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Employers of Record: The Solution for a Compliant “Work-from-Anywhere” Future?

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1. Introduction

Compliance is an essential component of Global Mobility. If employers are not compliant, this can have an immense and often negative impact not only on the employer but also the employee. The importance of this topic has even further increased with the global pandemic and the consequent rising interest in international remote work, which is also often called “work-from-anywhere”.

While the concept of Employer of Record services has already existed before, it is now quickly becoming more relevant and is considered by many companies as a possible set-up for international remote work. Whereas an Employer of Record has until now mostly been subcontracted in order to “test the waters” and enter new markets and countries, many companies are now investigating the concept as a potential solution for work-from-anywhere strategies and policies. One motivation for using Employer of Record services is to ensure compliance, inter alia regarding taxation, social security and labour law, while offering their employees the possibility to work remotely from abroad.

It has by now become clear that work-from-anywhere will be the future of work and, therefore, many companies are currently trying to find permanent solutions how this can be done. Global Mobility professionals need to support their companies by proactively analysing possible set-ups and making sure to remain compliant. This is of special importance, since also the special agreements that several countries set up bilaterally due to Covid-19 are soon ending and the compliance risks are increasing even further. These risks can impact the employer as well as the employee and can have far-reaching and long-lasting consequences, such as, for example the accidental formation of a permanent establishment. This thesis is going to analyse the use of an Employer of Record and if it is a viable solution that should be considered, especially with regard to taxation, social security and labour law.

Due to the novelty of work-from-anywhere and the heightened interest in Employer of Record services within this context, only very limited academic literature can be found on these topics. This research paper will lay the foundation for research within this field and will support strategic decisions in the Global Mobility field by providing an analysis of the compliance implications of international remote work and

the relevance of Employer of Record services for a compliant work-from-anywhere future.

This will be done by first providing a theoretical background and introduction to the concepts of work-from-anywhere as well as of Employers of Record as a basis for this thesis. It will be followed by an analysis of the varying implications and risks of international remote work. For this, the focus will lie on taxation, social security and labour law implications, as they are three major fields of compliance and an important factor when deciding if using the services of an Employer of Record might be a viable solution.

Then, the methodology applied in this thesis will be introduced. The methodology for the analysis is a literature-based research methodology. As a result of the novelty of work from anywhere and the use of Employer of Record services within this framework, only little academic research has been done in this field, so far. Therefore, the usage of a literature-based research method will lay the foundation for research regarding Employers of Record within the field of international remote work.

An understanding of the implications and possible liabilities of work-from-anywhere is essential for this thesis, as the following chapter will analyse the implications the usage of Employer of Record services might have on the aforementioned risks of work-from-anywhere. For this, the implications of taxation, social security and labour law will individually be analysed within the context of Employer of Record services. The analysis will show, if the risks and liabilities can be covered by an Employer of Record and which liabilities might still remain, if any.

The analysis will be followed by the investigation of the general advantages and disadvantages of an Employer of Record, with a focus on Global Mobility and the potential implementation of an Employer of Record as a compliant solution for a work-from-anywhere future.

These findings will finally be discussed, and an evaluation will be given if Employers of Records should be taken into consideration as a possible fixture in international company structures for a compliant set-up of international remote work and what the findings might mean for Global Mobility practitioners.

2. Theory

In order to analyse Employers of Record as a potential compliant and viable work-from-anywhere setup, it is important to understand the work-from-anywhere movement as well as the concept of Employers of Record in general. Therefore, this chapter firstly reviews international remote work and its changes within the last few years and the rising demand for increased flexibility. This is followed by a short overview of Employer of Record services and their development in recent years.

2.1. “Work from Anywhere”

Remote work had already been on the rise before 2020, even though the movement has been highly accelerated by the global pandemic since then. The shift towards work-from-home slowly began in the 1970’s, with the first implementation of work-from-home policies within companies. This trend further increased in the 2000s due to the ongoing digitalization as well as the advantages remote working entailed. While people had already been wondering before the pandemic if it is still necessary to regularly be in the office at least within knowledge-based workplaces, the worldwide lockdowns demonstrated that permanent remote working, or even international remote working, also called “work-from-anywhere”, is possible (Choudhury:2020). As an example, according to the Stanford Institute for Economic Policy Research the number of full-time remote workers in the U.S. has expanded by 40% between mid-2020 and the time before the pandemic (Wright Lindsey Jennings:2021).

Since then, it has become apparent that there are several upsides to work-from anywhere. It can have not only a positive effect on the employees, but also on the business. For the individual, remote working offers a flexibility and freedom, which is often required and desired due to dual careers or in order to reconcile family and working life. According to a study by Stanford University, a performance increase of up to 13% could be noted due to virtual work, in addition to a reduced turnover, increased employee engagement and a higher overall work satisfaction (Debner:2020). Another important factor is the cut of commute time, which further increases the

flexibility and productivity of employees, while at the same time contributing positively to a significant reduction in emissions. A further advantage in particular for the employer is, for example, the reduction of real estate costs, because less office space is required (Choudhury:2020).

One of the key reasons why work-from-anywhere is the working model of the future, is the current war on talents. Due to skill shortage, it is not sufficient anymore to move people to roles and the new approach will be to move roles to the people, instead.

In the Harvard Business Review article “The Implications of Working Without an Office” from 2020, Ryan Smith states that there is no turning back from the pandemic work-from-anywhere policies as a result of the ongoing war on talents. He elaborates that several companies have already decided to offer flexible remote working in the future and states: “They’ve already set the terms for what the future is going to be and when organizations are competing for talent, we’ll all be competing against that.” If a company wants to be able to compete for skilled workers, work-from-anywhere will be indispensable, especially since workers are starting to demand more and more flexibility regarding their working models. The survey from Harvard Business School presents that virtual work during the pandemic has overall been successful and that 61% of the participants prefer to work 2-3 days per week from home in the future, while 27% even hope to work completely from home on a permanent basis (Reynolds:2021). According to a recent Gallup poll in the U.S., this number is even higher: Two-thirds of the participants who have been working remotely during the pandemic wish to continue to do so (Wright Lindsey Jennings:2021).

