Learning Corner: Hiring and deploying without a local entity

Note: This article aims to outline generic principles only. Readers are strongly recommended to seek professional advice specific to their circumstances.

"Employment without establishment" refers to a situation where a business hires or deploys employees to perform work in a jurisdiction where the business does not have a physical presence or a formal legal establishment, such as a subsidiary or a branch. This concept is particularly relevant in the context of cross-border employment and international business operations. While this situation is not new, the scenario has become increasingly common with the rise of telecommuting and remote work, especially during and following the recent pandemic, which forced many employees to work remotely.

If the organization does not have a legal presence in a country, the question arises as to which entity should employ the employee. The good news is that there are various options, but it is important to understand the implications of each. In fact, while employment without establishment offers flexibility and access to diverse talent, it also requires careful planning to address legal, tax, and compliance issues. The key challenges include adhering to local employment laws, managing tax obligations, and reducing the potential exposure to "permanent establishment," which could impose additional tax burdens.

Depending on the jurisdiction and the nature of the work, different employment models may be suitable. Many organizations are already familiar with the use of Employer of Record (EOR) providers, or with the practice of hiring staff as independent contractors. These approaches have some merits, but also many limitations. In the EOR arrangement, the employee is legally employed by a third-party, which may have implications in terms of representing the parent company in the local market and participating in the parent company's Long-Term Incentive Plans. On the other hand, engaging workers as independent contractors rather than employees makes it imperative to understand the legal distinction between employees and contractors in each jurisdiction, to avoid misclassification issues.

An alternative option is to hire the employee directly through the original employing company, via a Global Employment Company (GEC). This may require registering the GEC in the overseas jurisdiction, even if it does not have a physical office. This option preserves a clear and direct employment relationship between the employee and the company, which could be relevant to the accrual of benefits and to the employee's eligibility for Long-Term Incentive Plans, such as stock options.

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Note that not all countries allow employment without establishment in the same manner or under the same conditions. Therefore, before choosing the most appropriate approach, it is important to consider several factors, including local labour laws, tax regulations, Permanent Establishment rules, immigration requirements (especially when deploying foreign staff), local statutory benefits and worker's protection.

Therefore, while employment without establishment offers flexibility and access to global talent, it is not universally permitted or straightforward in all countries. GECs can provide a centralized hub for the governance, monitoring and coordination of employees working in locations with no establishment, and can also act as the single interface for EOR providers, if necessary. Regardless of the option selected, businesses must carefully navigate local laws and regulations, often with the help of experts, to mitigate risks and ensure compliance while benefiting from the advantages of a global workforce.