

# Planes, Trains and Automobiles: Practical Considerations for a Mobile Workforce

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# Agenda

- Employee Mobility
- Payroll Tax
- Permanent Establishment
- Mitigating Risks

# Employee Mobility

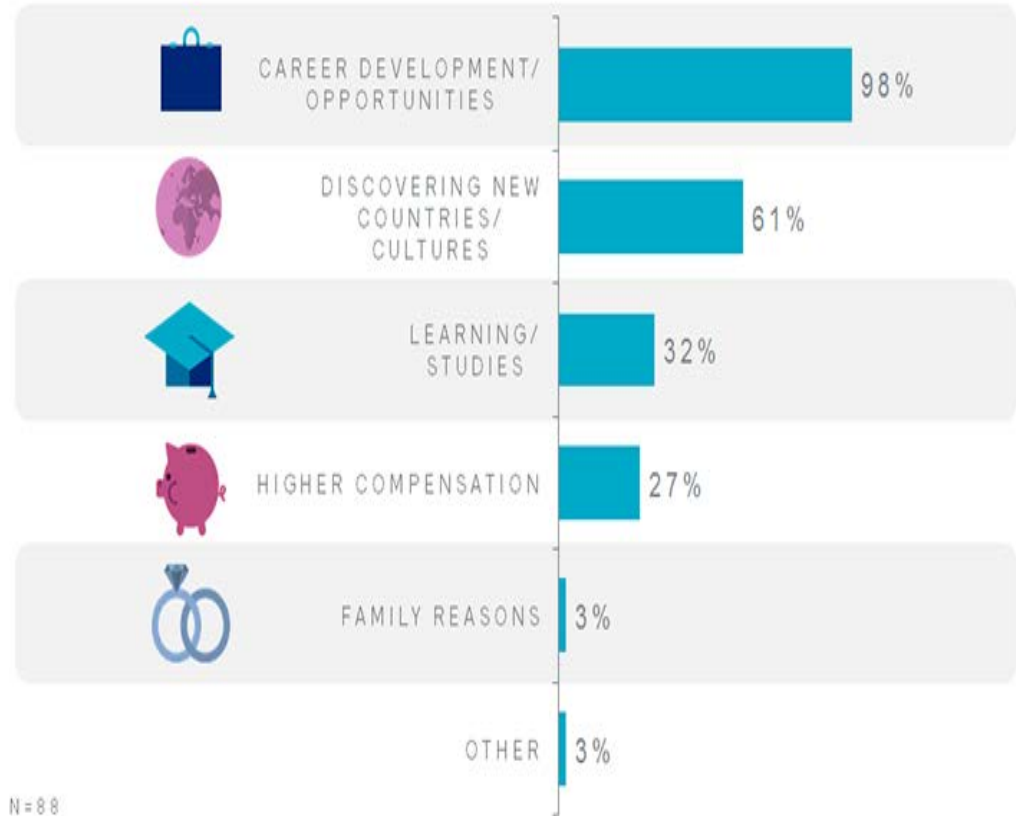
# Changing Workplace Landscape



# Mobility Imperative - Millennials

- Millennials are the fastest growing segment of the workforce
- Projected to be nearly 50% of the workforce by 2020
- At least 75% of millennials consider work trips to be a perk or status symbol
- Nearly 40% reported that they would reject a job offer if there was little to no travel opportunities

Q: WHAT ARE THE MOST COMMON REASONS MILLENNIALS ARE TAKING ASSIGNMENTS?



"Millennials in the Workforce – What Is Their Impact on Mobility Programs?" [www.mobilityexchange.mercer.com](http://www.mobilityexchange.mercer.com).

## Mobility Tax Concerns

Payroll/Social  
Security Tax

Permanent  
Establishment

## Mobility - Conundrum



# Payroll/Social Security Tax



# US Inbound Payroll Tax – Domestic Law

## Income tax withholding

- \$3k/90 day exception for nonresident aliens
  - 861(a)(3), 864(b)(1)
- Otherwise subject to income tax withholding
  - 3401(a), 31.3401(a)-1(b)(7)

## Social Security

- No de minimis exception
- Wages for services performed in the US are subject to FICA regardless of worker's or employer's residence
  - 3101, 3111, 3121, Rev. Rul. 92-106, Situation 4