A work-from-anywhere future will also enable more possibilities regarding remote international talent sourcing strategies. This way companies can reach also skilled workers from different countries and target cost-savings by sourcing talent from countries with lower costs (Debner:2021). In particular many millennials wish to work as “digital nomads” and can be recruited more easily by offering international remote work.

All in all, it becomes apparent that the concept of work-from-anywhere will be the working model of the future, due to a rising demand for flexibility and the competitiveness between companies in the war on talents. International remote work

can lead to higher work satisfaction as well as increased efficiency, while also enticing talents and millennials. Instead of prohibiting work-from-anywhere due to the high possible risks and complexity, companies should, therefore, analyse possible solutions in order to be able to offer international remote work and proactively set up standardized processes and work-from-anywhere policies within their company.

2.2. Employers of Record

Employers of Record are third-party organizations that hire and pay an employee on behalf of another company and take responsibility for all formal employment tasks. Thus, they serve as a “go-between” between the client company and its employees. Generally, businesses take over all employment tasks, costs and liabilities for their employees once they hire them. If a business prefers not to carry this responsibility, hiring an Employer of Record can be a possible option.

No one can say precisely when the first Employer of Record solutions were introduced as the term “Employer of Record” was not used at the time and the practice was largely unregulated until the 1980s, so few records were kept. It is, however, known that the concept originally stems from the U.S. (Boquen:2021).

This service is usually contracted for the global expansion of companies due to the complexity in international scenarios such as varying regulations and tax laws in different countries. Hiring an Employer of Record potentially negates the requirement of setting up a local entity via incorporation and registration and transfers payroll and HR functions from the company to the Employer of Record. They specialize in setting up entities around the world, so that the local infrastructure in countries is already in place and employees can be employed and paid on behalf of the company (Safeguard Global:2020).

The services of an Employer of Record usually entail all “legal and regulatory requirements of immigration, employment and payroll” (Shield Geo:2017). This includes, amongst other things, the onboarding of employees, background and screening checks, depositing and filing taxes, processing payroll, operating HR administrations as well as producing and maintaining employment contracts. In addition, they also act as an advisor towards the company regarding labour law

requirements in the host country such as mandatory notice periods, termination rules and severance pay. The work relationship, including position duties, projects, compensation and termination remain with the client (Safeguard Global:2020).

Furthermore, it is important to note the differences between an Employer of Record and a Professional Employment Organisation, which are both types of Global Employment Companies and are often confused with each other. In contrast to an Employer of Record, a Professional Employment Organization is generally in a co-employment arrangement with the company. Accordingly, the company also needs to be registered in the host country and both the Professional Employment Organization and the company share the legal responsibility, whereas with an Employer of Record it carries the legal responsibility, the company does not need to be registered (Safeguard Global:2020). This “co-employment model” of a Professional Employment Organization is only truly defined in the U.S. and recognized by legislature. Therefore, such a setup can commonly be found in the U.S. (PEO worldwide:2021).

Due to the global pandemic and the rise of the work-from-anywhere movement, more and more companies are now considering the service of an Employer of Record. Instead of using this service for the expansion into new markets, they are set up in order to offer flexible international remote work for the employees (Debner:2020). Since this is a rather recent development, the amount of research on the viability of this setup is still insufficient and will, therefore, be analysed in this paper.

3. Implications and Risks of “Work-from-Anywhere”

The rising movement of work-from-anywhere does not only bring positive aspects such as an increased flexibility for employees but can also entail various extensive and long-lasting risks due to the complex and varied laws and compliance regulations in the different countries. When investigating the viability of Employer of Record, it is of special importance to gain an understanding of the implication and risks it might entail, since this can easily tip the scale regarding the question if the concept is viable or not. Because of the vastness of possible complications and risks of international

remote working, this chapter will focus and give an overview of the main risks and compliance issues within the fields of taxation, social security and labour law.

Taxation across borders is complex and the rules often differ significantly from one jurisdiction to the next. In many countries, the taxation of employment income is the biggest share of revenues generated by governments. This complexity is heightened even further with a global work force. Employers are obligated in most countries to register with the local tax authorities and pay the correct withholding taxes to the right tax authorities. Whereas employers are generally subject to taxation in the place where the employees perform the work, employees are generally subject to taxation in the country or countries where they reside. This can result in tax obligations which need to be carefully tracked due to payroll withholding obligations in the relevant countries (Brand:2020). The risk of non-compliance can be rather high in this case if the employer is not aware of the residence of his employees and the obligations that might arise from this. The correct execution of withholding obligations regarding employment taxation is often complex, time-costly and prone to errors.

One of the greatest taxation risks of international remote work is the accidental creation of a permanent establishment. Engaging an employee in a country where the employer does not have a local corporate presence, can potentially cause the establishment of an entity in that country for corporate tax purposes, also known as a taxable permanent establishment. This can lead to the local tax authorities seeking payment of taxes in the corresponding country (Oakley:2020). Therefore, if the risk of a permanent establishment is particularly high in a certain country and is likely unavoidable, it can be advisable to consciously establish an entity in the concerning country, instead (Oakley:2020). Article 5 of the OECD (“Organisation for Economic Co-operation and Development”) MC defines in seven paragraphs the terms, conditions and requirements for a PE (Castro 2012: 127 f.). Overall, it is often a rather grey area at what point exactly a permanent establishment has been created. Therefore, many companies might only become aware of this once it is already too late, and the permanent establishment can no longer be averted. The risk of a permanent establishment depends largely on specific facts including the role of the individual(s) as well as the company’s local activities. However, any sales activity or the generation of revenue in a country is often a clear indicator (Oakley:2020).

