Employer of Record – A growing trend for employment opportunities in the EU

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Unlike employers from European Union Member States, third-country employers seeking to employ personnel and carry out operations in a Member State do not enjoy the freedom of establishment or the freedom to provide services which is afforded to Member States by the Treaty on the Functioning of the EU (TFEU). Accordingly, third-country employers in this regard are limited in their options.

The general position in the Republic of Cyprus is that, in order for a third-country employer to employ personnel and carry out operations in its territory, it must register a local company or establish a branch, which acts as an extension of the third-country legal entity in Cyprus. Inevitably, this means that a third-country employer may be subject to certain tax and statutory contribution obligations, as well as expenses for incorporating and/or maintaining a local company or branch. They may also wish to instruct a professional service provider to carry out an assessment as to whether or not a permanent establishment would be created.

Consequently, third-country employers, including now also those emanating from the UK, are increasingly seeking alternative means of employing personnel in Member States, without being bound to the strict requirement of having local presence in a Member State and, hence avoiding the associated expenses.

Accordingly, investors who are keen to expand their businesses into the European Union have begun exploring different avenues/practices in order to be able to support their overseas structures and ensure greater sustainability in a simpler and more cost-efficient way. As a result, new relationship structures have started developing between employers and employees which need to be carefully examined.

One of the more recent trends which seems to be gaining popularity in EU jurisdictions are “Employer of Record” (EOR) companies. These are generally understood to be organisations established within a

Member State that enter into an agreement with a third-country company to hire and pay employees on their behalf and take responsibility for all formal employment matters. An EOR company is meant to take the place of the employer and provide HR and payroll services for employees. Using this structure is said to allow third-country companies to indirectly engage with overseas employees in a Member State without having to set up a local entity.

Although it appears that an EOR abstains from participating in daily work activities, such as giving instructions to the employees or monitoring the satisfactory performance of the employees, it is seen to be responsible for carrying out the legal and regulatory requirements of immigration, employment and payroll. Accordingly, even though the EOR is the registered employer of an employee, it appears in cases that it may not have any supervisory or management role with regards to the employee's position, duties and responsibilities. In such circumstances, the third-country employer is the entity maintaining the substantive work relationship, taking all decisions on compensation, employee's duties and responsibilities, projects and termination of the employment relationship.

Importantly, EORs should not be mistaken for Professional Employer Organisations ("PEOs"). The difference with the latter is that PEOs are entities that are regulated by the 'Employment through Temporary Employment Businesses Law of 2012 (Law no. 174(I)/2012)' and the 'Regulations of 2012 (ΚΔΠ 517/2012)' and require a special license to operate. As opposed to EORs, PEOs remain the employer of employees throughout, however they are able to assign or 'lease' their employees to businesses for short periods of time, usually not exceeding 6 months.

In the absence of any legislation or court decision, at least for now, on the matter of EORs they occupy a grey area of the law. Consequently, there is no clear guidance as to the legal remedies available to an employee in the event of an employee-employer dispute, or where a third party wishes to bring an action against an employer under the principle of vicarious liability as the result of an employee's negligence during the performance of his or her duties. It is for this reason that when considering the utilisation of EORs, companies often seek legal advice.

In order to address some concerns, it is common practice to establish who the two parties in the employee-employer relationship are, and inevitably ask the question: 'who is the actual employer?'.

To this effect, in its recent judgement of Case C 610/18, the European Court of Justice (ECJ) attempted to shed some light on this matter. It concluded that for the purposes of satisfying certain provision of Regulation (EEC) No 1408/71 and Regulation (EC) No. 883/2004, an employer, for social security purposes, is the undertaking which has actual authority over an employee, which bears, in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her, and not the undertaking with which that employee has concluded an employment contract and which is named in that contract as being the employer of that employee.

Nevertheless, it must be clarified that the above judgment of the ECJ concerns an intra-Community social security dispute of a certain nature, in relation to the specific provisions of the respective Regulations which were referred to the ECJ for a preliminary ruling. Accordingly, the judgement of the ECJ should not be strictly interpreted as applying to all situations when attempting to identify the 'actual employer', but rather, it should serve as guidance.

To conclude, it is expected that in the near future, attempts will be made at European Union level to address and regulate the now popular EOR companies and the relationship between employees and employers, thereby closing the gap in the law that currently exists.