## FUTA

- No de minimis exception
- Wages for services performed in the US are subject to FUTA regardless of worker's or employer's residence
  - 3301, 3306(b), Rev. Rul. 92-106, Situation 4

# US Inbound Payroll Tax – International Agreements

## Typical US income tax treaty

- No income tax withholding **if foreign employer** with no US PE and 183 days or less of US presence
- Must obtain Form 8233

## Typical US totalization agreement

- No FICA liability for assignments of 5 years or less
- Must obtain certificate of coverage

## Only Canada-US agreement covers FUTA

- FUTA technically due for all countries other than Canada, even if treaty and totalization agreement apply
- Some arguments otherwise


# US Income Tax Treaties

Armenia	Egypt	Jamaica	Norway	Thailand
Australia	Estonia	Japan	Pakistan	Trinidad
Austria	Finland	Kazakhstan	Philippines	Tunisia
Azerbaijan	France	Korea	Poland	Turkey
Bangladesh	Georgia	Kyrgyzstan	Portugal	Turkmenistan
Barbados	Germany	Latvia	Romania	Ukraine
Belarus	Greece	Lithuania	Russia	USSR
Belgium	Hungary	Luxembourg	Slovak Republic	United Kingdom
Bulgaria	Iceland	Malta	Slovenia	Uzbekistan
Canada	India	Mexico	South Africa	Venezuela
China	Indonesia	Moldova	Sri Lanka	
Cyprus	Ireland	Morocco	Sweden	
Czech Republic	Israel	Netherlands	Switzerland	
Denmark	Italy	New Zealand	Tajikistan	

# US Totalization Agreements

Australia	France	Netherlands	Switzerland
Austria	Germany	Norway	United Kingdom
Belgium	Greece	Poland	
Canada	Hungary	Portugal	
Chile	Ireland	Slovak Republic	
Czech Republic	Italy	South Korea	
Denmark	Japan	Spain	
Finland	Luxembourg	Sweden	

# Global Mobility HR – Tax Equalization Agreement



Allows employees working abroad to pay the same amount in taxes as they would if they had worked within their home country

Employers reimburse employees working abroad for additional US and foreign taxes resulting from their international assignments using a hypothetical tax calculation

Requires accounting firm to prepare employee's returns in both home and host country and compute tax equalization

# Permanent Establishment (PE) or Taxable Presence

## Increased Scrutiny of PE/Taxable Presence

Tax authorities have focused efforts on identifying income that may be subject to tax in their jurisdictions

- PE and taxable presence may be based on activities of traveling employees temporarily present in a jurisdiction

Taxable presence and PE rules are being strengthened to increase the circumstances in which an entity may be subject to tax outside its country of incorporation (OECD Pillar 1)

- Location of customers
- Transfer pricing

# Consequences of PE/Taxable Presence

Tax filing requirements

Local tax

Potential disallowance of deductions (e.g., 882(c)(2))

Interest and penalties

Payroll tax



# PE/Taxable Presence Analysis

Tax residence in the local jurisdiction (determined under local law)

E.g., US trade or business "considerable, continuous, and regular" profit-oriented activities

Permanent Establishment (treaty concept)

Exempts income in the jurisdiction unless the enterprise has a permanent establishment

## Types of PE (US/OECD/UN Treaties)



- Fixed place PE – Art 5(1)



- Agency PE – Art 5(5)



- Services PE
- Construction PE – Art 5(3)

## Fixed Place PE



Premises owned, rented or otherwise at disposal of the foreign corporation or its employees

- Permanency
- Conduct of meaningful business activity

## Physical Presence – OECD Commentary

- Mere presence of the corporation or its employees at a location in the jurisdiction is not sufficient to constitute a PE
- Regular visits by sales personnel to customer premises in the jurisdiction alone are not sufficient to constitute a PE
- PE requires continuous use of physical space which is at the disposal of the enterprise (owned, rented, permission from a customer or other third party)

