in the Netherlands and they all live in the Netherlands.

Here, despite being employed by the UK organisation, social security would be payable by both the individuals and the organisation in the Netherlands on the basis social security is paid in the country in which the employees are working.

As the project comes to an end, the same team starts spending time working in the UK. They still live in the Netherlands and spend their weekends there, but they spend around half of their time working in the UK as there is less work to be done in the Netherlands. When they're in the UK, they stay in serviced accommodation close to the UK workplace.

As the team spends more than 5% of their time working in a different country, we need to consider their habitual residence. It is likely that the team would be considered habitually resident in the Netherlands, as they still live there and spend their non-workdays there. It's likely that their families remain in the Netherlands and their strongest personal connections will likely remain in the Netherlands. As they continue to spend more than 25% of their time working in the place they are habitually resident, they will remain subject to social security contributions in the Netherlands, as will their employer. An A1 certificate should be obtained for each member of the team from the Dutch authorities in order to satisfy the UK authorities that they are exempt from social security in the UK

The project in the Netherlands has been completed and the team spend most of their time working from the UK headquarters with only one day a fortnight being spent working in the Netherlands. Their families still remain in the Netherlands and they still stay in serviced accommodation when working in the UK whilst retaining their homes in the Netherlands.

Here, the key turning point is that the team would no longer be considered to be performing substantive work duties in the Netherlands under the UK-EU Trade and Co-operation Agreement as they are spending less than 25% of their time working there. In scenarios where a person does not spend at least 25% of their time working in the country where they are considered habitually resident, the social security obligation will generally

fall to the jurisdiction in which the employer is established. As the team have always been, and continue to be employed by the NHS organisation, the team and their employer will be liable to social security contributions in the UK for a period of up to 5 years providing the facts and circumstances remain the same. A multi-state worker A1 certificate should be obtained for each member of the team from the UK authorities in order to satisfy the Dutch authorities that they are exempt from social security there.

9.3. Case Study 3: Valerie – a non-UK national

Valerie is employed by the NHS organisation to work with the team in the Netherlands. Once Valerie completes her probation period, the Dutch team agree that Valerie can work from home for four days a week. After a few months, Valerie mentions in conversation that she actually lives in Belgium so she is finding working from home much easier than commuting to the Netherlands each week; she did not realise that the Dutch team were not aware of this.

This case study should be considered in two parts; first, during Valerie's probation period she was living in Belgium but performing 100% of her duties in Belgium. As such, social security remains payable in Belgium and no action needs to be taken. Secondly, once Valerie starts working from home for four days a week, she is spending 80% of her time working in Belgium, where she is also habitually resident. Under the UK-EU Trade and Co-operation Agreement, social security contributions were due in Belgium for both her and her UK employer from the first day this arrangement started. An A1 certificate will need to be applied for, backdated to the date Valerie started working from home, in order to exempt her from social security contributions in the Netherlands. The Dutch authorities should refund Valerie and her employer the contributions they have made whilst Valerie was working from home in Belgium and there will be a backdated payment of social security contributions payable to the Belgian authorities for this period. Penalties and interest might be applied on this amount by the Belgian authorities.

9.4. Case Study 4: Jeff

Jeff is a US national who comes to the UK. He provides consulting services to an NHS organisation but continues to be based in the US where he is self-employed.

Jeff is performing his services for a UK entity but on a self-employed basis with all duties performed from the United States. As such he is entitled to remain in the US Social Security system and should obtain a Certificate of Coverage to exempt him from any contribution liability in the UK. As a self-employed individual Jeff pays the combined employee and employer social security contributions and no contributions are due from the contracting entity.

10. Personal tax obligations for employees working remotely

10.1. Generally, when considering in which country tax is due on earned income, one must consider the individual's residence, domicile, and the source of the income in question. For example, a UK national working in the UK and living in the UK will pay tax in the UK on 100% of their employment income.

10.2. The matter becomes more complex when there is an international working arrangement. For a UK domiciled individual, they are taxable in the UK on their worldwide income and gains in a tax year where they are considered resident in the UK. If their employment income is also taxable in another country, where does the individual pay tax then?