In recent years, this risk has been increasing even further due to the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (commonly known as "BEPS 2.0"). BEPS 2.0 was first initiated at the beginning of 2019 and aims to introduce measures to ensure a global minimum level of taxation, with a focus on the introduction of new regulations to address the tax challenges of the digitalization of the economy. Furthermore, it plans on granting new taxing rights to the countries where users of highly digitalized business models are located (Bode:2020). The framework consists of two Pillars. In short, it can be said that Pillar One aims to develop a new right to tax highly digitalized companies as well as consumer-facing companies who reach consumers in a jurisdiction through digital means, whereas Pillar Two introduces the notion of a global minimum profit tax (Chua:2020).

On Friday October 8, 2021, the OECD announced that 136 Nations, including the United States and the rest of the G20, have now signed on to the OECD/G20 Inclusive Framework (Richard:2021). BEPS 2.0 is relevant with regard to potential implications and risks of work-from-anywhere because of the impact it is going to have on permanent establishments. An example of this are the new nexus rules which would impact organizations with limited presence. They would be subject to tax under Pillar One regardless of local presence (or lack thereof), if they meet a certain revenue threshold. Moreover, the implementation of BEPS 2.0 is likely to increase the number of audits within companies which, consequently, increases the risk of tax authorities also auditing set-ups such as international remote work regarding tax compliance (Chua:2020).

Regarding social security, there are also some notable risks involved with international remote work and global nomads. Similarly to local tax authorities, employers are also obligated to register with the local social security authorities. In addition, in most countries in Europe “there are minimum employment benefits that need to be borne in mind, including, for example, contributions toward employees' statutory health, pension and unemployment insurance” (Oakley:2020) that are also often withheld via payroll. Since these obligations are mostly country-specific and can change very quickly, the lack in local expertise regarding social security regularly causes non-compliance that can often lead to penalties (Oakley:2020).

Lastly, there also can be implications and risks regarding labour law in case an employee works remotely from abroad. If they work from a different country, local labour law of the host country may apply. Not only can this lead to reporting regulations that are required from the employer, but also local employment laws can apply which can have a significant impact on the employment relationship. Examples of differing local labour laws can be, for example, notice periods for terminations, the minimum or maximum length of employment contracts, different regulations regarding severance pay or even the applicability of public holidays and minimum wages. The shift in applicable labour law can also be highly relevant and cause unforeseen complications in possible labour disputes (Wright Lindsey Jennings:2021). A final area of possible complications or risks within that regard is immigration law. Even though, business visits are generally acceptable within Europe, visas are still required for lengthier work-related stays and depending on the work activity within that country. Not abiding to immigration laws can also potentially lead to high penalties and fines (Oakley:2020).

All in all, it can be said that even though the topic of work-from-anywhere carries high potential, there is a vast number of risks that need to be considered and, ideally also managed, before a company can implement a work-from-anywhere strategy.

4. Methodology

The methodology for the analysis in this paper is a literature-based research methodology. This was chosen, because of the novelty of “work from anywhere” and the use of Employer of Record services within this context. Currently, only very limited academic literature or papers can be found regarding “work from anywhere” and, especially, employers of record. Additionally, the literature and information that can be found so far for these two topics is fragmented and the potential of employers of records regarding compliance has not been analysed with regard to “work-from-anywhere”, yet.

This thesis is based on the hypothesis that employers of record provide a viable and compliant solution for companies who decide on implementing a work-from-

anywhere policy or mentality. This hypothesis is going to be analysed by researching and comparing the advantages as well as disadvantages of employers of record and if this creates a compliant set-up regarding taxation, social security and labour law. The findings are going to be discussed and evaluated in order to provide an answer if the hypothesis proves true or not.

Most companies are still in the process of setting up a policy or guidelines regarding international remote work. Therefore, not many companies have implemented an Employer of Record as a solution for “work from anywhere”, yet, which eliminated a quantitative or qualitative research as a useful and valuable research methodology.

Instead, this field of research currently requires a foundation for knowledge development, which supports strategic decisions within the global mobility field and assists with the development of new guidelines or policies for the “new normal” of international remote work. With this literature-based research methodology, the thesis can potentially incite new directions or possibilities for the global mobility field.

5. Analysis

The following chapters are going to analyse the potential of Employers of Record as a solution for a compliant work-from-anywhere future by investigating three of the largest and most important compliance fields: Taxation, social security and labour law. Each subchapter is going to focus on one of the fields and is going to analyse the implications an Employer of Record has on them. This investigation is then going to be followed by a chapter on the analysis of the advantages and disadvantages of Employers of Record. The results are going to be discussed in order to demonstrate if the hypothesis proves true that Employers of Record are going to become a viable and integral part of compliance within Global Mobility and a potential setup for a work-from-anywhere future.

5.1. Tax Implications of an Employer of Record

The minimization or, ideally, elimination of taxation risks and liabilities is one of the main motivations for companies to decide on hiring the services of an Employer of Record. This chapter is going to analyse if an Employer of Record actually offers a tax-compliant set-up, with special regard to international remote work.

One of the main risks regarding taxation is the correct withholding of personal income taxes with the responsible tax authorities, which is typically done by complying with payroll withholding obligations. For this, employers often need to be registered with the tax authorities in a country and need to be aware of any specific local taxation laws or regulations. Since the obligations and laws vary greatly from country to country, staying compliant proves exceedingly time-consuming, complex and is also rather susceptible to errors. This is especially the case if an employer needs to do so in a foreign country where an employee might be working remotely and might, therefore, become subject to taxation. Payroll and tax departments of companies are generally specialised in local laws and regulations and lack the expertise regarding taxation in the host country.

