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Brexit and Global Mobility

How does Brexit effect business travel

Freedom of movement for EU nationals has now ended. This has a significant impact on business travel.

All non-settled EU nationals now require a visa in order to come and work in the UK. Similarly, British nationals wanting to travel to the EU for business now need to navigate the visa regimes across the 27 different member states.

Businesses are rapidly realizing this will have far reaching consequences. We are increasingly being contacted by clients who want to understand their legal, tax and social security obligations and how best to navigate these issues.

Case Study 1

An international business has sites in the UK and Spain. They are used to Spanish and British nationals travelling between their sites as and when needed for business reasons. Typically these consist of short stays with individuals spending a couple of days in Spain/the UK respectively. Occasionally business trips may last for longer periods, if staff are involved in projects across the sites, or for the annual employee conference. Are employees still able to do this now that free movement has ended?

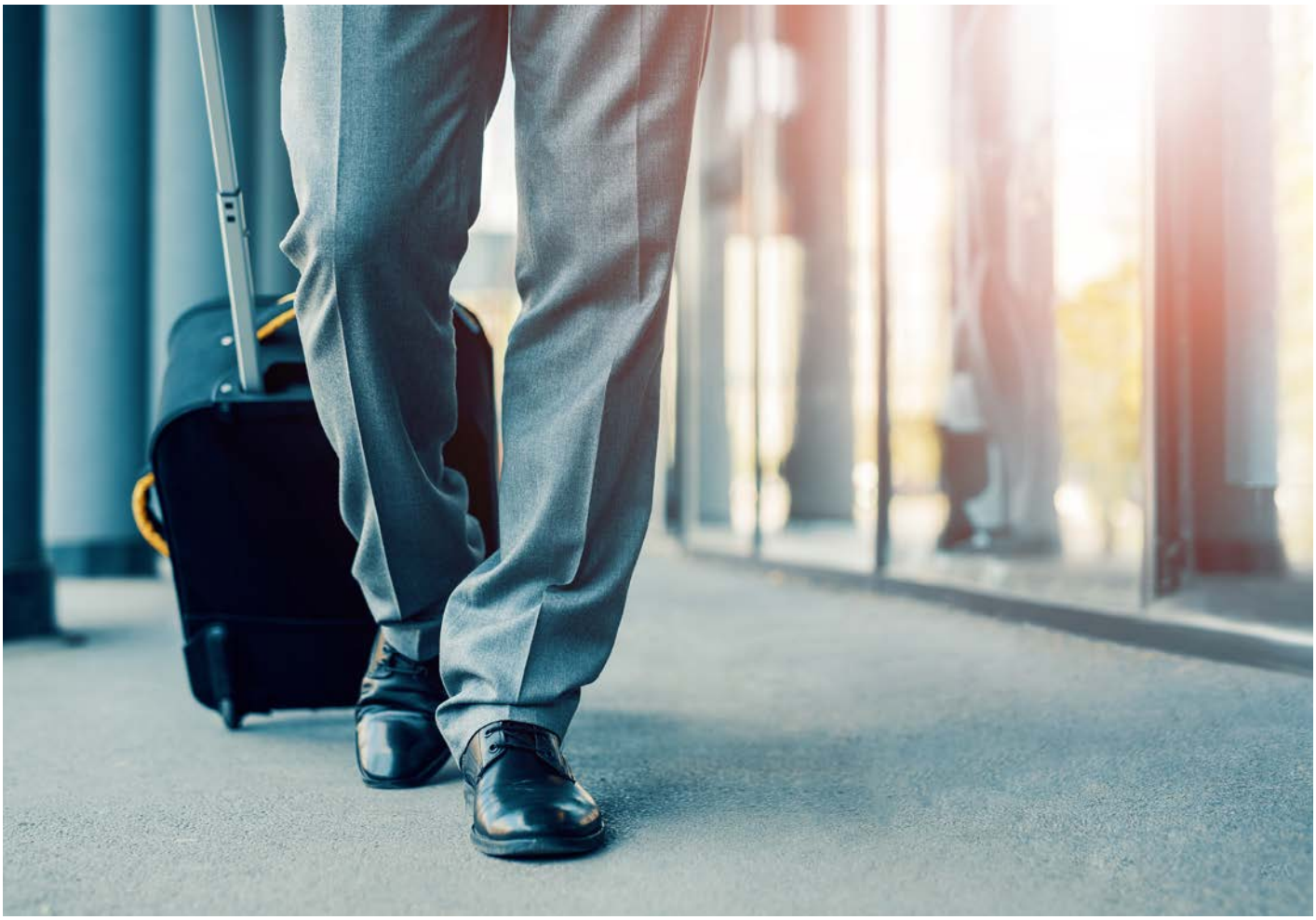
Looking first at inbound travel into the UK.