11. Personal tax obligations for employees working remotely

11.1. Residency for tax purposes can change from year to year and it is also possible to be resident in more than one country at the same time. As previously mentioned, the UK has entered into DTTs with an extensive network of countries in order mitigate the risk of double taxation.

11.2. In the event that an individual is considered tax resident in two countries under the respective tax laws of both countries, one needs to apply the tie-breaker tests contained in the residence article of the relevant DTT to determine in which country they will be exclusively resident in from a tax perspective. The tie-breaker tests need to be considered sequentially and once one satisfies a test in favour of one of the two countries, that is the country that they are deemed to be resident for tax purposes.

11.3. The first tie breaker test to consider is the Permanent Home test. Per the OECD model convention commentary, a 'permanent home' does not have to be legally owned and could be a rented property say, under a renewable 12 month lease. The key is that the property is continuously and immediately available for the individual's use, rather than just occasionally for the purpose of a stay which, owing to the reasons for it is of a short duration, e.g. holiday travel/business travel etc. Any form of home may qualify (house, apartment, rented furnished room) however, the permanence of the home is critical. If an individual began to let out one of their properties to a third party, then ordinarily this will no longer constitute a permanent home for this purpose.

11.4. If the individual has a permanent home in both countries, or neither, one must consider their personal and economic relations to determine where their centre of vital interests is. In this respect, attention should be given to their family and social relations, their occupation, their political, cultural or other activities, their place of business and where they administer their property. Whilst the overall fact pattern needs to be evaluated, it is reasonable to state that the personal acts of an individual are particularly important here. The OCED commentary records that "*…. If a person has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he and his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State…..".*

11.5. Where the residence status cannot be determined under either of the above-mentioned tests, an individual is deemed to be tax resident where they have their habitual abode. This refers to which country one spends most of their time in. The commentary does not specify the duration of time the comparison must be made. However, it mentions that such comparison covers a sufficient length of time to be able to determine whether the residence in say UK or another country is habitual and to also determine the periods during which the respective stays occur.

11.6. Where the residence status still cannot be determined in, then preference would be given to the country of which the individual is a national.

11.7. Case study 1: Luke

Luke is a British citizen and has always lived in the UK. He is employed by an NHS organisation however during 2021, he started working in Italy, splitting his time between the UK and Italy with around 60% of his time spent in Italy. His family remained in the UK in their family home, where he returned most weekends. Whilst he's in Italy, he stays in an apartment he has rented for the year on a renewable lease.

Luke is considered UK tax resident for the 2021/22 UK tax year under UK domestic legislation due to the number of days he spent in the UK during the tax year. He is also considered resident in Italy during the 2021 calendar year because he spent more than 183 days there during 2021. Per the OECD model convention commentary, a 'permanent home' does not have to be legally owned and could be a rented property. The key is that the property is continuously and immediately available for the individual's use, rather than just occasionally for the purpose of a stay which, owing to the reasons for it is of a short duration, e.g. holiday the permanence of the home is critical. If the individual began to let out one of their properties to a third party, then, ordinarily, this will no longer constitute a permanent home for this purpose. On the basis that Luke has a permanent home simultaneously in both countries in the relevant tax year, one needs to consider the next tie-breaker test, i.e. centre of vital interests.

On the basis Luke has a permanent home in both the UK and Italy, we must consider his personal and economic relations to determine where his centre of vital interests is. In this respect, attention should be given to his family and social relations, his occupation, his political, cultural or other activities, his place of business and where he administers his property. Whilst the overall fact pattern needs to be evaluated, it is reasonable to state that the personal acts of an individual are particularly important here. The OECD commentary records that *"…. If a person has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he and his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State…..".*

Based on the example, it is reasonable to argue that Luke's centre of vital interests would currently lie in the UK. This is on the basis that his family remains in the UK whilst he is in Italy, he returns to the UK most weekends to be with them and he is employed and paid by a UK employer.

