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Working remotely from Thailand: legal, immigration and tax Q&A

February 2023



1 Preliminary notes

On 1 September 2022, Thailand's new and highly anticipated Long-Term Resident Program (LTR) came into effect. With this program, the Thai government intends to further promote the country's attractiveness as a regional hub for living and place of doing business by providing a number of tax and non-tax benefits for so-called 'high-potential' foreigners. This creates an unprecedented opportunity to flexible employment in Thailand and across the region.

We have worked out the most common scenarios:

- **Working from abroad as an extension of 'work from home'.** The difference being that the employee's home is located in a different jurisdiction from the employer, either on a permanent or temporary basis.
- **Offshoring workforce.** With the current trends of globalisation of the workforce and the normalisation of remote working, expatriation might become less preferable in the future. Companies may be interested to hire international talents without the need for them to relocate into the country of employment. The employer may also offer salary and benefits related to where the employee performs work as opposed to where he/she was hired.

Illustration: a Singaporean web designer residing in Thailand is employed by a tech company headquartered in Singapore.

- **Prospection:** Foreign based companies could also send employees abroad to explore potential business opportunities in any given market.

Illustration: a German Citizen, in charge of business development for an insurance company in Germany, relocates temporarily to Thailand to explore market opportunities in the country.

2 Questions & Answers

2.1 Does Thai law allow foreign individuals to work remotely from Thailand for a foreign-based employer?

The definition of 'employer' and 'employee' and 'work' according to the Labour Protection Act B.E. 2541 (1998) (Labour Protection Act), and the Foreigners' Working Management Emergency Decree, B.E. 2560 (2017) (Foreigners Working Decree) are broad and do not differentiate amongst employers based in Thailand or overseas.

Therefore, if a foreign individual works remotely from Thailand and does not fall under the categories listed in the exclusion list of the Foreigner Working Decree (i.e., consular, diplomatic, and other authorised activities), such individual will be considered as 'working in Thailand' under the Foreigners Working Decree and thus will be required to hold a (i) a non-immigration visa and (ii) a work permit – regardless of the employer's location.

In addition, according to the Ministerial Regulation on the procedure for foreigner work permit application, issuance and notification of foreigners' work B.E. 2563 (2020) (Foreigners' Work Permit Ministerial Regulation), work permits are issued to foreigners working in Thailand for a foreign-based employer only if such employer has established a subsidiary, a branch, a representative or regional office in Thailand.

Lastly, some occupations or activities are prohibited for foreigners (Notification of the Ministry of Labour Re: Prescription of the Prohibited Occupations for Foreigners Not all businesses are free to be carried out by foreigners in Thailand 21 April B.E 2563 (2020) (Prohibited Occupation Notification)).

Therefore, under the classic scheme, a foreign individual can only work remotely from Thailand for an employer who has established a subsidiary, a branch, or a representative or regional office in Thailand.

However, the new LTR visa introduces the possibility for foreign workers employed by 'well established overseas companies' to obtain a work permit. In addition, there is no requirement for the overseas company to establish a subsidiary, a branch, or a representative or regional office in Thailand. Nevertheless, the following criteria must be met:

- The applicant must:
 - have a personal income of a minimum of USD 80,000 / year in the past two years or have a personal income of a minimum no less than USD 40,000 / year in the past two years and hold a Master's degree or above or own intellectual property or receive Series A funding; and
 - have at least five years of work experience in the relevant fields of the current employment over the past 10 years; and
 - have health insurance with at least USD 50,000 coverage or social security benefits insuring treatment in Thailand or at least USD 100,000 deposit.
 - The employer must be a public company on a stock exchange or a private company in operation for at least

three years with combined revenue of at least USD 150,000,000 in the last three years.

Conclusion: the new LTR visa scheme introduces the possibility for a foreign remote worker, with no employer established in Thailand, to obtain a work permit and a non-immigrant LTR visa. Remote working is now authorised under Thai law, provided that the overseas company and employee meet the requirements set by the LTR scheme.



