

10TH
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CROSS-BORDER REMOTE WORK FAQs

SPAIN

1. Assume that a foreign national employee of a foreign company wishes to work remotely for a period of time in your country performing services exclusively for the foreign company and not interacting with the local market in your country.

IS WORK AUTHORIZATION REQUIRED? IF SO, PLEASE PROVIDE A BRIEF DESCRIPTION OF THE TYPE OF VISA, PROCEDURE, PROCESSING TIME, ETC.

In this case, since the foreign employee will be working exclusively for the foreign company, he will not need a work authorisation. The only aspect that ties the employee with Spain, is that Spain is the place from which he will be remotely working.

Having said that, the employee is required to have a non-profit temporary residence authorisation according to articles 46, 47, 48, 49, 50 and 51 of the 557/2011 Regulation. This type of authorisation allows the employee to live in Spain, while he is still working for his foreign company. The first thing to bear in mind regarding this authorisation is that it does not allow, under any circumstances, for the employee to work for

a Spanish company or for any other company here in Spain. On the other hand, the non-profit temporary residence authorisation does in fact, permit the scenario that has been presented to us in this case; a foreign employee working for a foreign company, while living in Spain.

Regarding the paperwork, there are several key issues matters to be aware of. The two requirements that are particularly important in order to procure a non-profit temporary residence authorisation are:

- *the foreign worker must prove that he has the financial means necessary to support himself (since he will not be working in Spain, but will instead just be working from Spain). One way to prove this in the present case, could be for instance, by bringing forth the documentation which certifies that the employee will be paid monthly by the foreign company (the employer) and that he has sufficient means to support himself here in Spain, despite the fact that he is not allowed to work for any company in Spain. The minimum required amount represents the 400% of the monthly Public Multiple-Effect Income Indicator in euros, or its legal equivalent in a foreign currency.*

- *the foreign worker will need to establish that he/she has medical insurance coverage that operates here in Spain.*

These are the requirements that have to be met to be eligible for this type of authorisation:

- *in the event that the applicant is of the age of criminal responsibility (in Spain, this is 16 years old), he must not have a criminal record in Spain, or in any of the previous countries where he has resided for the last five years, for crimes stipulated in Spanish law.*
- *he has not engaged in illegal or irregular migration in Spanish territory (e.g. unlawfully enter, stay or transit through the territory).*
- *he must not be listed as objectionable in the territorial space of countries with which Spain has signed an agreement in this regard.*
- *he must have sufficient financial means to adequately support his maintenance costs and accommodation expenses, including, where appropriate, those of his family, during the period of time for which they wish to reside in Spain, and without the need carry out any work activity or otherwise engage in the practice of any profession, in accordance with the provisions of this section.*
- *he should have arranged for public or private health insurance with an insurance company authorised to operate in Spain.*
- *he should be where he is supposed to be (where appropriate), within the period of commitment not to return to Spain that he (the foreigner) has assumed when voluntarily returning to his country of origin.*
- *he should not suffer from any of the diseases that may have serious public health repercussions, in accordance with the provisions of the International Health Regulations of 2005.*
- *he should have paid the processing fee for his visa application.*

Regarding the appropriate way to proceed, most important of all, is that this process must be arranged from the country of origin, meaning wherever the employee resides before moving to Spain. Therefore, the employee in question must go to the Spanish Consular office in his area of residence, where he may ask for the authorisation.

The following documentation will be necessary to file a request for authorisation:

- *passport that is valid for a minimum of one year;*
- *criminal record certificate;*
- *documents that prove the two key requirements (financial means and health insurance) as previously stated;*
- *a medical certificate that proves that the foreign worker does not suffer from any of the diseases that may have serious public health repercussions.*

Once this has been completed, the authorities will decide, within the maximum period of one month, if the authorisation shall be granted or denied. From this point on, the only procedure left to do will be to expedite the actual authorisation once the foreign worker has entered Spain, which he/she will be able to do at the local police department.

IS THERE RISK OF “PERMANENT ESTABLISHMENT” CONSEQUENCES FOR THE FOREIGN COMPANY BY VIRTUE OF THE REMOTE WORKER’S ACTIVITIES? IF SO, WHAT ARE THE MAIN FACTORS DETERMINING THE EXPOSURE.

Although it is quite difficult to completely avoid the risk of ‘permanent establishment’ the case in point is far removed from being labeled as such; this is largely due to the fact that if the employee proceeds as indicated, it is quite obvious that neither the company nor the employee will be tied to the Spanish Labour Law system, in any way. Therefore, if the employee only works from Spain for a foreign company and does not interact with the local market, the risk of potentially creating a permanent establishment is dramatically reduced.