Should the above-mentioned points change in the future, e.g. Luke's family accompanies him to Italy, it may potentially mean that the determination of the country where Luke has his 'centre of vital interests' is inconclusive or it may even lean towards Italy, depending on the exact change(s) to the fact pattern.

Where the residence status cannot be determined under either of the above-mentioned tests, an individual is deemed to be tax resident where they have their habitual abode. This refers to which country they spend most time in. The commentary does not specify the duration of time which must be spent in that country. However, it mentions that such comparison covers a sufficient length of time to be able to determine whether the residence in say UK or Italy is habitual and to also determine the periods during which the respective stays occur. Should Luke's existing travel fact pattern continue, one would expect that this test could favour Italy over the UK at some point in the future, particularly as time goes on if he continues to spend the majority of his time in Italy in any given tax year.

Where the residence status still cannot be determined by any of the above mentioned tie-breaker tests, then preference would be given to the UK, given that Luke is a UK national.

Once the country of treaty residence is established, the relevant DTT will set out the tax treatment of different types of income. Generally, an individual may still be subject to tax in the country which they are not treaty resident, but this is often limited to income derived from sources in that country. Foreign tax credits and treaty exemptions may be available in order to eliminate double taxation. Double taxation agreements are a complex area of tax and further advice should be sought should these circumstances apply.

12 Employee personal tax obligations in the UK and overseas

12.1 In the UK, tax is deducted automatically from certain income sources including employment income and pensions. Individuals with income outside of these sources where tax has not been withheld at source must declare this via a self-assessment tax return.

12.2 NHS organisation employees with remote working arrangements may also need to file a UK tax return if they were in receipt of any untaxed income from outside the UK or to potentially claim tax relief on income taxed in the UK and another country.

12.3 In order to file a tax return in the UK, an individual must first register for self-assessment with HM Revenue & Customs (HMRC). This can be done online and should be completed by no later than 15 October following the tax year for which an individual needs to file a return for. The online filing deadline in the UK is 31 January following the end of the relevant tax year.

12.4 In certain circumstances, the individual may need to seek the assistance of a tax adviser in the UK in order to help them correctly file their UK tax return. International aspects often can be a problem for individuals to report themselves due to the complexity of the rules. Often, the filing which individuals are able to access themselves via HMRC's online filing tool is somewhat limited and does not allow for complex residence reporting statuses.

12.5 Moreover, any individual who has received income from employment relating to duties performed overseas may have the requirement to register with the local tax authorities and to file a tax return in the country in which the duties are performed. This will also extend to any other income received which was derived in that country, for example rental income from a property located overseas or bank interest from a foreign bank account. Often, depending on the country, an individual may be exempt from filing a personal tax return if all their income has been subject to withholding taxes at source. For example, if an employee spent time working remotely in Portugal but all of the income relating to Portuguese workdays had been subject to withholding taxes in a local Portuguese payroll, this person may not need to file an income tax return given that all of their relevant income had already been reported to the Portuguese authorities and subject to Portuguese tax.

12.6 Another reason an individual may need to file a tax return in a jurisdiction outside of the UK is if they are deemed to be resident there for tax purposes. Residence is a complex concept and the rules for residency will vary from country to country. Often, the number of days spent in any country during a tax year will be key in determining an individual's residency position and as such it is immensely important that employees working remotely overseas track their travel and days spent in and out of country accordingly.

12.7 There are a number of factors which may impact a person's tax residency and each set of circumstances should be reviewed on a case by case basis. If a person is tax resident in any jurisdiction, they may be required to report all of their worldwide income on their personal tax returns.

12.8 In both the UK and overseas, the filing of personal tax returns is the responsibility of the individual and any penalties for non-compliance will often be imposed solely on the individual

13 Wider issues to consider

13.1 Trust policy should be considered from the offset in order to agree on consistency of the treatment of international remote workers as well as to set any precedent for future remote working requests.

13.2 Fluctuations in exchange rates may also need to be considered if there is a requirement to operate a local payroll in the country in which an employee is situated or if the employee will be paid in a currency other than which their contractual salary is based.