If the Spanish nationals hold Settled or Pre-Settled Status, they can continue to travel to the UK as before so long as their status remains valid and has not lapsed. They can carry out any activities whilst they are in the UK, including working in any capacity.

If they do not hold this status, Spanish nationals travelling to the UK may now require prior permission to do so, depending on the activities they will be undertaking whilst in the UK.

In some cases, the employees' activities may fall within the scope of the "permitted" activities under the "visitor" route, in which case they can enter the UK as a visitor (and will not need to make a visa application in advance or be sponsored by their employer).

However, if what they will be doing falls outside of these specific allowed activities, and, in particular, **if they will be carrying out any work in the UK, they will almost certainly require a work permit under the Skilled Worker visa or Intra-Company Transfer visa.** The business will need to sponsor these employees and will need to make sure it has applied for and obtained a sponsorship licence in advance of any travel. This will be the case, even if the visit only lasts a couple of days; the length of stay is largely irrelevant and is not the deciding factor to whether a visa is required.



If individuals enter the UK as visitors but actually end up working, they will be working illegally. This has significant ramifications for the business. The business will be guilty of employing someone illegally and could face **a fine of up to £20,000 per illegal worker**, or, depending on the circumstances, it could be committing **a criminal offence and face an unlimited fine and up to 5 years in prison.** The business will also be **"named and shamed"** and face the **significant adverse publicity** which comes with this. It could also have a negative impact on its ability to win new business, depending on the sector/nature of the business. Finally, the business is likely to have its sponsor **licence revoked.** This means that it will not be able to recruit non-UK national, non-settled talent through the work permit system, and may be barred from reapplying for a licence for anything from 12 months to 5 years (depending on the circumstances). **Any existing sponsored migrants will have their visas curtailed. In other words, they will typically be given 60 days to find another sponsor or leave the country.** This could be disastrous for the business, its recruitment plans and its sponsored workforce.

The business should take specific legal advice about its business travel on a case by case basis to understand what rules will apply.

Similarly for outbound travel from the UK to Spain, the business will need to understand the visa rules that apply in Spain to assess whether its British employees can enter without a formal work permit or not.

For tax purposes, work days in the visiting country need to be recorded and advice sought as to when a local tax liability may arise, as this can occur after far less than 183 days. Depending on the length of the assignment an A1 portable document may be required to confirm continuing social security coverage in their home scheme under EU legislation. This will still be the case post-Brexit under the detached worker rules within the Withdrawal Agreement.

This opens up a whole new host of compliance obligations when considering business travel between the UK and the EU. We are currently advising a number of employers on these tricky areas to determine the immigration requirements. We can advise on the inbound travel requirements and work with a network of European legal experts to understand the outbound requirements. For example, we are managing a large project for an international business to collate immigration advice across the multiple jurisdictions in which it operates to understand what rules will apply to British nationals looking to travel to their sites overseas.