This is not the case for Employers of Record. They have various entities set up around the world with local payrolls in place and are registered with the necessary tax authorities in the countries. Therefore, they are quite knowledgeable about any local obligations, especially since they are, inter alia, in charge of the processing and funding of the payroll and depositing and filing of taxes for the company in the relevant country. As mentioned, the Employer of Record is registered with the tax authorities as the employer of staff. Consequently, they are obligated to withhold certain taxes from employee payments, in particular income tax and payroll tax contributions. They are required to submit those amounts to authorities on a regular basis and comply with any reporting requirements (Boquen:2021). Taking all this into consideration, it can be stated that the use of an Employer of Record is tax-compliant with regard to personal income tax.

It is also important to consider the implication of the OECD Model Tax Convention when analysing any kind of cross-border movement regarding taxation, in particular the Articles 15 and 16 when analysing personal income taxation. As a summary, Paragraph 1 of Article 15 states that the remuneration received by a person

is taxable in the country or state where the work activity was performed. This is followed by the general exceptions to this in Paragraph 2. It states that the country of residence may tax these activities instead of the country of employment, if the following three conditions are met: a) the employee's presence in the state of employment does not exceed 183 days in any twelve-month period commencing or ending in the fiscal year concerned, b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other state, c) the remuneration is not borne by a permanent establishment which the employer has in the other state. If all three conditions apply, the employee remains taxable in the country of residence. It is also important to take into account Article 16, which states that "Directors' fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State" (OECD:2017). Therefore, any international remote work of members of the board of directors involves additional risks or implications that need to be considered carefully in advance.

In the context of Employers of Record, the implications of Article 15 of the OECD Model Tax Convention may vary depending on the reason for making use of Employer of Record services. In most cases, it will most likely be one of two set-ups. The first main set-up is that an Employer of Record is hired in order to expand into a new market. In this scenario, the employee is usually a resident in the same country as the company and it is most likely advisable for the company, and particularly the employee, to fulfill the prerequisites of Article 15 Paragraph 2. Since the remuneration is generally charged by the Employer of Record to the company and an Employer of Record is not considered a permanent establishment, the company would need to make sure that the 183 days are not exceeded according to Paragraph 2. If all this is fulfilled, the employee may remain taxable in the country of residence, which would most likely increase the attractiveness for many employees since they could avoid various tax complications this way. The second main set-up is that employees are regularly moving between different countries *inter alia* for personal reasons. As analysed in the previous chapters, the past few years have shown an increasing interest in work-from-anywhere and the need for the ability to move jobs to the people due to the current war for talents, which might be an incentive for companies to consider Employer of Record

services. In line with Paragraph 2 of Article 15, Employers of Record offer employees the possibility of high mobility between different countries because of their various entities around the globe. If the conditions of Article 15, Paragraph 2 are met, the employees are able to remain taxable in their country of residence.

Employees that are particularly mobile, so that their tax residence cannot easily be determined anymore, are often referred to as “tax nomads” or generally “digital nomads”. Because there is no uniform international tax law regarding taxes for digital nomads, this can often involve many tax risks and issues. Different countries have different ways of determining tax residency and various factors such as nationality or the perceived tie to a country can have an impact on this (Paolo:2021). Therefore, it is important for such an employee to analyse their tax residence carefully and communicate it to their employer.

However, particularly if there might be adjustments in international taxation law in the future in favour of digital nomads, Employers of Record might prove an attractive option for highly mobile employees due to the high flexibility and possibility of transferring an employment contract rather easily to a different country. This can potentially support the employees’ needs with regard to their tax residency in the future.

An especially interesting field to analyse is the compliance of Employers of Record regarding the risk of permanent establishments, since contrasting information can be found on this. The creation of a permanent establishment in another country can be considered one of the highest risks regarding international remote work due to the long-lasting effects and high costs that accompany it. The possible avoidance of setting up local entities and of accidentally creating a permanent establishment are one of the main aspects of the heightened interest of companies in Employers of Record regarding international remote work.

Employers of Record often advertise with the statement, that their services are tax compliant, and that no legal entity of the company is required. An example of this is the following:

“[...] that’s exactly what they offer to organizations that are looking to expand into new global markets: the ability to employ abroad without having an entity,

along with the in-country expertise to do so compliantly” (Safeguard Global:2020)

With this, it needs to be kept in mind, that the quote above is also used in order to advertise their services to companies. It is, therefore, not in their interest to deter any possible clients by highlighting the subject of permanent establishments. Nevertheless, this leaves the impression that no risk of a permanent establishment applies when making use of Employer of Record services.

In contrast, another article states that corporate tax risks, including the risk of creating a permanent establishment in the host country, still apply. It highlights that the use of a Professional Employment Organization such as an Employer of Record does not minimize the risks regarding permanent establishment. Because of this, full liability for any taxable permanent establishment is usually contracted out and the liability remains with the company (Oakley:2020).

Yet another evaluation has been given by PwC (2018). They argue that the risks of permanent establishment, even if not eliminated, can be reduced by using a Professional Employment Organization.

The ambiguity regarding the evaluation of permanent establishment risks of Employers or Record most likely stems from the general grey area of permanent establishment. However, it still demonstrates that the use of Employer of Record services does not ensure a completely tax-compliant set-up. Whereas it is compliant regarding personal income tax, the risk of permanent establishment, while reduced, still remains. Especially with the upcoming BEPS 2.0 and a rise in audits, this risk might further increase in the future. Since the risk of a permanent establishment is heightened by the permanence of the set-up, the use of Employer of Record services proves less of a risk as a temporary set-up or solution.

5.2. Social Security Implications of an Employer of Record

One major aspect of compliance is the correct payroll and benefit processing of employees, including any social security obligations. Otherwise, this can have a tremendous negative impact and far-reaching consequences especially for the

employee and even lead to an absence of coverage. It is, therefore, highly important to identify the social security risks of international remote working and how compliant Employers of Record are within that regard.