The main factors to consider when determining if a situation constitutes a permanent establishment are:

- *the existence of a place of business – any premises or facilities that are used for carrying out the economic activity of the company, whether (or not) they are used exclusively for this end.*
- *the place of business must be “fixed” – although currently, a certain mobility of the place of business is admitted, the fact that a certain degree of permanence in time, in the territory of the State, becomes more relevant.*

- *the activities of the company are carried out through the fixed place of business – this requires that the physical space of the place of business is effectively used for the development of a business activity.*

AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES WOULD THE REMOTE WORKER BECOME SUBJECT TO LOCAL SOCIAL SECURITY AND OTHER PAYROLL REQUIREMENTS? CAN SUCH REQUIREMENTS BE FULFILLED BY A FOREIGN COMPANY, AND IF SO BY WHAT MECHANISMS?

As stated, the foreign employee is forbidden from working for any company here in Spain, while in possession of the non-profit temporary residence authorisation.

He will not therefore, be subject to social security or any other payroll checks, whilst he is allowed to work from Spain under this type of authorisation. The employee is strictly working for the foreign company; the only difference is that we will do it remotely from Spain, but the requirements regarding the present employment relationship will not be found in Spanish law, unless it is the one chosen by the parties in the employment contract.

It is important to recognise that Art. 8 of the Rome I Regulation specifies that the employment contract will be governed by the law chosen by the parties, which should be specified in the same employment contract.

AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES DOES THE REMOTE WORKER BECOME SUBJECT TO LOCAL EMPLOYMENT LAW REQUIREMENTS SUCH AS IS WAGE-HOUR, LOCAL HOLIDAYS, ANNUAL LEAVE, MATERNITY LEAVE, DISABILITY LEAVE, PROTECTION AGAINST UNFAIR DISMISSAL, ETC.

This answer does not differ from the previous one, according to the Rome I regulation and because the employee is not working for any company here in Spain, the local employment law requirements do not need to be met.

It is also important, despite what has been stated previously, to keep in mind that according to Art. 9 of the Rome I Regulation, if the application of rules of the state of the employer is contrary to the public order of the state where the employee is working from, a judge may determine that certain laws shall not be applied and may decide instead to utilise the ‘police rules’ of the state where the employee is working from (Spain).

ARE THERE SPECIAL REQUIREMENTS GOVERNING REMOTE WORK IN YOUR COUNTRY WHICH WOULD COVER THE REMOTE FOREIGN WORKER?

There are some special requirements that need to be met by Spanish employers, or even employers who have employees working in Spain for their company, but once again, these do not affect the case at hand, since the foreign employee is working in Spain, but only for a foreign entity and in accordance with different legal and jurisdictional laws.

WHAT IS THE EMPLOYEE’S EXPOSURE TO LOCAL INCOME TAX, AND UNDER WHAT CIRCUMSTANCES IS THE FOREIGN EMPLOYER REQUIRED TO ARRANGE FOR WITHHOLDING OF INCOME TAX?

The employee will be exposed to local income tax from the moment he is considered a Spanish resident. Under Spanish law and according to Art. 9 of the Spanish Personal Income Tax Act, a person becomes a Spanish resident regarding tax matters, in the event that he/ she resides in Spain for more than 183 days a year.

It is understood that from the very moment the employee starts to pay taxes here in Spain, foreign business entity, as the employer, will need to arrange for the respective withholding tax. If this comes to play, then the company should start taking into consideration Art. 8.4 of the Rome I Regulation, which essentially may change the applicable law, “where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated [in paragraphs 2 or 3 (...)]”.

WOULD THE REMOTE WORKER BE ENTITLED TO BRING A CLAIM FOR WORKPLACE INJURY IN YOUR COUNTRY?

Even if he can bring a claim (which the employee is always permitted to do), as a rule, it should not succeed, generally. As stated in Art. 8 of the Rome I Regulation, the employment contract will be governed by the law chosen by the parties, which should be specified in the same employment contract.

If the employee was to requisition a Spanish Court when a dispute of this kind should arise, in principle, with a choice of law clause, the company should have a solid argument to prove that the competent court would not be the Spanish one, along with other important aspects of the employment relationship.

WOULD THE REMOTE WORKER BE COVERED UNDER THE LOCAL NATIONAL HEALTHCARE SYSTEM OR INSURANCE?

No, because the employee will not, technically, be working in Spain, and most importantly, because he is actually forbidden to work in Spain with the type of authorisation that he will be obtaining. Consequently, he will not be registered with the Spanish Social Security system, and this is actually the reason why one of the requirements needed in order to obtain the authorisation is to prove that he has health insurance and through an insurer that is able to operate in Spain, considering the fact that he will not be registered in the national healthcare system.

IS A FOREIGN EMPLOYER SUBJECT TO DATA PRIVACY AND SECURITY REQUIREMENTS REGARDING PROTECTION OF EMPLOYEE PERSONAL INFORMATION FOR A FOREIGN EMPLOYEE WORKING REMOTELY IN YOUR COUNTRY?

The analysis above applies to this question as well; the foreign employer should be subject to the law chosen by the parties and specified in the employment contract. Thus, if for example, the law chosen by the parties was that of a State in the USA, the company should not be concerned with the application of Spanish law, in regard to data protection.

