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KPMG report: Permanent establishment-related considerations, employees working remotely

As companies evaluate whether to bring employees back into offices once the global pandemic is under control, they will need more than ever to give more thought to permanent establishment (PE) issues created by a remote workforce.

While lockdown-related relief measures announced by certain countries (such as Australia, the United Kingdom, Canada, and the United States) have mitigated some of these concerns in the short term, companies will need to focus on the future state as relief measures draw to an end and restrictions on movement begin to lift.

This report briefly highlights PE-related considerations for companies that contemplate having employees provide significant services or work for extended periods outside of their jurisdictions and provides references to helpful resources.

Working from remote jurisdiction and PE risk

The initial analysis as to whether employees in a remote jurisdiction may create a PE risk for a company focuses on:

- Whether the employees may cause the company to be considered to have a fixed place of business in the jurisdiction or
- Whether the employees have the ability to negotiate or make decisions on behalf of the company while in the jurisdiction

Companies also need to consider whether an income tax treaty with a "services PE" provision (such as those that the United States has with Canada, India, China, and South Africa) could apply to give rise to a PE even without the traditional factors. Such provisions may deem a PE to exist if an employee's total workdays and value of services provided in another jurisdiction are sufficiently extensive or if a company has significant revenues from related projects within a jurisdiction. Companies, thus, need to evaluate whether a "services PE" provision may apply to any of their operations and, if so, consider systems to monitor the application of the provision.

For non-U.S. companies with employees operating in the United States, potential PE consequences need to be evaluated even if the employees are seconded to a U.S. affiliate for the duration of their U.S. activities. A U.S. PE can arise due to the activity of seconded employees if the non-U.S. company has significant direction and control over the employee's activities, and those activities are considered to include conducting the non-U.S. company's business. Factors to consider include:

- The integration of the employee's services into the non-U.S. company's business operations
- The continuing relationship between the employee and the non-U.S. company

Although it is generally possible for employees to perform stewardship activities for the non-U.S. company from the United States without creating a PE, the division between such activities and more problematic business activities would need to be monitored.

In addition to potentially subjecting a company to additional tax in a jurisdiction, creation of a PE in that jurisdiction could affect a group's transfer pricing more broadly—in particular if the re-allocation of the group's workforce that gives rise to the PE is extensive enough to affect whether and where the group's "development, enhancement, maintenance, protection, and exploitation" (DEMPE) and other high-level functions are concentrated.

KPMG resources

For an overview of other considerations related to a remote workforce, including employment tax issues and governance issues, refer to KPMG's **Global reward and mobility considerations related to COVID-19** [PDF 93 KB] and **Work anywhere, together webcast slides**.

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