

Remote Working – tax and legal considerations

One of the most significant impacts of COVID-19 on employers globally has been the accelerated need to consider working arrangements. Employees now wish to work more flexibly, and organisations that can offer this are more likely to win the war for talent in a tight labour market. It has been estimated that by 2030, up to half the labour market will be Millennials who favour flexibility over remuneration.

This **is the new normal**. It has been normalised by a shift in tech-enabled workforces, but began as a temporary solution necessitated by managing the health and safety of employees and their families.

As remote working becomes the new normal, a range of issues can arise for employers if they do not consider the full impact of their employees working remotely, whether domestically, or overseas on a working holiday or for a longer period of time on a more permanent basis.

One of the first things to consider is understanding **whose responsibility it is to ensure the organisation is compliant** when employees are working remotely. Is it payroll, finance, the in-house tax team or HR? Our experience is that it can sit with any of these functions and that should not cause concerns generally, provided that the organisation is aware of its remote workforce so that it can ensure compliance.

We recommend that organisations develop a policy to govern the range of potential remote working arrangements. This will help them to manage their obligations, the risks and costs involved, as well as setting a clear expectation for employees on what is an acceptable remote working arrangement.

International remote working

We have outlined the key factors to be aware of when developing a governing policy on international remote working. The answers to these questions should help an organisation get a better understanding of the potential risks and costs arising from having an international remote workforce.

1. What systems do you have in place to track your mobile employees? Can you record where they are working and monitor the number of days in a specific country?
2. Will the employee's presence in another country trigger employer reporting and withholding obligations there? Will social security, pension contributions, or payroll taxes be payable?

New Zealand does not have a social security system in the same way that other countries do. Nor do we have compulsory employment insurances and pension contributions (we currently only have ACC, although changes to this have been signaled). While New Zealand has a 92 day exemption for short visits by non-residents, this type of exemption is not common in many other countries.

Further, although New Zealand has a number of Double Tax Agreements with other countries that could mitigate the risk of an employee triggering certain employer reporting and tax obligations during short visits, application of these will be dependent on other criteria being met.

It is also important to note that when measuring day count thresholds all days of presence are taken into account, whether for business or personal travel. As such, any other trips to the remote working country within a 12 month period (or calendar or fiscal year, depending on the relevant Double Tax Agreement) need to be considered. Therefore the employer will need visibility over the employee's other travel to that country.

3. Could the employee's presence in a country trigger a permanent establishment there which could expose the New Zealand organisation to corporate filings and tax exposure? This depends on the tax rules of the specific country, as this is based on domestic law and the relevant Double Tax Agreement.
4. What impact will this arrangement have on the employee's personal tax position? This is typically determined by days of presence in the overseas country but can take into account other ties to that country such as citizenship, permanent place of abode etc.
5. Do your employees have the legal right to work in the country that they will be travelling to and to perform the type of work they need to for their role? Is there any flexibility in that country's immigration rules to allow online work for short periods without a formal visa, or does the business visa limit the type of work the employee is actually allowed to do? In most situations if an employee is returning to a home country of which they are a citizen, this is unlikely to be an issue. However, it may be an issue for employees working in countries where they are not citizens.
6. The Employment Relations Act (ERA) governs employment relationships in New Zealand. The territorial scope of the ERA application is not limited to New Zealand and therefore the minimum entitlements set out in the ERA (and other New Zealand employment-related legislation) will continue to apply. Depending on where the employee is working remotely, the employment could evolve to become subject to the employment laws of the relevant overseas country. This means that the employee could be entitled to the rights and benefits of that country, although this is more likely to be an issue if they remain overseas for an extended period of time.

7. New Zealand's Health and Safety at Work Act (HSWA) sets out the duties and obligations for employers in relation to workplace health and safety. Workplace includes any location where employees undertake work. As such, the employer's obligations will continue to apply, even if those employees are working remotely outside New Zealand. Proactive engagement with employees and ongoing monitoring will be vital to understanding and addressing the inherent health and safety risks.

8. Compliance with data protection and privacy legislation? The Privacy Act requires organisations to take all reasonable steps to ensure that personal information transferred overseas is protected by privacy standards that are comparable to those under New Zealand's privacy law.

9. Other general policy decisions need to be considered, such as: Who is responsible for covering the cost of travelling overseas (airfares, managed isolation, work from home set up costs)? What happens if the employee is unable to return to New Zealand when expected? Will the employee be expected to work in a designated workplace or work from different locations? Will the employee be expected to work within certain hours and will those coincide with New Zealand's time zone? Do employment agreements reflect remote working arrangements?

The specific implications of any international remote working arrangement will depend on a number of facts including, but not limited to:

- the jurisdiction the employee will be based in;
- the duration of the remote working arrangement; and
- the individual employee's personal circumstances.