## Permanency – OECD Commentary

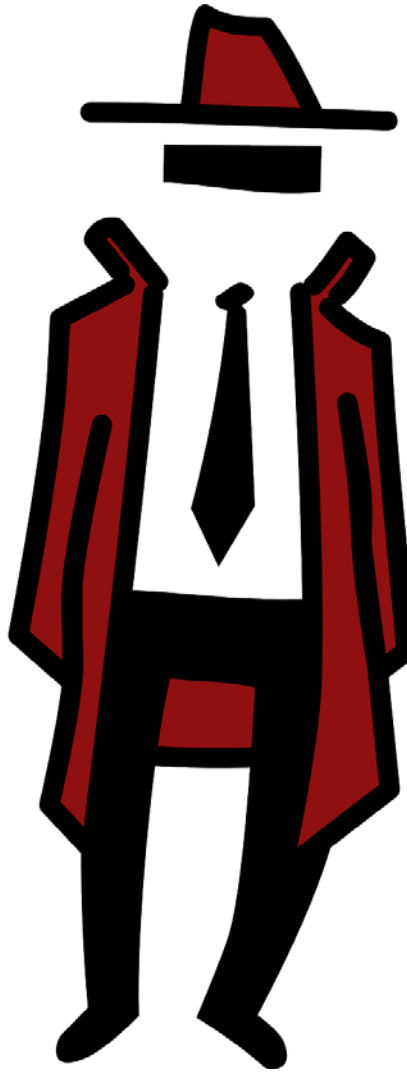
- Most treaties provide and OECD Commentary suggests that activities that are carried on for less than 183 days cannot constitute a PE, but there is not consistency in practice
- Short periods of time at recurring intervals can give rise to a permanent establishment.
- In the case of some treaties that provide for services PE (e.g., India-US), even one day of providing services for a related may give rise to a PE in the jurisdiction
- For a large multinational, counting days rarely makes sense

## Preparatory and Auxiliary Activities

- Using facilities for storage, display or delivery of goods
- Maintaining a stock of goods for the purposes of storage, display, or delivery
- Maintaining a stock of goods for the purpose of processing by another company
- Maintaining a fixed place of business for the purpose of purchasing goods or collecting information
- Maintaining a fixed place of business for any other preparatory or auxiliary activity.
- Note that treaties with a construction PE clause may effectively override these rules as to construction activities

## Agency PE – Art 5(5)

- Legally or economically dependent on the principal
- Has and “habitually” exercises the authority to conclude contracts in the name of the principal



- Negotiation of material terms of contracts
- Suggestion that the home office will “rubber stamp” contract negotiated by agent

## Construction PE - Art 5(3)



A building site, a construction, assembly, or installation project or supervisory activities in connection therewith

