



# Risk & Governance Newsletter (November 2023)

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## In brief

PwC Legal Japan's Risk & Governance Legal Newsletter aims to address topics related to risk management and governance that arise in companies on a daily basis and to provide information that may be useful for solving issues in those areas.

In this newsletter, we will outline the **legal considerations for cross-border remote work under Japanese law**.

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## In detail

### 1. Introduction

In light of advances in information and communication technology, the pursuit of diverse work styles, and restrictions on the flow of people due to Covid-19, companies that operate globally are making use of personnel residing in foreign countries. Cross-border work, such as working for a company through remote work while residing in another country, has expanded in recent years (such work can take various legal forms, and we will refer to them collectively as '**cross-border remote work**'). In this newsletter, we will use a typical example of a situation where cross-border remote work occurs in the practice of a global company to explain key legal points to bear in mind, with a focus on aspects of Japanese labor law.

### 2. Implementation of cross-border remote work

Many companies with a global presence operate not only through domestic establishments such as head offices, but also through overseas establishments such as branches and local subsidiaries. Such business activities usually involve employees physically leaving their home countries and relocating to work overseas. For example, an employee who works at a company in Japan (regardless of a Japanese company or a branch or subsidiary of a foreign company in Japan) may work at the company's own overseas establishment (branch or representative office) or at the company's parent or subsidiary overseas. If work at a foreign subsidiary is to be performed in the form of a secondment from the company in Japan to the foreign subsidiary, it is a relatively common practice that the seconded employee will have an employment relationship with both the company in Japan and the foreign subsidiary, and the day-to-day working conditions (such as scheduled working hours, holidays, and so forth) will be arranged in accordance with the rules of the foreign subsidiary.

While such arrangement will continue to play an important role, remote work has become popular in recent years due to advances in information and communication technology, the pursuit of diverse work styles, and restrictions on the flow of people caused by Covid-19, and the scope of types of employment have increased following cross-border remote work. For example, cross-border remote work is being utilized in various situations such as where a company in Japan directly employs a person residing in a foreign country, or if the company in Japan continues to employ an employee who has decided to reside in a foreign country for personal reasons, or seconding an employee to a foreign subsidiary while the employee remains residing in Japan.

With regard to such cross-border remote work, there are benefits such as employees can obtain a new job from a foreign company while maintaining their current living environment such as their place of residence, or experience working at their current company's overseas establishment, and the employee would be able to continue their current job even if their living environment changes, such as where they live. Also from the company's perspective, there are benefits such as securing talents residing in foreign countries, preventing outstanding employees from leaving the company, being able to implement flexible staffing without restrictions on place of residence of employees, and reducing relocation costs associated with overseas assignments.

On the other hand, from the perspective of various regulations such as labor laws, given that the country of residence of the employee and the country of the employer are different in cross-border remote work, it is necessary to consider the applicability of the regulations in both countries. Additionally, as there may not necessarily be specific regulations in both countries that take into account the new phenomena of cross-border remote work, it may be difficult to reach a clear conclusion. Below, we will summarize the applicability of laws and regulations, focusing on aspects of Japanese labor law, regarding typical situations that may arise in cross-border remote work (it should also be noted that consideration is required from various perspectives which we will not deal with in this newsletter, such as tax<sup>1</sup>, social security<sup>2</sup>, and visa<sup>3</sup>).

### **(1) Employment of foreign residents by companies in Japan**

In this scenario, it is envisaged that a company in Japan (regardless of a Japanese company or a branch or subsidiary of a foreign company in Japan) newly hires a person residing in a foreign country, or when a locally hired foreign employee, while still remaining employed by the same company in Japan, returns to his or her home country for personal reasons (e.g., to accompany a spouse working for another company on his or her overseas assignment, to care for a parent, and so forth).

Unlike overseas assignments, these cases are characterized by the fact that the company in Japan directly manages the employment as the employer, without involving foreign subsidiaries or branches located in the country of residence of the employee. The issue is how the laws and regulations of Japan and the country of residence of the employee apply to the working conditions of employee.