It is important to consider the implications of each remote working arrangement on a case-by-case basis. However, coming up with a policy with acceptable parameters e.g. time frame, allowable activities and locations, will assist with managing the above risks.





Domestic remote working

Multiple workplaces – what is a workplace?

The flexibility afforded under remote working policies and practices puts focus on where an employee's workplace is. This can have other implications, such as what allowances or benefits should be provided to support the employee, are these subject to tax or not, and how does this impact the employee's KiwiSaver, social welfare entitlement etc.

One of the common issues is whether tax applies if an employer covers the cost for an employee to travel from home to a client site or another workplace of their employer. Inland Revenue released "Operational Statement 19/05: Employer provided travel from home to a distant workplace – income tax (PAYE) and fringe benefit tax" to clarify the tax position on travel from home to a distant workplace provided by an employer.

In light of this statement, employers need to consider a number of factors when determining whether employer provided travel can be appropriately paid as non-taxable, including:

- Is this a one-off or only occasional payment for travel?
- Is the travel necessary for the employee to meet their employment obligations?
- Does the travel relate to a temporary posting or secondment up to two years? (e.g. a posting to another office in a distant location for a 12-month period)
- Does the employee also genuinely work at a hometown workplace? (noting that, in relation to travel, home can be considered a workplace for the multiple workplace approach in certain circumstances)
- Does the employee have specified days when they are required to work from home?

Typically, an employee does not have multiple workplaces just because they can choose to work from home from time to time. Rather, there needs to be a more defined requirement stating when the employee's place of work is their home and when it is not.

Further, whilst the Commissioner accepts that home is a workplace in the context of travel, the same principle does not extend to the provision of accommodation. You may need to consider whether any accommodation provided would create a PAYE liability.

FBT and motor vehicles

Inland Revenue has made it clear that any time a motor vehicle is made available for an employee's private use, an FBT liability will arise (unless an exemption applies). An employee's use of an employer-provided vehicle for travel between home and work has long been established as 'private use'.

This typically means that (even where there is a genuine private use restriction) when an employee is able to take a vehicle home, the vehicle is deemed to be made available for private use.

However, Inland Revenue has also recognised the court's intention that no private benefit arises from travel from a home, if the home is the employee's workplace. For example, if a sales representative works from home when they are not visiting clients, they would be considered to be on-work as soon as they leave their home workplace with the vehicle.

This means that under remote working arrangements it is possible for situations to arise where a vehicle, provided to an employee for work travel, that essentially entails travel to and from that employee's home, is not subject to FBT (provided there is also a genuine private use restriction).

These situations will largely depend on whether there are business reasons that dictate the employee's home is a genuine workplace. Employers need to carefully ensure that the facts of their case support this approach before concluding there is no FBT.

WFH assistance

Many employers have chosen to assist employees with equipment to support them working from home. The motivations for employers to provide their workers with equipment can be due to factors such as:

- Ensuring employee productivity;
- Enhancing employee satisfaction and retaining employees in the face of the "Great Resignation"; and
- Meeting employer health and safety obligations.

Regardless of the motivations, employers will need to consider the most suitable mechanism for providing employees with equipment.

\$400 Safe-harbour payment

Inland Revenue's Determination EE003 provides the ability for employers to pay their staff a \$400 non-taxable allowance under a "safe-harbour" amount. As a "safe-harbour" amount, employers do not need to obtain evidence of what the money is spent on for it to be tax-exempt. However, this payment is intended to assist employees to acquire equipment to enable them to work from home and, importantly, the payment should reflect expenditure or a loss incurred by an employee (or likely to be incurred).

Before making such a payment, employers will need to consider whether it is appropriate in all circumstances, such as where employees are not working from home currently but could be expected to in the future. It is important how the policy around this payment is written and communicated. This is not an opportunity for employees to simply get \$400 tax free.

Other safe-harbour amounts

Determination EE003 also provides for other safe-harbour amounts to be paid to employees to assist with costs associated with working from home. Anecdotally, we have not seen many employees provide these amounts.

- First, a tax-free payment of \$15 per week can be made to employees to reflect the business-related portion of household costs as a result of working from home, for example utility bills and internet bills.
- Secondly, a tax-free payment of \$5 per week can be made to employees to cover the business use of an employee's private telecommunication costs.

We note that Determination EE003 (and its precursors) were introduced as a response to the COVID-19 lockdowns and it is due to expire on 31 March 2023. There is no indication of what Inland Revenue is planning on doing post this date.

Reimbursements

Alternatively, employers can make a tax-free reimbursement to an employee for the cost of working from home equipment. They can do this to the extent that the employee would have been entitled to a depreciation deduction on the asset in the current income tax year if the employment limitation did not exist.