Multiple sites may constitute a construction PE

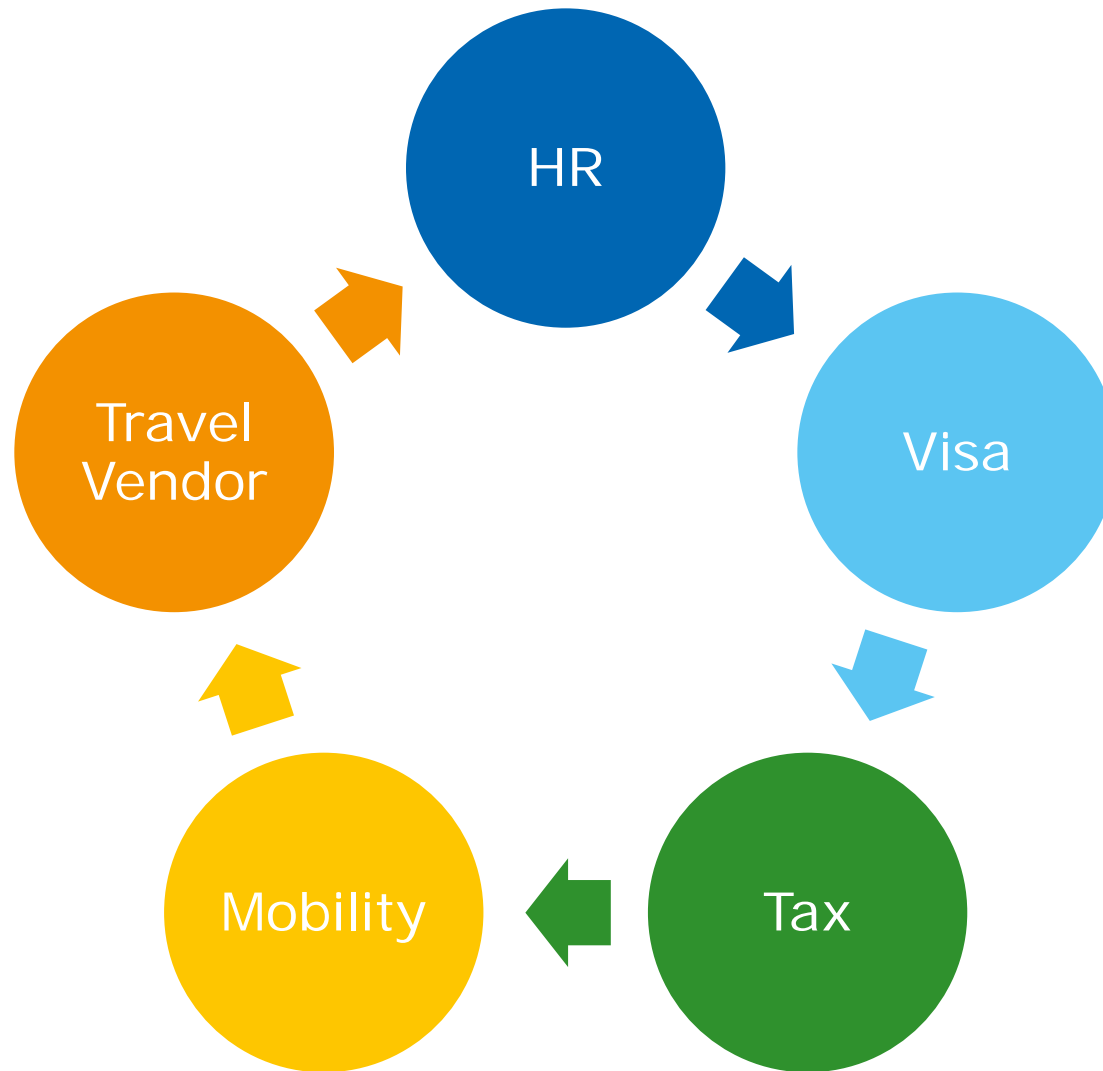


## Services PE

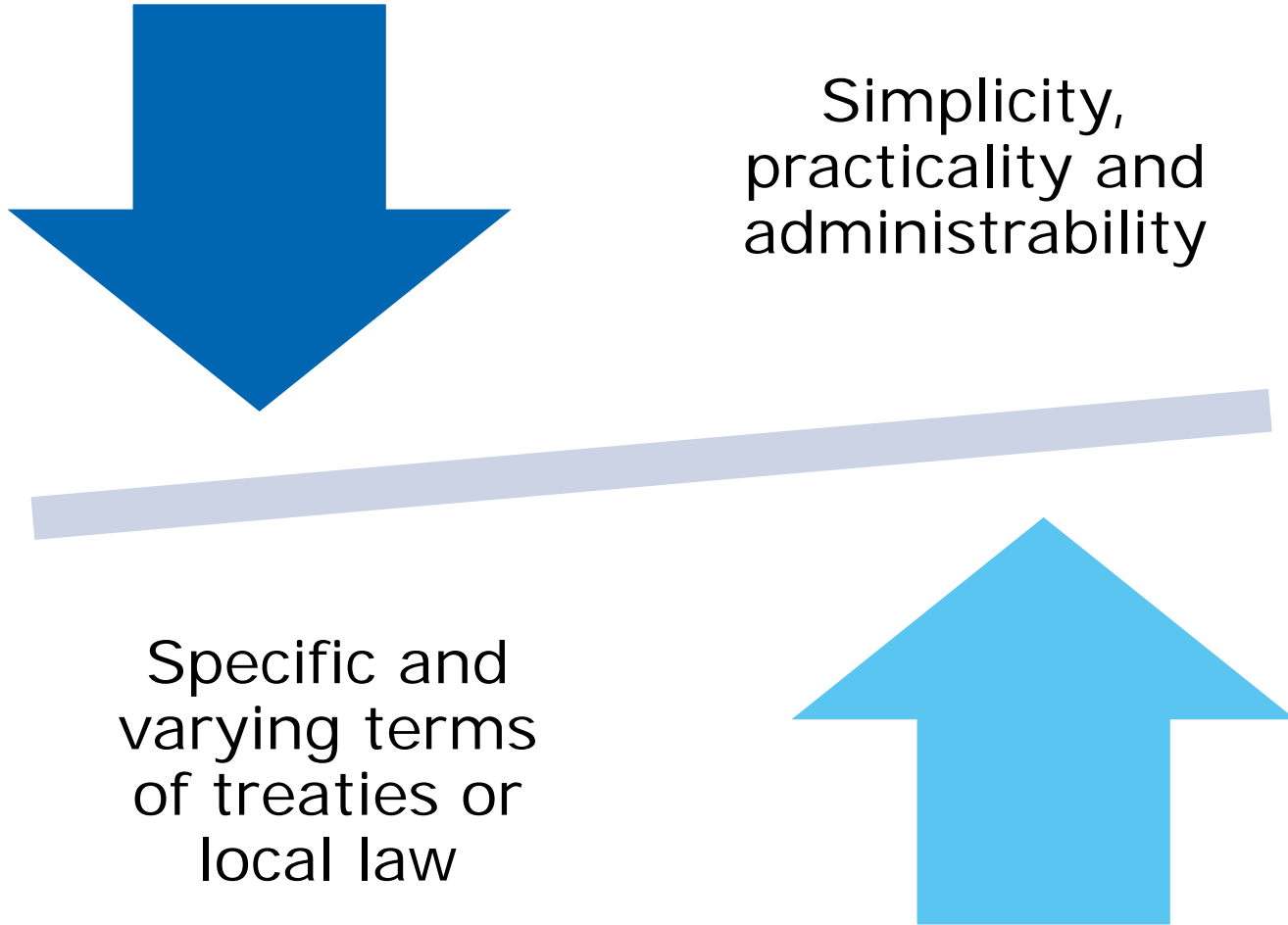
- As the ability to provide services across jurisdictions increases, some countries have taken the position that certain services when performed inside the country can give rise to a PE
  - See, e.g., India, Canada, Chile, Czech Republic, Slovak Republic and Turkey
  - Under the U.S.-India treaty, the performance of services for a related party for one day can give rise to a PE
  - Services must be performed by the enterprise, not by individual employees