As identified in chapter three, one of the main risks of work-from-anywhere regarding social security is insufficient knowledge of the local compliance regulations, resulting in missing or incorrect registrations and the non-compliance of social security obligations within that country. This does not only have long-lasting effects and a negative impact on the employer, but also has far-reaching consequences for the employee. At worst, this can lead to a double burden and, consequently, high unnecessary costs, or even the absence of social security coverage for the employee. This can prove fatal in case of for example an accident or incapacity for work. Therefore, it is essential that this is avoided at all costs.

When using Employer of Record services, the workers are on a local employment contract in the host country where they generally reside as well as work and, thus, they are subject to social security in that country and local social security laws apply. Due to the nature of their business, Employers of Record have established entities around the globe and all locally required registrations as an employer are already in place in the different countries. Payroll obligations, health insurance and pension contribution requirements are often complex, especially due to vast differences between different countries. The law that governs them changes frequently. However, this can be managed by the Employer of Record with their local expertise, which an organization would most likely not have when establishing an entity in a new country (Boquen:2020). In addition, they can support employees regarding the local specifications and necessary steps regarding, for example, entering the local health insurance system when moving to a new country.

Another aspect is the access to pension plans. One of the main reasons when first introducing Employer of Record services was the improved access to competitive insurance package, particularly for small and medium-sized enterprises.

All in all, Employers of Record are responsible for all legally required benefits administration in each country of operations, such as maternal leaves or paid vacation and healthcare, and provide their own insurance plans for workers. In case of non-compliance, the Employer of Record is liable, and any possible penalties are carried

by it as the legal employer. It can, therefore, be said that an Employer of Record provides a compliant set-up regarding social security for the employer as well as the employee (Simic:2021).

5.3. Labour Law Implications of an Employer of Record

Generally, making use of Employer of Record services is legal. However, restrictions might be in place depending on the relevant country. These restrictions can, for example, be time limits or necessary approvals. This is for example the case in Germany, where the German Employee Leasing Act (“Arbeitnehmerüberlassungsgesetz, AÜG”) generally restricts the usage of employment leasing in order to protect the local employment market. There, an employee can only be leased for a maximum of 18 consecutive months, before a ban of at least 3 months is required, before the same employee can be leased again (AÜG §1b). The concept of an Employer of Record also falls under this category, which negates the usage of Employer of Record services in most cases. Similar restrictions exist also in other countries.

As with the previous compliance fields mentioned, it is the responsibility of the Employer of Record to adhere to any local labour laws or compliance requirements. Since the employees conclude the employment contract with the Employer of Record, it is their legal employer. As such, the Employer of Record is the host country liaison between the employee and government authorities and responsible for any administrative tasks around hiring, from the very first to the last day of an employee’s contract. If a company decides to terminate the contract of an employee, the Employer of Record will terminate the contract and dismiss the employee. In contrast to the set-up of a Professional Employment Organization, there is no co-employment between the organization and the Employer of Record, which simplifies the set-up with regard to labour law (Simic:2021).

For all employees, the labour law of the country in which they habitually reside and work and which is also the country of the Employer of Record they conducted the employment contract with, applies. Therefore, also the local labour laws and compliance regulations apply, and it is the responsibility of the Employer of Record to

inform and advise the organization on any country-specific particularities such as, for example, contract minimum lengths, severance pay or notice periods for terminations (Shield Geo:2017).

One additional major factor is the concept of chain liability. A chain liability is in place if a company assigns certain tasks to another company in order to perform certain operations. The subcontractor might hire personnel to perform these operations or hire an employment agency to take over these tasks and a chain has been created. This is also the case when using the services of an Employer of Record. The company subcontracts the Employer of Record, who in turn might also subcontract an employment agency. If such a construct is in place, all parties in this chain can be held equally responsible.

As an example, in the Action on Scheme Arrangements Act, which came into force as of the 1st of July 2015, chain liability for salaries has been introduced. In this example, in order for the act to apply, three requirements need to be fulfilled. Firstly, a chain of companies has to exist, which can consist of international companies. All involved companies need to be performing a part of the work of the assignment. Secondly, operational or contracting agreements must be in place between the company and the subcontractor. Lastly, the employee who performs the operation has not or has not fully received his salary. If all conditions apply, the employee has the possibility to hold any pin in the chain liable for the fact that he did not receive any salary. The various pins can push that liability to the next pin in the chain until the main client is reached. This is called pre-emptive liability (Linhardt).

In the case of the usage of Employer of Record services, a chain liability might also apply depending on the countries involved and the conditions in place. Since the company is the main client in such a set-up, any liability falls back onto the company, even though the Employer of Record is officially liable. This is not only the case for payroll or salary liabilities, but can also potentially apply to taxation, social security or labour law.

All in all, an Employer of Record offers a mostly compliant work-from-anywhere set-up regarding labour law. However, this greatly depends on the country in question and if any restrictions apply or if specific requirements need to be fulfilled. Moreover, the construct of the Employer of Record as the legal employer, while the

organization maintains the substantive work relationship and remains in charge of day-to-day work activities, has potential for conflict. Even though this set-up seems quite compliant, one needs to keep in mind the risk of a chain liability. If this applies, the company as the main client always remains liable, even though the liability originally lies with the Employer or Record.

6. Advantages and Disadvantages of an Employer of Record

Following the analysis of the compliance implications of an Employer of Record, it is essential to investigate the advantages as well as disadvantages of this service in order to assess the viability of making use of it for a compliant work-from-anywhere set-up. These benefits and drawbacks include the aforementioned areas of taxation, social security and labour law, but also further areas of interest that need to be investigated. Hence, this chapter is going to give an overview of the advantages followed by the disadvantages the usage of Employer of Record services entails.