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<sup>1</sup> Regarding tax considerations, there is a risk that the provision of services by resident employees may be considered as a permanent establishment by the employer company in the country of residence of the employee, and therefore the company be subject to tax in the country of residence of the employee.

<sup>2</sup> In relation to social security, it is necessary to examine whether there is an obligation to enroll in the social security of both the country of residence of the employee and the country where the company is located, and whether there is a social security agreement between the two countries on exemption from enrolment.

<sup>3</sup> In relation to visas, an increasing number of countries, such as Spain and Estonia, are introducing visas for cross-border remote workers (digital nomad visas) as a national policy (Republic of Estonia – digital nomad visa: <https://www.e-resident.gov.ee/nomadvisa/>). In any event, it is necessary to check how cross-border remote work is handled in the country of residence of the employee.

**(a) Japanese law**

Some perspectives under Japanese laws are as follows.

Firstly, the issue is whether Japanese labor laws and regulations are applicable to employees working overseas. On this point, according to a circular from the Ministry of Labor (as it was then known), the Labor Standards Act is applicable to cases evaluated as businesses in Japan even if the work is carried out overseas (Circular No. 776 dated August 24, 1950). Taking this into consideration, as long as the employer is a company in Japan, the Labor Standards Act may be applicable to the employees as if they were engaged in business in Japan, regardless of their country of residence. However, it is important to note that given that the relevant circular is intended for situations where Japanese construction companies dispatch employees employed in Japan overseas in connection with overseas construction work, as well as the majority of Japanese labor laws and regulations were not made with employees working in overseas in mind, there is scope for argument that this may not necessarily apply to cross-border remote work. Therefore, it is necessary to determine which arrangement should be taken based on the individual circumstances.

Additionally, laws and regulations applicable to international employment relations, such as cross-border remote work, vary depending on their nature as illustrated below.

**(i) Governing law of the employment contract**

According to the Act on General Rules for Application of Laws (hereinafter referred to as the '**General Rules Act**'), the law of the country chosen by the parties applies to the formation (issues such as the timing of formation and the existence of restrictions on contract formation) and effect (issues such as the content and termination of the employment contract) of the employment contract (Article 7 of the General Rules Act). For example, this applies when the governing law is stipulated in the employment contract.

If the parties have not chosen a governing law, the law of the place with which the contract is most closely connected applies (Article 8 of the General Rules Act), but in relation the formation and effect of the employment contract, it is presumed that the law of the country where the labor is to be provided is the law of the place which is most closely connected (Article 12, paragraph 3 of the General Rules Act). In the case of cross-border remote work where the worker resides in a foreign country, the country of residence will generally be considered to be the place which is most closely connected.

**(ii) Invocation of mandatory provisions by employees**

Even if the law of a certain country is chosen as the governing law of the employment contract, if the employee expresses his or her intention to the employer to apply the mandatory provisions<sup>4</sup> of the law of the place with which the employment contract is most closely connected, such mandatory provisions shall also be applied in addition to the governing law (Article 12, paragraph 1 of the General Rules Act). This is a special rule to protect employees who are in a weaker bargaining position in labor relations. In other words, it should be noted that even if a company in Japan agrees with the employee which is residing overseas on the employment contract that Japanese law to be the governing law, if the employee

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<sup>4</sup> Under Japanese law, provisions regulating the rights and obligations under private law between employers and workers such as the duty of safety consideration stipulated in the Labor Contracts Act (Article 5), abuse of the right to dismiss (Article 16), conversion of fixed-term employment contracts to indefinite term (Article 18), refusal of renewal of fixed-term employment (Article 19), and so forth are understood to be enforceable even if the parties agree to rule them out.

expresses his or her intention to apply the mandatory provisions of the law of their country of residence (in addition to the similar provisions under Japanese law), such provisions will also apply.