# Mitigation of PE Risk

# Mitigation Players



# Policy Conundrum



## Toolkit for PE Risk Mitigation

- **Travel Policy** – short term business travel
- **Secondment** – services for an affiliate
- **Short Term Assignment** - personal development
- **Global Employment Company (GEC)**
- **Remote Work** - travel for personal or visa reasons
- **Switching to Local Payroll** - permanent or long-term temporary reassignment

# Travel Guidelines - Activities to Restrict

## — Fixed Place

- Having unrestricted access, or a permanent or semi-permanent work station at any facilities
- Renting space (other than a hotel room) or storing property
- Using or renting warehouses or facilities for storing displaying or delivering goods or merchandises, purchasing goods or merchandise or collecting information
- Making any decisions relating to high level strategy, business planning, product management/development or business development

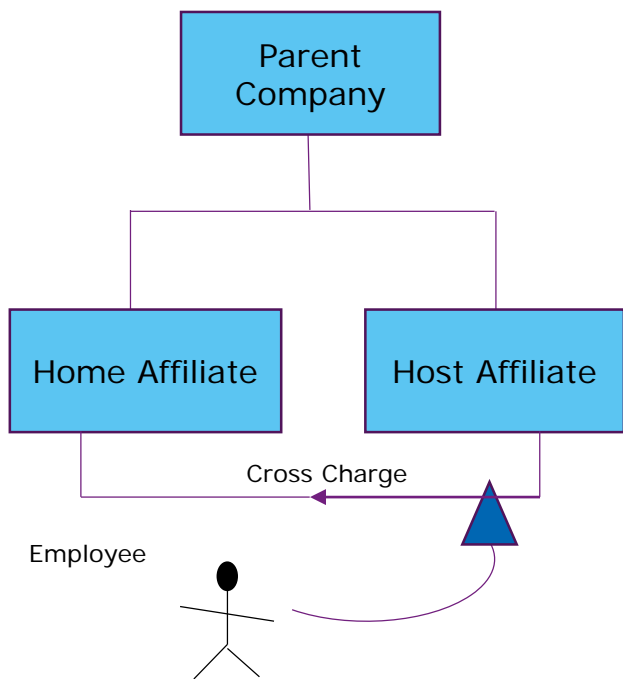
## — Agency

- Negotiating, signing or executing contracts or accepting or securing orders for the employer or any affiliate, or representing the authority to do so
- Representing home office will “rubberstamp” provisions negotiated abroad
- Discussing pricing or other material terms
- Extending offers of employment