The most apparent advantage of using an Employer of Record is the overall compliance of this set-up. The previous chapters have demonstrated that it provides a mostly compliant set-up regarding taxation, social security and labour law. It, therefore, reduces the risks of international remote work for the client as well as the employees. The remaining risks that companies need to be aware of before deciding on an Employer of Record, are going to be covered under the disadvantages later in this chapter. Officially, any remaining risks are to be carried by the Employer of Record, as the liability and responsibility regarding inter alia payroll, tax law and employment relationships, including record compliance and administrative operations, lies with it. Especially with the current trend of changing local regulations on immigration and employment to prevent abuses and loss of tax revenue, this is a major benefit of an Employer of Record compared to establishing entities in the different host countries (Shield Geo:2017).

An additional advantage is the time efficiency. Setting up an entity in a new country including the required incorporation and registrations can be a highly complex and strenuous task that is hindered even further by the lack of local expertise a company might have. While this effort of establishing a new entity might be

worthwhile for the expansion into few but considerable countries, this is not an ideal fit for the scope of a work-from-anywhere future, where companies aim for the highest flexibility and access to as many countries as possible. An Employer of Record is already based in various countries and offers a great way of “testing the waters” in different countries or first entering new markets (Safeguard Global:2020).

As mentioned, employees are looking for more and more flexibility, some even wishing to work as a digital nomad. With the shortage of skilled workers and the consequent need to move jobs to people instead of people to jobs, a service agreement with an Employer of Record offers a feasible way of competing for skilled workers by advertising international remote work. Additionally, an Employer of Record is a way of swiftly adding workers in new global markets and moving them between countries due to the company’s or the individual’s needs.

Even though there are various advantages to an Employer of Record, there are also disadvantages to consider. When deciding on using the service of an Employer of Record, the organization keeps a supervisory or management role regarding the employee’s position and maintains a substantive work relationship, remaining in charge with regard to all decisions on compensation, position duties and possible termination. However, the organization is not the legal employer, anymore. This has the potential to blur the lines of responsibility between the organization and the Employer of Record and might even generate the feeling of losing control for the company, especially since the organization does not have an independent standing in the host country. It is important to note, however, that due to the contract with the client, the Employer of Record is obliged to act in the organization’s interest, as long as compliance is not at risk (Shield Geo:2017).

This loss of control is also present regarding the payroll process in the host country, which lies within the responsibilities of the Employer of Record. Even though these responsibilities are mainly of an administrative nature, many worker’s might be reluctant to be formally employed by an Employer of Record, since this might feel “less safe” and less prestigious than formally working for, for example, a renowned international company. Due to this relatively new trend of Employers of Record as a possible solution for a work-from-anywhere future, this concept is not yet well-known

outside of Human Resources and goes against traditional beliefs of a direct employment many employees might still have (Shield Geo:2017).

As stated before, Employers of Record advertise the lack of liability they provide for the company. Officially, the Employer of Record is liable *inter alia* regarding payroll, tax law and labour law and carries any possible risks and penalties or fines. However, in truth it is still possible for the company to be held liable. This is a disadvantage particularly regarding the risk of permanent establishment. One of the main reasons for taking into consideration the use of Employer of Record services is that companies wish to avoid the inconvenience, complexity as well as time expenditure of registering and managing entities in each different country. This benefit, however, can potentially be negated due to the permanent establishment risk. While an Employer of Record can minimize or at least reduce the risk of the accidental creation of a permanent establishment, it isn't fully eliminated. Therefore, the set-up of an Employer of Record as a viable solution for work-from-anywhere is not completely tax-compliant.

Moreover, another potential risk is the chain liability. Depending on the exact circumstances, due to the subcontractor relationship between the company, as the client, and the Employer of Record, as the subcontractor, the company can potentially be held liable for salary or payroll liabilities, but also for taxation, social security or labour law liabilities. Each pin in the chain can push the liability onto the next pin in the chain. As the main client, the liability ultimately falls onto the company and is not carried by the Employer of Record, as originally advertised. Even though Employers of Record still offer a high level of compliance, this potential risk cannot be overlooked.

Furthermore, a change in company culture can be a possible negative effect, especially if the Employer of Record is also in charge of recruitment processes. Although it is only the legal employer, it can nevertheless have an impact on the company culture as well as on the development of the organization. A possible countermeasure to this can be the focus of the organization on learning and development in order to ensure a common understanding of the company culture and the growth of employees alongside the company's values and culture (Simic:2021).

A further disadvantage can be legal restrictions such as time limitations depending where the organization is legally located. An example of this is Germany, where a permanent employment via an Employer of Record is not possible according to the German Employee Leasing Act (“Arbeitnehmerüberlassungsgesetz, AÜG”). The German Employee Leasing Act states that workers can only be leased for a maximum of 18 months, before a break of at least three months is necessary (Boquen:2021). Similar limitations exist also in other countries and need to be checked before deciding to use the service of an Employer of Record.

Another disadvantage to consider is that launching the services of a Global Employment Company is an extensive sourcing process that ties up the capacity of important resources within a company. Many essential functions, such as Procurement, Legal, HR; Finance or Insurance can be required. Because of this, the implementation can potentially be time-consuming. To avoid this, many companies decide on outsourcing the implementation and management of the Global Employment Company (Zovko:2015).

Lastly, the subject of cost efficiency also needs to be analysed. Depending on the size, set-up and strategy of the organization, this can either be an advantage or a disadvantage of using Employer of Record services. Generally, it tends to be cost-efficient especially for smaller companies or if only a few employees are hired via an Employer of Record per country. The costs of an Employer of Record can be highly variable and greatly depend on the services that are performed. Especially for larger companies with a higher number of employees, an Employer of Record can be a great cost factor. Commonly, the services are charged either as a percentage of the total cost of the employee to the organization, or on a set per month basis (Boquen:2021).

Once a certain company size is reached, it might be more cost-efficient to establish an entity in the host country and build up local expertise internally. In this case an Employer of Record might only be an interim solution in order to enter a market quickly. This needs to be investigated for each organization individually.