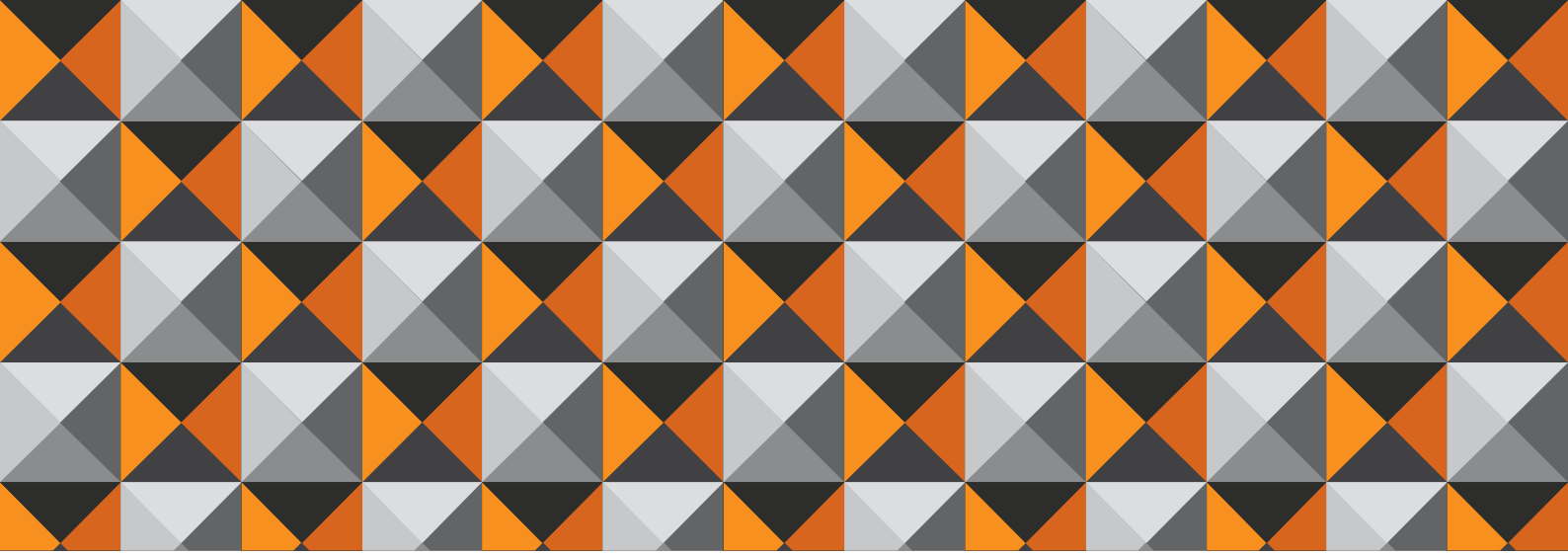
It is important to note that unlike the safe-harbour amount, evidence must be obtained and held to prove that the equipment is intended for use by the employee for their employment. Further, the amount of depreciation that could theoretically be claimed must be relative to the proportion in which the employee uses the asset for their employment. As such, 100% of the depreciation claim amount of an asset can be reimbursed tax free only when it can be evidenced that the asset will be used exclusively for employment purposes.

Equipment on loan

The provision of equipment this way falls under the FBT regime. However, provided the equipment is intended to be used primarily for employment activities and remains the property of the employer (i.e. it is required to be handed back when it is no longer needed), FBT will not be payable under the 'business tools' exemption, provided that it has a cost of less than \$5,000 inclusive of GST.

If the employee is subsequently allowed to keep the equipment and not hand it back to the employer (e.g. in the event they leave their job), then FBT would be payable on the market value of the equipment at that time.

However, where an employer simply gifts equipment to staff (i.e. gives every staff member an office chair to keep), then this would attract FBT. Similarly, if an employer provided vouchers to staff to purchase equipment for themselves, this would also give rise to FBT.



Final thoughts

Inland Revenue has so far stopped short of issuing any comprehensive guidance in relation to the full range of remote working and flexible working. However, organisations are increasingly being asked by employees if they can work from overseas (be it temporarily through extended leave or permanently), or to make working from home a permanent feature of their employment. Coupled with an increase in creative remuneration packages in an effort to retain employees, we anticipate this may be an area of increased focus for Inland Revenue over the next couple of years.

Whilst new arrangements need to be considered, so too do historical ones. There are likely certain allowances and benefits embedded in employment agreements, or in fact being provided to employees, that could no longer be appropriately considered reasonable or non-taxable. For example, if an employee has previously been provided a non-taxable additional transport allowance but now works from home for a significant portion of their time, the extent to which such an allowance could reasonably be non-taxable will have changed.

As remote working, whether overseas or within New Zealand, is becoming the new normal it is important employers have complete oversight as to where their employees are working and have a policy in place to provide guidance as to what is acceptable. This should enable employers to manage compliance and mitigate any tax and employment law risks.

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