### **(iii) Mandatorily applicable laws and regulations**

It should be noted that among the labor laws and regulations, the provisions that are established with a strong policy intention of the state to realize them such as by means of criminal penalties and the like (for example, the provisions of the Labor Standards Act and the Minimum Wage Act) would always be applicable in cases where Japan is the forum or jurisdiction, regardless of the governing law of the employment contract or the invocation of Article 12, paragraph 1 of the General Rules Act by the employee as mentioned above<sup>5</sup>.

### **(b) Law of country of residence**

It is also necessary to examine how the laws and regulations of the country of residence (labor law, private international law, and so forth) apply to cross-border remote work in that country. In particular, it is necessary to note the provisions that may be applied mandatorily regardless of the governing law of the employment contract, such as those concerning dismissal and labor standards (working hours, holidays, annual paid leave, wages, and so forth) in the law of the country of residence, as mentioned above in paragraphs (1)(a)(ii) and (iii) under Japanese law. In addition, from a practical point of view, it is also important to take into consideration the living conditions of the employees so that they do not suffer from any inconvenience compared to other employees who work for local employers in the country of residence (such as working hours, treatment of holidays, and so forth).

As mentioned above, it is necessary to understand the relevant legal systems of both Japan and the country of residence of the employee, and to conduct appropriate labor management in accordance with the applicable laws and regulations, taking into account the individual situations as necessary.

## **(2) Assigning an employee of a company in Japan to work for a foreign subsidiary**

A company in Japan may assign its employee to work for a foreign subsidiary while the employee resides in Japan. This may be done to utilize the employee for foreign business, even if he or she cannot be assigned to a foreign country due to reasons such as family circumstances, or to reduce the cost of travel expenses associated with the assignment.

If the form of secondment to the foreign subsidiary is adopted, the secondee will have employment relationships with both the company in Japan and the foreign subsidiary. Therefore, it is necessary to conduct appropriate labor management in accordance with the applicable laws and regulations, taking into account the individual situations as necessary, upon understanding the laws and regulations of both Japan and the country where the foreign subsidiary is located. In addition, it should be noted that the mandatory provisions of Japanese law (as mentioned in paragraphs (1)(a)(ii) and (iii) above) may be applied compulsorily, as long as the secondee works in Japan.

Alternatively, it is possible to adopt a method in which the company in Japan and the foreign subsidiary enter into a service agreement, and the company in Japan assigns the service related to the foreign subsidiary based on the contract to the employee. In such a case, the employee will work for the service related to the foreign subsidiary under the instructions and control of their employer, which is the company in Japan. However, it should be noted that if the employee actually performs the service under the instructions and control of the foreign subsidiary, a direct employment contract may be established between the employee and the

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<sup>5</sup> Y. Sakurada and M. Dougauchi, *Annotated Private International Law*, Vol. 1, Yuhikaku, 2011, p. 289

foreign subsidiary, and the foreign subsidiary may bear the responsibility as the employer under Japanese law.

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## The takeaway

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There are various forms of cross-border remote work other than those mentioned above, and applicable regulations and steps that should be taken will vary depending on the individual circumstance. From a legal perspective, it is important to manage employment contracts and conduct labor management by following the steps below:

- (1) Consider and determine the legal form of employment of cross-border remote work (employment, secondment, outsourcing, and so forth);
- (2) Examine and determine the regulations of the country of residence and the country of business that may apply depending on the adopted legal form (in particular, it is important to take note of the mandatory provisions of the country of residence aimed at protecting workers residing in that country that may always apply);
- (3) Consider and determine the terms and conditions of employment contracts, including the governing law, and the manner of labor management, taking into account the applicability of the regulations of both countries; and
- (4) Make it an internal structure to incorporate the terms and conditions into employment contract and/or employment guidelines and handbook.

In addition, it is expected that laws and regulations in various country will be revised in the future in response to the expansion of cross-border remote work in practice. Therefore, even after introducing an in-house system for cross-border remote work, it is important to keep up to date with the latest laws and regulations, and continuously deal with them by reflecting them in the company's internal systems.

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## Let's talk

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For a deeper discussion of how this issue might affect your business, please contact:

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