Case Study 2

A UK based business employs an Italian national employee. They have worked in the UK for a number of years. They recently returned to Italy and, as a result of the pandemic, they have now requested to work remotely from Italy going forwards.
The business employs them under a British employment contract and only operates UK payroll. The employee can carry out their role from Italy without any issues. The employee is highly regarded within the organisation and HR would like to approve this request if possible. However, the business is concerned about the legal, tax and social security implications of agreeing to this.

This is a complicated question as there are many different issues to consider here.

From an immigration perspective, the business will want to be satisfied that the individual has the correct permission to work in the jurisdiction where they are carrying out their duties. In this case, they will want to make sure that they have the correct status to carry out their role in Italy without breaching any Italian right to work requirements. The business will need to take local advice to make sure this is the case. If they do not have the requisite permission, the business will need to understand how this can be rectified and any penalties for non-compliance.

From an employment law perspective, the business will need to understand the implications of working in Italy. It is often the case that by virtue of carrying out duties in a different jurisdiction, additional specific employment law protections may be triggered. For example, in this case, the Italian employment law protections might impact on employees' working arrangements (such as hours and holidays) or termination arrangements (such as minimum notice periods or statutory protections from being dismissed). Again, the business would need to take specific advice in Italy to understand what, if any, additional protections apply.

From a tax perspective, the tax system is not driven by EU legislation but by the bilateral agreements between the countries concerned so has not changed as a result of Brexit. Where an employee will be working from Italy on an indefinite basis going forwards they will be subject to income tax in Italy.

Additionally, though, care needs to taken that the activities of the employee themselves will not create a Permanent Establishment (PE) for the employer. The rules for when a PE are created are quite extensive but in general terms this will apply:

- Where the employee regularly works for customers in that country
- For more senior employees or directors who have the power to bind the company to contracts
- You provide accommodation for them to work at in that country (including payment of a specific allowances to the employee)
- Client facing staff who use their home address as a correspondence address for customers

For junior back-office staff who are remotely at their own cost the risk is relatively low, but certainly where senior staff, such as directors, are working overseas it is recommended that local advice is sought as to the Tax Authorities likely view of the position.

Where a PE is created this will result in Corporation Tax as well as Income Tax issues that will require registration locally with the Tax Authorities.

For social security, it would have been possible for the employee to remain in the UK scheme had they been in Italy on temporary assignment, but where they are moving there permanently Italian social security will be due. Many EU countries have much higher social security contribution rates than the UK, such as Italy, with employer rates reaching 30% - 40% in some instances. This could therefore have a significant cost impact for the employer.

The same sorts of issues would apply, if the situation was in reverse, with an employee wanting to relocate to work remotely from the UK. Again, the business would need to understand the immigration, employment law and tax and social security ramifications of this arrangement, along with the potential penalties for a failure to comply.

We are increasingly advising on these sorts of queries in the fall out from the pandemic, and are well used to liaising with a trusted network of European lawyers and accountants to help businesses navigate these issues.

Next steps

If your business currently employs staff who travel from the UK to Europe or vice versa as part of their role, or who work for your UK business from other jurisdictions, you will need to take urgent advice on the compliance issues which will apply post-Brexit.

How we can help?

Brabners and Saffery's can help you navigate these issues by:

- Auditing your current business travellers to determine your business' legal and compliance obligations;
- Advising on the immigration requirements for business travellers into the UK;
- Advising on any visas required to enter the UK, and, if required, helping the business obtain a sponsor licence and the relevant visas for its employees. More information can be found **here**;
- Advising on your employment documentation to ensure it is legally compliant and fit for purpose post-Brexit: policies and procedures, contracts of employment, offer letters and secondment agreements;
- Helping you to challenge and mitigate any non-compliance penalties;
- Liaising with legal advisers across Europe (or overseas in house counsel) to provide joined up advice on these issues;
- Providing advice and assistance in relation to the tax and social security issues for globally mobile employees;
- Liaising with local advisors who can confirm local tax treatment and offer payroll solutions where required.
- Assisting in preparing tax returns for such employees.

The Team

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