7. Discussion

The previous chapter clearly indicated that there are several advantages and disadvantages regarding Employers of Record. Overall, it can be said that the set-up is rather compliant and protects organizations from various risks when entering a new country, although not every risk can be eliminated.

When considering an Employer of Record as a possible set-up for the implementation of international remote work, the most important factors are the compliance of the construct as well as well the flexibility it provides. One of the greatest advantages of Employer of Record services is, in fact, the aforementioned flexibility. Even though the original sourcing process of the subcontractor can be quite time-consuming, the general set-up in new countries is very time-efficient and gives the possibility to enter new countries and markets quickly. Employees can be transferred swiftly and smoothly between countries and skilled workers and talents can be sourced from different countries without being limited to the country of the employer. This is also particularly attractive to digital nomads. Since the war on talents and the consequent need for new international remote sourcing strategies are some of the greatest motivations for work-from-anywhere, this is a considerable benefit of Employer of Record services.

The second major factor, the compliance of this construct, is divided between significant advantages, but also disadvantages. In many aspects, an Employer of Record offers compliance. This is particularly the case regarding payroll, social security and employment income tax. The company can profit greatly from the local expertise of the Employer of Record in the different countries. Whereas the analysis of labour law implications has shown that there are still some restrictions and risks to be found within that field, on the whole it can be said that the concept of an Employer of Record proves to be one of the most compliant possibilities as a set-up for a work-from-anywhere future. However, there are also risks and liabilities that are not covered by the Employer of Record and that a company would need to be aware of and willing to take on. The main disadvantage is the remaining risk of a permanent establishment. Another significant reason for the interest of companies in Employers of Record is that no local entities need to be set up by the companies. As this is very complex and the management of the different entities very time-consuming, it is quite attractive for

companies if this can be omitted. However, this is not completely the case regarding the risk of permanent establishment. Even if the risk can be reduced and the registration of a local entity might originally not be necessary, the risk remains that this can lead to the local tax authorities seeking payment of taxes in the corresponding country and the creation of a permanent establishment. Therefore, it still does not offer full compliance and might be the deciding factor against Employers of Record for some companies. The second major compliance risk to remain is the risk of chain liability. In short, the chain liability causes the company to potentially remain liable, in case the Employer of Record pushes the liability onto the company as the main client. Therefore, the risk of liability can also not be completely eliminated for the company. Since the risk of permanent establishment and chain liability are two severe risks, this impacts the viability of Employers of Record as a compliant work-from-anywhere solution.

A factor that greatly influences if it is a potential construct for a company is the cost efficiency. As highlighted before, this can vary greatly depending on the organization in question. Generally, it can be a cost-efficient set-up for small and medium-sized enterprises, while it is often quite costly for larger companies. Nevertheless, it might still be relevant for them and needs to be analysed. If the cost factor is too high, then it might be advisable to establish entities in the corresponding countries, instead.

It can be argued that some of the greatest detriments of Employers of Record are intangible. Its possible negative impact on the company culture needs to be taken into consideration. Since the Employer of Record is the legal employer and is often also responsible for recruiting new employees, the influence of the Employer of Record can be substantial. In order for employees to identify themselves with the organization and strengthen employee engagement it is, therefore, essential to have countermeasures in place that integrate the company culture in the mindset of the employees. Another detriment is the current standing of employment leasing within society. Currently, a direct employment is still valued highly, and many workers would be hesitant to be employed by an employment leasing company such as an Employer of Record. Consequently, hiring Employer of Record services could potentially have

a negative impact on the organization's reputation and reduce the attractiveness of an employer for skilled workers in the ongoing war on talents.

Taking all this into consideration, it can be said that Employers of Record are going to become a viable possibility for future work-from-anywhere set-ups, even though they cannot offer full compliance. Their main strength still lies in "testing the waters" of new markets without the Employer of Record being a permanent construct and, thus, reducing the remaining risks even further. However, the usage of Employer of Record services will still be an option that should be investigated, especially due to the immense flexibility and possibilities regarding international remote recruiting it offers.

A possible alternative to Employer of Record services apart from the company establishing new entities in the particular countries is, for example, the hiring of contractors. However, even though this eliminates the greatest risks such as the creation of a permanent establishment or local employment risks, this solution is generally rather difficult to set up compliantly and often carries a higher risk than Employer of Record services, due to the possibility of misclassifications. Furthermore, contractors have been under rising scrutiny by the tax authorities in Europe (Oakley:2020). Therefore, an Employer of Record offers one of the most compliant solutions for a work-from-anywhere future at the moment, if a company wishes not to have to set up local entities in all the different countries. While this might still be possible if a company wants to focus on a few countries, it is highly impractical if a vast number of countries needs to be covered. Within the context of work-from-anywhere, one major benefit of Employers of Record is the great coverage of countries worldwide and the feasibility of quick and easy transfers of workers between countries, while still being rather compliant.

Nevertheless, the strategy of an organization ultimately decides if an Employer of Record is a viable solution in each individual case.

There is a high possibility that, while it may take some time, changes will be made to legislatures due to the developing movement of international remote work. If this is the case and some further risk and liabilities might be eliminated and the concept of employer leasing loses part of its negative connotation, Employers of Record have high potential to become an integral strategy within the Global Mobility field.

8. Conclusion

“Work-from-anywhere” is assuredly going to become a vital aspect of Global Mobility in the future. Due to the global digitalization and the rising demand of employees for a flexible international remote work culture, it has become less and less important for organizations from where their employees perform their work. The pandemic has shown that working-from-home, and even international remote work, not only is possible, but can even increase productivity and work satisfaction. In addition to this, international remote work also offers the possibility to compete for skilled workers in the war on talents by applying remote international talent sourcing strategies. Since some companies already decided that work-from-anywhere is going to be the future of work, there is no more turning back, and they have set the terms for any company that might wish to compete on talents. Therefore, companies are now looking for compliant solutions of how to implement the concept of “work-from-anywhere” permanently in their company culture and policies.