13.3 In addition to the above point, benchmarking and a wider review of salary levels may be worth considering, particularly if an individual is working remotely from a country where the cost of living is significantly higher or lower than the UK

13.4 Medical insurance policies will need to be reviewed in order to understand whether an employee's home country medical insurance policy has geographical limitations regarding coverage. Some countries may limit access to state funded healthcare to certain groups of people, such as citizens or residents and as such consideration must be given to the level of health coverage available to employees working remotely from another country.

13.5 Similarly, consideration should be given to company liability and insurance policies in the event of an employee accident whilst at work. NHS organisations should be aware of what insurances are required in countries where employees are situated along with what the company's liabilities are in the event of an accident.

Summary

The key issues of contractual terms, statutory employment rights, pension, data protection, immigration and taxation are likely to be the priority areas for NHS organisations to consider, when making decisions on overseas working for staff. Other areas for consideration include health and safety, supporting the staff member's mental health and well-being, working time (maximum weekly working hours and rest breaks are two key areas for consideration), management, supervision and appraisals, protecting confidential information and support and integration within the team. We recommend that local advice should be sought, as a minimum, regarding local employment rights, immigration status and taxation.

Overseas working is feasible but there is a cost associated with it (both financial and in terms of the internal resource required to deal with the logistics). We recommend that local advice should be sought, as a minimum, regarding local employment rights, immigration status and taxation.

The information contained in this note is for general information only. No liability can be accepted for action taken based on its content. Advice must always be sought in specific cases.

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Checklist for NHS Organisations

Key considerations

1. Early discussions with staff member looking to work overseas (regarding proposed overseas location, start date, role and terms).
2. Seek advice from NHS Pensions on options available to the individual as regards pension and advise staff member to seek independent financial advice.
3. Seek local legal advice on specific issues particular to the case, such as data protection, immigration status, tax, statutory employment rights applicable to staff working in the overseas territory and health and safety requirements. Agree that the staff member will pay for/contribute towards this advice.
4. In terms of tax advice, consider implications from both the employer's and employee's perspective (e.g. determine whether the particular NHS organisation will have a Permanent Establishment ('PE') in the overseas location (e.g. review the employee's expected travel pattern and duties to determine PE risk), in which case implications (e.g. operation of local payroll, taxation and reporting requirements) determine whether the NHS organisation is subject to tax in the relevant foreign jurisdiction and determine the position on social security contributions (e.g. in which country they are payable).
5. Amend the employment contract to include new relevant terms regarding:
    a. Place of work clause
    b. Normal working hours and days (taking into consideration any time differences between the UK and overseas territory and normal working days in the host-country)
    c. Pay, benefits and currency
    d. Tax points
    e. Pensions points
    f. Management/supervision/appraisals
    g. Requirements to return to the UK to work (whether temporarily or permanently) and associated travel expenses
    h. CPD/training requirements
    i. Probationary period/ termination provisions if unsuccessful (e.g. where working overseas does not suit the organisation's/ relevant professional body's requirements for undertaking work or where the organisation is unable to secure professional indemnity insurance)
    j. Annual leave including whether the individual will be required to take leave on UK statutory holidays or those of the remote location
    k. Specific data protection rights
6. Consider implications of the organisation's current policies and procedures (e.g. expenses, data protection etc.) and whether to amend appropriately to cover staff working overseas.
7. Consider IT infrastructure to ensure data is not localised in the overseas country/IT support for staff generally.
8. Conduct a data transfer risk assessment of the intended overseas location.

9. Assess the risks posed by allowing data and systems to be accessible by directly employed staff overseas.
10. Consider additional data protection obligations if staff are not directly engaged by the NHS organisation (i.e. are a contractor or outsourced) and data protection implications.
11. Determine whether the host country is subject to a data protection adequacy decision/put in place appropriate legal safeguards where there is no adequacy decision.
12. Ensure systems security (e.g. secure VPNs, encryption, secure log in, data minimisation for staff working overseas, two factor authentication, automatic log-out after inactivity).
13. Update privacy statements of data subjects whose data will be accessed and assess to ensure compliance with data protection laws.
14. Consider protection of confidential information.