HAS THERE BEEN ANY LITIGATION OR SPECIFIC LAW OR REGULATION REGARDING THE FOREIGN REMOTE WORKER IN YOUR COUNTRY?

Despite the fact that regulations on remote workers currently exist, at this time however, there is no specific legislation that contemplates this particular case; a foreign worker, working for a foreign company, remotely in Spain.

2. Would any of the above answers change if the remote worker (a) is a citizen of your country, or (b) engages in activity interacting with the local market.

a) No, the fact that the remote worker is citizen of Spain does not determine the applicable legislation, per se, and therefore, nothing in this scenario would change the above analysis.

b) If the employee was to engage in activity with the local market, the first problem likely to arise would require a determination as to whether (or not) there is a permanent establishment here in Spain. Should any doubts or uncertainty surface as a result of this, employment rights could probably be requested by the employee although, theoretically, the company should be successful still in applying the legislation designated in the contract. With respect to social security payments, the employer would be able to defend his contention that the foreign legislation applies, considering that Royal Decree 1415/2004 on Social Security Contributions, states that natural or legal persons residing abroad, who carry out activities in Spain, will have their domicile in the place where the effective administrative management and direction of their business is located, and should be able to prove that this is not Spain.



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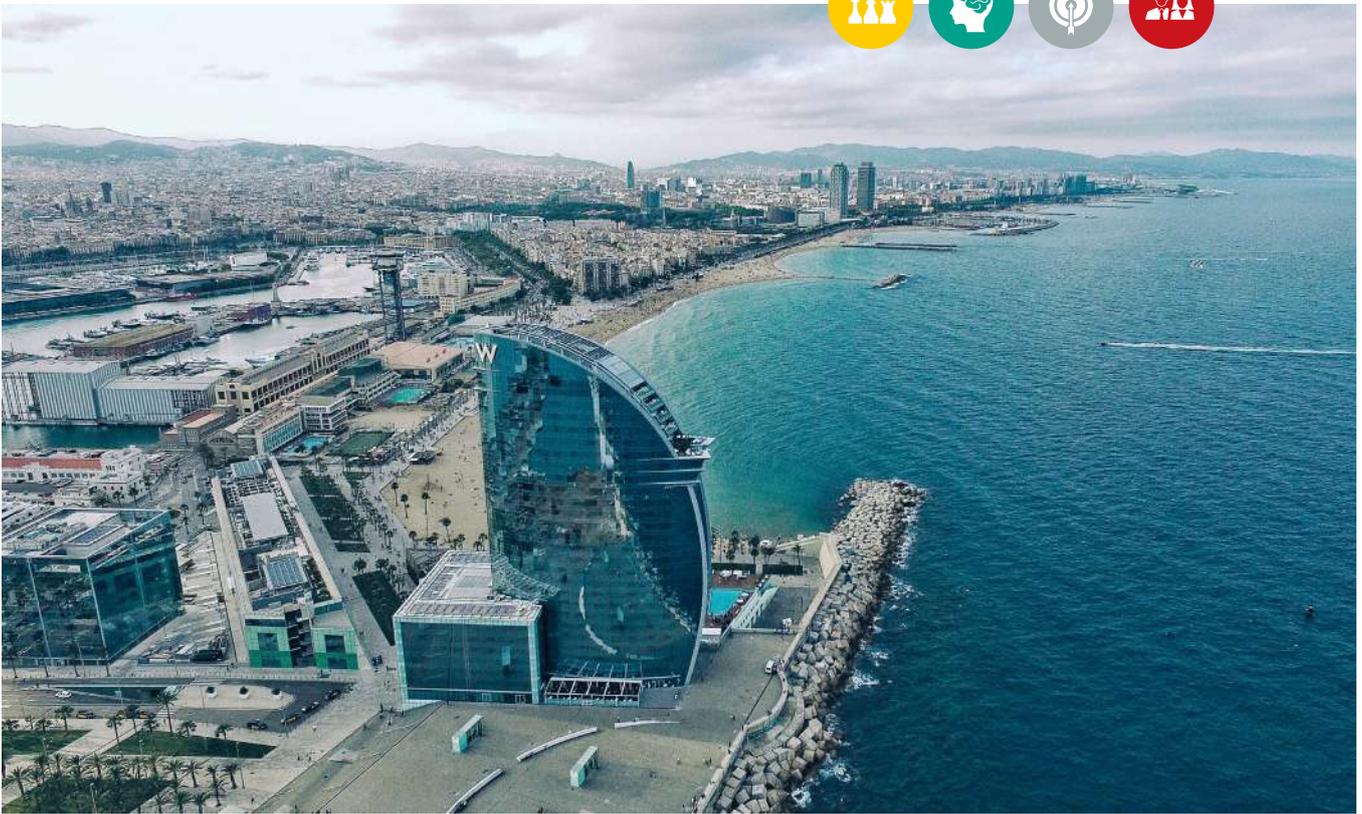
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