One such possible solution organizations have become interested in are Employers of Record, a type of Professional Employment Organization, where they hire and pay an employee on behalf of another company and take responsibility for all formal employment tasks, so that the company does not have to register a new entity. They have set up entities around the world and are experts on local specifications, so that they are primarily used by companies as a way to enter new markets quickly and efficiently. Recently, the interest in Employers or Record steadily increased as a possible viable solution for implementing a work-from-anywhere strategy or policy.

However, there are also downsides to international remote working in the form of various implications and risks, particularly in the fields of taxation, social security and labour law. The major risks include the incorrect implementation of withholding obligations such as, for example, personal income tax, the risk of permanent establishment, non-compliance regarding social security registrations and obligations as well as possible local specifications and restrictions within countries due to labour law that may apply to an employee such as, for example, different minimum and maximum lengths of contracts, minimum wages, or termination notice periods.

As part of this thesis, an evaluation of the implications in the areas of taxation, social security and labour law of an Employer of Record as a possible set-up for international remote work has shown that, while the set-up is mostly compliant, there are still aspects of non-compliance. While the set-up of an Employer of Record is especially compliant regarding social security and personal income tax due to the subcontractor expertise of the local regulations and set-up of necessary registrations with local authorities, the major risk to remain is the risk of permanent establishment. Although the use of Employer of Record services can minimize this risk, it cannot be eliminated, and it is still possible for local tax authorities to seek a local registration of the company as well as payment of taxes in the corresponding country. Moreover, a risk that arises from the subcontractor construct between a company and an Employer of Record, is the risk of chain liability.

In addition to the abovementioned advantages and disadvantages that became apparent from this evaluation, there are further benefits as well as drawbacks that need to be considered. Important advantages include the time-efficiency and high flexibility it provides. Depending on an individual's or the company's needs, employees can easily move and be transferred between countries where the Employer of Record has an entity in place. This fulfills one of the most relevant requirements of potential solutions for work-from-anywhere strategies and has a considerable effect on the viability of Employers of Record within this field.

However, there are also potential intangible drawbacks to an Employer of Record. The traditional belief that non-direct employment is inferior is still present with many workers. They often fear that employment leasing is less safe than a direct employment and prefer to be employed directly by a company. Therefore, being officially employed by an Employer of Record is possibly less attractive for an employee and they might be reluctant to work within such a set-up. Consequently, this has the potential to negate the positive effect of international remote work when competing for skilled workers and talents.

Furthermore, the subcontracting of an Employer of Record might be subject to local restrictions or conditions in certain countries that can decrease the viability of an Employer of Record.

A last factor to consider is the cost efficiency of an Employer of Record for each company. The amount of costs can vary greatly depending on the Employer of Record chosen and the specific kind of services required. While it can be rather cost-efficient for small and medium-sized companies, the costs are often rather high for larger companies. This needs to be analysed and considered for each company individually.

The analysis has confirmed the hypothesis that Employer of Records potentially offer a viable solution for the compliant implementation of work-from-anywhere policies. Even though not all compliance risks can be eliminated, they can in large parts be minimized by the usage of Employer of Record services. Even though the remaining risk of permanent establishment proves to be a highly limiting disadvantage, this is counteracted by the immensely attractive aspect of the flexible transfer of employees between countries and the extensive coverage of countries around the world. Within this context, the concept of using Employer of Record services proves to be an ideal solution for international remote recruiting strategies in the ongoing war on talent. This flexibility can regularly not be provided if an employer needs to register and manage entities within the countries. Moreover, the company itself is generally unable to offer the same amount of coverage of different countries as an Employer of Record.

Nevertheless, there are still various disadvantages to Employers of Record, such as the potential loss of company culture and possible reluctance of skilled workers regarding non-direct employment that needs to be taken into account.

Overall, each organization needs to analyse individually if Employer of Record services fit their company's structure, strategy and needs, or if the establishment of entities in different countries is to be preferred. In this analysis, they need to balance the remaining risks against the international advantages an Employer of Record entails. This is also the case for the analysis of the cost efficiency. Depending on the Employer of Record and required services in question, they can be quite cost efficient, whereas other Employers of Record can be rather costly and can have a substantial influence on the decision. The factor of costs is also relevant regarding the sourcing of an Employer of Record. If a company decides to use these services, the sourcing process can be very extensive and requires the capacities of relevant functions within the

company such as Finance, Law, Human Resources and Procurement. Therefore, they often decide to outsource the onboarding of an Employer of Record, which again is a relevant cost factor.

Although Employers of Record services most likely won't be an option for every company in the future, it will become more relevant due to the rise in digital nomads and the implementation of work-from-anywhere policies worldwide and might even become a permanent fixture in Global Mobility strategies. This is enhanced by the fact that currently no completely compliant solution is available that offers the same efficiency and flexibility. Due to the pandemic, the need and demand for more flexibility regarding international remote work is currently on the rise. Therefore, the chances are high that laws and regulations are going to be adjusted to be more "work-from-anywhere" friendly regarding inter alia taxation in the future. Once this will be the case, Employer of Record services might become even more viable.

All in all, Global Mobility leaders and practitioners should investigate the concept of Employers of Record and become knowledgeable in this field in order to be able to proactively support their company with finding the right solution for the implementation of international remote working and to be a step ahead in the ongoing war on talents. Even if it does not prove to be a viable solution for the company in question, it is still important to investigate the possibility and, therefore, try to find a solution for the business instead of focusing on restrictions and prohibitions for the company. Since the viability of the usage of Employer of Record services depends on the specific circumstances of the company and the services that are required, an analysis is generally advisable.

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