PIOTR PODSIADŁY
Employment practice

AGNIESZKA LISIECKA
adwokat, partner,
head of the Employment practice

Employee's unilateral relocation abroad

An employee working remotely could theoretically work from anywhere in the world. Such employees sometimes feel that because their physical presence at the workplace is not required, they can freely decide on the place where they will perform their duties. But a change in working location—particularly leaving for a different country—can cause serious legal consequences for the employment relationship between the parties. Thus employers need to be aware of these consequences and carefully regulate the location of remote work, as well as enforce the solutions they adopt.

Unilateral change in working location—most important potential consequences

One of the key issues with an employee's relocation (not only abroad, but also within Poland), which in practice typically goes unnoticed until an unfortunate accident arises, involves **the employer's occupational health and safety obligations**. Apart from certain exemptions under the regulations on telework, the employer bears responsibility for occupational health and safety. If the parties have not established a place for remote work, the employee may choose a place where the employer will not be capable of performing its occupational health and safety obligations, or performance of those duties will be at least greatly hindered. For example, it may be problematic to conduct a potential accident investigation, which employers are not exempt from carrying out in relation to remote workers, regardless of the location where they perform work.

Relocation of an employee abroad may also result in a **change in the law governing the employment relationship,** regardless of the clauses on this issue in the employment contract. Under the rules in force in the European Union, a choice of law must not have the result of depriving the employee of the protection afforded to him or her by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of a choice of law. Under the basic rule, an employment contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his or her work in performance of the contract (Art. 8(2) of the Rome I Regulation (593/2008)). A temporary or brief unilateral relocation by the employee to another EU country thus should not result in a change in the governing law. But in the case of a long-term or permanent relocation, or relocation

Under the general rules, the place of work must be indicated in the employment contract, and a change generally requires agreement between the employer and the employee.

to a country outside the EU, the risk of a change in the governing law cannot be excluded. A change in the governing law would be significant, as it would require compliance with the minimum conditions for employment in the given country, particularly involving such matters as minimum wage, working time, entitlements to leave, and the procedure and requirements for terminating employment.

Another issue that should be considered is the risk of a **change in jurisdiction over employment disputes**. In certain situations, the employer could be sued in a court in a country different from the one in which the employer has its domicile or registered office. Based on the EU regulations, the employee may choose to sue the employer in the courts for the place where the employee habitually carries out his or her work, or last did so (Art. 21(1)(1) of the Brussels I-bis Regulation (1215/2012)). Although it is difficult to image that an employee could exercise this privilege in a situation where they decided on their own to move to a different country, if the employer is aware of the relocation but does not object, or expressly accepts it, such a possibility cannot be ruled out.

Performing work abroad may also exert certain effects under **tax law** and social insurance law. From the perspective of tax law, the place where the employee has tax residency, and thus is subject to taxation on all their income regardless of source, will be crucial (the Polish regulations provide for tax residency in Poland in the case of an individual who is present in Poland for a total of at least 183 days in the year or has the centre of their life interests in Poland). Apart from this, there may also be limited tax liability, i.e. being subject to taxation in a given country on income earned in that country. Here, apart from the national regulations, the provisions of the applicable treaty on avoidance of double taxation would also have to be considered (if there is a tax treaty in force between Poland and the other country).

The rules for **social insurance** work somewhat differently. As a rule, particularly in the case of countries with which Poland has not concluded a social security agreement, an employee can be subject to social insurance from the very first day of performing work in the given country. As an exception—although this applies only to EU member states and countries with which Poland has concluded a social security agreement—an employee may continue to be subject to social insurance in Poland if they hold the relevant document (in the case of EU countries, this is the "A1 certificate").

Especially in the case of countries outside the EU, for performance of work in those countries it may also be necessary to complete formalities under **immigration law**, in particular to obtain a residence permit as well as a work permit.

Place of performing remote work—what the law says

To minimise the risk of having to struggle with the consequences discussed above, employers should exercise due diligence in regulating the place of remote work by employees. Under the general rules, the place of work must be indicated in the employment contract, and a change in the place of work generally requires agreement between the employer and the employee. But the regulations on remote work introduced in connection with the COVID-19 pandemic, and the Labour Code provisions on telework (i.e. currently the only regulations governing remote work), contain specific rules concerning the place of work which can often generate problems in practical application.

The regulation introduced in connection with COVID-19 is silent on determination of the place of work, only defining remote work as work performed "away from the place of regular performance of the work." Although the regulations are not clear in this respect, the employer undoubtedly has a right to designate the place of performance of remote work, and even more so to set restrictions in this area. Also in the case of telework, the issue of establishing the place for performance of the work is not precisely regulated. The regulations state that telework is work "regularly performed away from the workplace." This could thus be any place established by the parties to the employment relationship. It is recognised that this place can be established not only affirmatively, by designating one or more places for performance of the work, but also negatively, by indicating places where performance of telework is impermissible.

The vague working of these regulations, which do not require establishment of a specific place of work, often result in practice in failure by the parties to regulate this »

essential issue adequately, or at all. Meanwhile, the consequence of failure to specify the place for performance of remote work or telework, or defining it only negatively, is to leave the choice in this respect to the employee. If the employee then decides to work abroad, this can lead to the various serious consequences described above. Therefore, employers should strive to establish a specific location for performance of remote work and expressly address the issue of performance of remote work abroad.

To some extent, these problems could be resolved by the regulation on remote work currently being drafted to replace the regulations on telework. Remote work is to be defined as work performed "wholly or partially at a place indicated by the employee and agreed with the employer, including the employee's place of residence…." This proposed wording confirms the rule of agreeing on the location of remote work, but the precise definition of the location will still be up to the employer.

Unilateral relocation by an employee—what the employer can do

If the employee's unilateral relocation abroad does not violate the rules in force at the given employer, and is acceptable to the employer, the employer can take steps to verify and if necessary comply with duties related to legalisation of the employee's work in the given country. But, understandably, in the vast majority of cases, employers are not inclined to accept this state of affairs. Then the possible steps to be taken will depend on whether (and how) the issue of the place of performance of remote work was regulated by the parties to the employment relationship.

In light of the consequences of relocation abroad, it should be recognised that even if the location of remote work is not adequately regulated, the employee should consult with the employer on the intention to perform work abroad.

If the employee directly violates the established rules, the employer may, depending on the circumstances of the case, instruct the employee to perform at the agreed location, warn or reprimand the employee, or even terminate the employment, including with immediate effect.

In light of the consequences of relocation abroad discussed above, which may entail significant costs and additional obligations on the part of the employer (at least connected with the need to verify the law in force in another country), it should be recognised that even if the location of remote work is not adequately regulated, the employee should consult with the employer on the intention to perform work abroad. But if the employee fails to consult with the employer, and the location of remote work was not regulated (i.e. the employee has not broken the established rules), employers should exercise caution in exacting potential consequences against the employee —although in this case as well, under certain circumstances, a violation by the employee could even warrant termination.