

Bird & Bird

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# The Workforce of the Future

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2022



# Employment Structures

With the advent of the Coronavirus pandemic, the world of work was forced to implement new working structures overnight. Although some companies had been considering some of these alternative models of work for some time, as the world crosses its fingers that a sense of normality is returning, it is clear that these changes are now here to stay. At the same time, a series of longer-term trends are transforming how and where we work, and how we communicate and share information. Many employers see the value in embracing this new, more flexible world. But these complex changes bring with them a range of legal issues that must be analysed and addressed - legal, financial, and reputational - never before contemplated or encountered in the modern workplace. Our series, the Workforce of the Future examines some of the hidden risks associated with new and emerging ways of working.

A process already started before the pandemic is the disappearance of borders in the labour market. The scarcity of much wanted job profiles and the battle for talent is pushing companies to broaden the scope of their recruitment activities. In their search, companies no longer restrict themselves to the region or even country of their offices. This process was accelerated by the COVID-19 pandemic and the general discovery of teleworking. Teleworking has opened new possibilities to hire employees in countries without a company presence. However, whilst the pre-COVID world would usually have seen talent being asked to relocate to an employer's physical site, a new "general labour market" has emerged.

When hiring employees in this general labour market, companies are confronted with a scattered landscape of different rules and obligations to comply with. Navigating through all these rules and obligations can be a nightmare which has resulted in companies turning to alternative employment structures that, on their face, avoid having to set up a local corporate presence.

Recent trends include the prominence of using a Professional Employer Organisation or Employer of Record, hiring employees as contingent workers or even adopting a frontier model. However, whilst these structures often tick an employer's boxes at a high level, all is not often what it seems and, depending on the jurisdiction, the use of these structures is at best not allowed and, at worst, risks exposing the company to unacceptable penalties or simply makes the structure inefficient to use in practice.

We have, therefore, developed a Heatmap providing an overview of the key risks and issues in using each of these employment structures in 19 countries across the world. We have looked at the risks from different angles including tax law, employment status, labour leasing, data privacy issues and the protection of intellectual property rights.

The Heatmap is an essential tool for employers who are considering adopting a new structure (or who, perhaps, already have one but have not undertaken the proper analysis). The Heatmap is the first important step in selecting the employment model best suited for a particular situation in a specific jurisdiction.

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# *Key to Employment Structures and RAG Analysis*

The Heatmap considers the following employment structures:

- a. **Non-Resident Employer:** The employee is employed by a legal entity within the employer's group that is incorporated in a different country. This entity then registers with the relevant Labour, Revenue and Administrative authorities in the employee's country of residence; e.g. ABC Inc. (incorporated in the State of Delaware) employs an employee to work in Spain and registers with the Social Security and Tax authorities as a non-resident employer.
- b. **Professional Employer Organisation ("PEO") / Employer of Record ("EOR"):** The employee is employed directly by the PEO/EOR on behalf of another company, with the PEO/EOR assuming all legal obligations and duties of the employer, e.g. payment of salary, provision of a contract. The end-user company will have a commercial relationship with the PEO/EOR that governs how the individual is managed on a day-to-day basis and apports liability.
- c. **Contingent Workers:** The individual works for the Company pursuant to independent terms of engagement, such as a consultancy agreement or a freelance contract.
- d. **Frontier workers:** The individual is engaged, and nominally based, in a country in which the company has a legal entity but is permitted to regularly travel to (and work from) a different country on a regular basis.

In assessing the various HR legal risks, we have adopted the following Red, Amber and Green ("RAG") analysis:

- **RED:** The employment structure is either (a) unlawful; or (b) extremely difficult to implement, regulate and/or manage in practice. A classification of RED means that a company will either need to rethink the employment structure or accept that there is a significant risk of penalties/sanctions.
  - **AMBER:** The model is not unlawful. However, an AMBER structure requires a company to work through a number of practical, administrative and/or legal issues. An AMBER structure is generally, largely manageable but this will still depend on the company's resources and overall attitude to certain risks.
  - **GREEN:** The model is easy to implement and there is low/no risk of sanctions/penalties.
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# Countries



Australia



Belgium



China



Czech Republic



Denmark



Finland



France



Germany



Hong Kong



Hungary



Italy



Netherlands



Poland



Singapore



Slovakia



Spain



Sweden



UAE



UK

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Non-Resident Employer

PEO/EOR

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Frontier Worker

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 *Czech Republic*

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## + Finland

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