## Travel Guidelines – Preparatory & Auxiliary Activities

- Gathering information and requirements
- Stewardship activities to ensure compliance with corporate policies and standards, set budgets and goals
- Attending coordination meetings
- Receiving or giving internal training
- Interviewing candidates
- Attending or presenting at tradeshow, seminars or conferences, discussing products and services in general or at a high level

## Secondment



- Long term assignment to perform work for a local affiliate but employee wants to retain home country benefits
- A “Home” entity enters into an agreement with a “Host” entity whereby an employee will temporarily become the employee of the Host entity while remaining on the payroll of the Home entity
- The Host entity is often, but not always, an affiliate of the Home entity
- The Host entity is responsible for local law compliance
- The Host entity reimburses the Home entity for the labor, typically at cost



# Pros and Cons of Secondment

## Pros

Limits PE/corporate income tax exposure

Employee maintains "home" benefits and RSUs

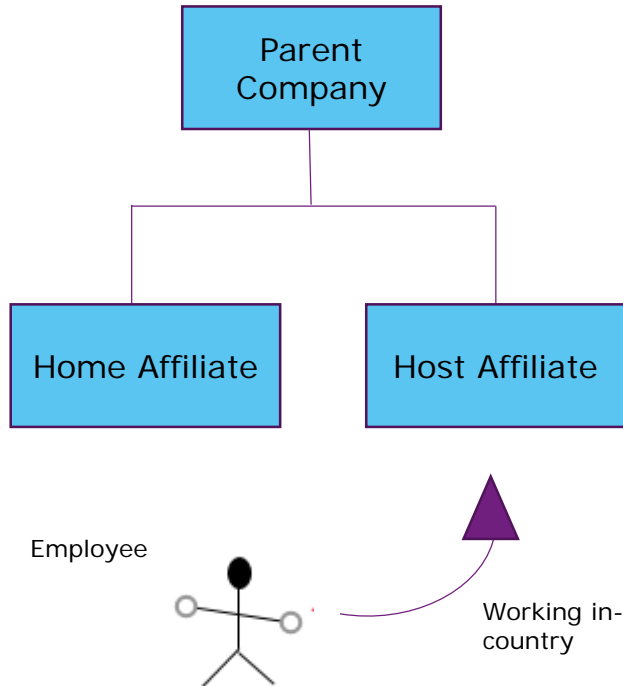
## Cons

Not recognized in all jurisdictions

Multiple intercompany agreements

Administrative burden and expense

# Short Term Assignments



- Generally - temporary foreign transfers with a duration between 3 months and one year
- Employees maintain their home country of residence and remain on payroll of Home affiliate
- Works best if limited to “personal development” or other employee-development, training, shadowing, global perspective, etc.
  - Consider training visa if available
  - Curriculum, training expectations, etc.

# Pros and Cons of Short Term Assignments

## Pros

Simplicity – no change to existing relationships

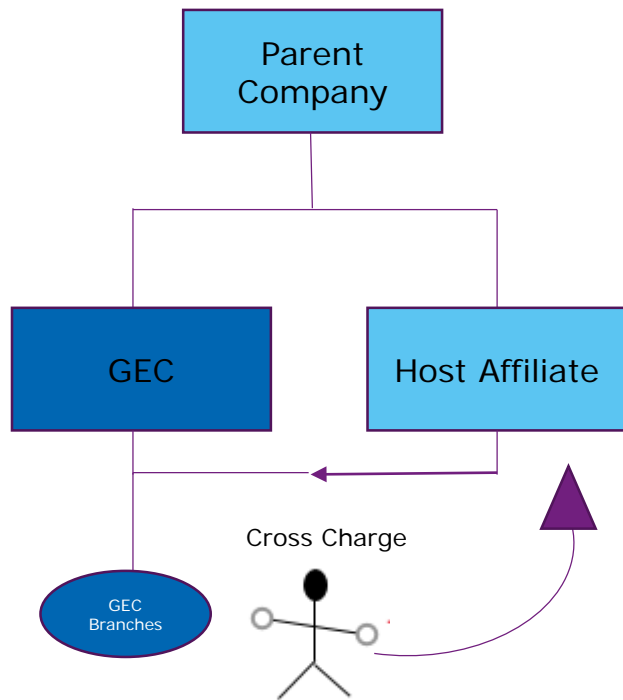
Employee maintains “home” benefits and RSUs

