

Lockdowns and the ‘Stranded Executive’

Mitigating Tax Risk in the Time of COVID-19

The coronavirus crisis quickly put end to much travel, be it across town or across borders. One side effect of these movement restrictions is that many executives have been unable to go into their places of employment and are currently working from home. While most of these arrangements are being carried out without significant problems, some circumstances raise particular tax risks – namely, situations where an employee of an affiliate in one country (the “Company Country”) lives in another country (the “Home Country”) and that employee is stranded, working at home, unable to go into her office in the Company Country.

An executive who finds herself in this situation must be cautious and avoid undertaking certain activities in her Home Country because the result can be significant tax costs, compliance problems, and costly controversy in multiple countries.

In particular, a home-bound executive must avoid creating a “fixed place of business” in her Home Country for the Company Country affiliate that employs her. Typically this risk arises when an executive regularly performs duties from a permanent or semi-permanent office in a different country from her country of employment. Although an executive may have no control over where she is performing her job functions right now, steps can and should be taken to mitigate the inherent risks in this situation. Above all, as described further below, it is critical that an executive working in her Home Country avoids contractually binding the Company Country affiliate for which she works.

Activities

- While in her Home Country, an executive must not bind her employer, either orally or in writing, to any contract, commitment, or legally binding obligation.
- If such matters are unavoidable during the lockdown period, a manager with the Company Country affiliate who is actually physical present in the Company Country should be given authority to handle them. The stranded executive may consult with the authorized Company Country employee and offer recommendations and guidance.
- If this arrangement requires a new delegation of authority, that delegation should be memorialized in writing, optimally signed by executives of the Company Country affiliate who are physically present there.
- Other employees of the Company Country affiliate should not be given permission to use an electronic or digital image of the stranded executive’s signature on documents that bind the Company Country affiliate (regardless of whether those employees are present in the Company Country).

- The stranded executive must not solicit business from Home Country customers for her Company Country affiliate.
- The executive should not hold herself out as being an employee of, or having authority over, any Home Country affiliate.
- As at-home orders begin to recede, possibly before cross-border travel restrictions are lifted, the stranded executive should resist any temptation to use an office, meeting space, or any other resource of a Home Country affiliate.
- Executives should return to their Company Countries to work as soon as it is permissible for them to do so.

Support and Documentation

- Any administrative or IT support for the work-from-home arrangement should be provided by the executive's Company Country employer. Likewise, any required equipment (printer supplies, replacement computers, etc.) should be provided by the employer affiliate.
- The stranded executive should retain a daily journal of her activities while in her Home Country, contemporaneously documenting – to the extent possible – the restrictions that prevent her from traveling, including both legal “lockdowns” that govern the executive's Home Country (or province, or city, as applicable) and medically required quarantine periods due to any illness of the executive or a member of her household.

For questions, please contact a member of our [Tax team](#). For more information on tax issues related to the pandemic, please visit our [COVID-19 Resources Page](#).

UPDATE: April 22, 2020

The IRS took action this week to assuage concerns that foreign executives stuck in the United States during the coronavirus crisis will inadvertently create U.S. permanent establishments for their foreign employers.

According to [FAQs](#) posted April 21 on the IRS website, certain foreign corporations will be granted a 60-day grace period during which activities performed by an affiliated individual temporarily present in the United States will not be taken into account when determining whether the foreign corporation has engaged in a trade or business in the U.S. or has otherwise created a U.S. permanent establishment.

The FAQ describes three requirements to qualify for relief:

1. The activities of the individual(s) would not have occurred in the U.S. but for disruptions to travel caused by COVID-19.
2. The individuals who undertook the activities were in the U.S. temporarily.
3. The activities took place during a self-designated “COVID-19 Emergency Period,” which is an uninterrupted period of up to 60 calendar days, beginning on or after February 1, 2020, and on or before April 1, 2020.

The FAQ broadly defines travel disruptions to include everything from government lock-down orders, to cancelled flights, to the feeling of being “unsafe traveling during the COVID-19 Emergency due to recommendations to implement social distancing and limit exposure to public spaces.”

To discuss documentation requirements and consider the merits of filing a protective U.S. tax return, please contact a member of [IP&B's tax team](#).