## Cons

Activities very limited or increases PE risk

“Shadow payroll” may be required for local tax payment

# Global Employment Company (GEC)



- A separate legal entity that provides employee services to other entities in return for a management or service fee
- Generally used as the employer for employees which travel to or may be seconded to foreign entities within the group
- A GEC may fulfill several roles in an organization;
  - Permanent legal employer for globally mobile employees and/or employees with global roles
  - Payroll company
  - Temporary employer for global assignees
  - Administrator for global assignments
- Especially useful in jurisdictions where parent company has no presence

# Pros and Cons of GECs

## Pros

Limits PE risk,  
starts statute of  
limitations

Employee  
maintains  
"home" benefits  
and RSUs

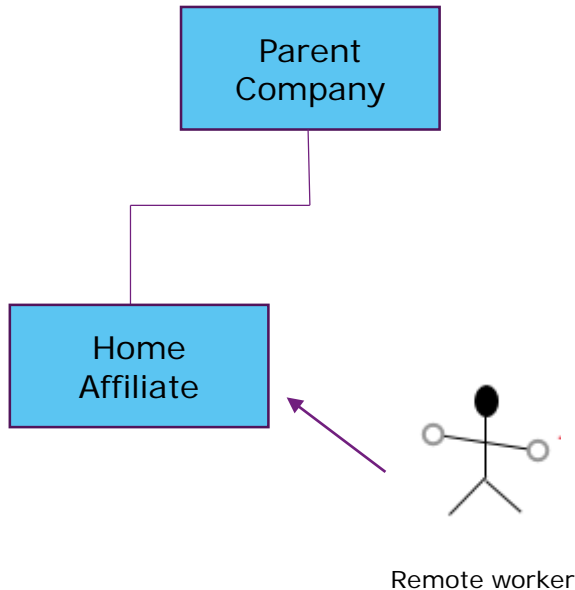
## Cons

Filing  
requirements in  
multiple  
jurisdictions

Complexity in  
administration

Intercompany  
payments

# Remote Work



- A remote employee is a full-time employee that performs their normal everyday work virtually, from outside of the office, while traveling internationally
- Employee remains on home payroll.
- Types of remote work include:
  - Traveling for visa related issues
  - Working while caring for a family member
  - Mobile office

# Pros and Cons of Remote Work

## Pros

Employee flexibility

Employee maintains "home" benefits and RSUs

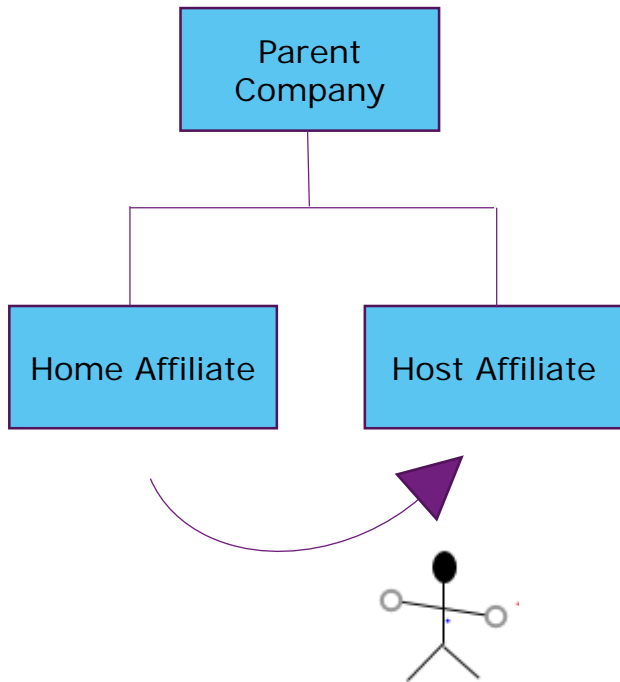
## Cons

May only be "intermittent"

Cannot work in premises at the disposal of the employer

PE risk and payroll tax exposure

## Switch to Local Payroll



- Employee transfers from the US payroll to the local payroll of the foreign affiliate
- Tax compliance issues are undertaken by the foreign affiliate



# Pros and Cons of Transfers to Local Payroll

## Pros

Mitigates PE risk

Administrability

## Cons

Employee does not maintain "home" benefits and RSUs

Employee salary may be reduced to local bands

Not flexible or available for short periods



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