2.2 Is there a difference if the remote worker is a Thai citizen or a foreigner?

There is no law prohibiting a Thai citizen to work remotely from Thailand for a foreign-based employer and Thai citizens are de facto not required to hold a visa and work permit.

Nevertheless, foreign-based employers shall be careful that the work carried out by their local remote employees is not considered as falling into a category of activity requiring a Foreign Business License under the Foreign Business Act B.E. 2542 (1999) (Foreign Business Act). If so, the local remote employee will in theory trigger the obligation for the foreign employer to establish a corporate set-up in Thailand and apply for a Foreign Business License (see also below 2.5(a)).

Conclusion: Thai remote workers are not subject to the restrictions imposed by immigration and Labour laws to foreign remote workers. However, they might trigger the requirement to obtain a Foreign Business License if they perform an activity enumerated under the lists of the Foreign Business Act.

2.3 What are the controls and sanctions?

The Department of Employment (DoE) is the authority in charge of the control of the foreign workers and enforcement of the foreign work regulations. The Immigration Police has

also authority to inspect workplaces and check visa and work permit status of foreign employees.

Applications for non-immigrant visa and work permits are granted after consideration of supporting documentation and proof of employment provided by the employer and the employee such as company registration certificate, pictures of the workplace and staff, tax registration, etc.

Hence, a first level of control on documentation is carried out by the authorities based on the evidence provided by the employer and the employee. In the event of fraudulent employment or fraudulent declaration, the visa and the work permit may be revoked. It could also be considered as a false statement to official, forgery of document, lying to official or use of fraudulent document which are criminal offenses under the Penal Code. Any offender may be liable with imprisonment to a term up to three years or to a fine of THB 6,000 or both.

In addition, as per the Foreigner's Working Emergency Decree, any foreign individual working in Thailand without a valid work permit or carrying on work outside of the scope authorised by his work permit is liable to imprisonment for a term not exceeding five years or to a fine of THB 5,000 to THB 50,000 or both. Nonetheless, if the foreign individual agrees to leave the country within the next 30 days, the inquiry official may settle the case, requiring the payment of a fine.

Employers of foreign employees working without holding a valid work permit or working outside the scope of their work permit are liable to a fine ranging from THB 400,000 to THB 800,000 per employee.

Conclusion: working illegally in Thailand may expose foreign remote workers to imprisonment, significant fines and deportation. Nevertheless, in practice, inspections are not common and imprisonment is very unlikely.

2.4 Does Thai employment law allow a Thai company to employ a foreign individual to work remotely from outside of Thailand?

Thai employment law does not prevent a Thai company from employing a foreign individual to work remotely from outside of Thailand. However, the foreign employee will be required to hold a valid work permit in Thailand, notwithstanding the fact that the foreign worker is working exclusively from outside of Thailand. In addition, the Thai company will be required to comply with foreigners' employment quotas.

As a reminder, the foreigners' employment quotas in Thailand are as follows (NB: a BOI company may benefit from exemptions and LTR visa holders are not counted as foreigners):

- Limited company: four Thai employees per foreigner for a limited company and THB 2,000,000 fully paid-up share capital per foreigner.
- Branch office: One Thai employee per foreigner for branch within the limit of 10 foreigners and THB 3,000,000 investment/capital per foreigner (capital remittance must cover all expenses for a period of six months).
- Representative office and regional office: one Thai employee per foreigner within the limit of two to five foreigners depending on the activity and THB 3,000,000 investment/capital per foreigner (capital remittance must cover all expenses for a period of six months).

In addition, having an employee working from abroad might expose the Thai company to corporate tax, social security contributions and Labour law application in the country where the employee is based, including minimum wage, working hour or dismissal proceeding.

Conclusion: a Thai Company may employ foreign individuals and have them work remotely outside of Thailand. Though, the Thai company will be subject to the same legal requirements and constraints when employing a foreigner in Thailand in addition to the additional requirements that may apply in the jurisdiction hosting the remote employee.

2.5 Is there any way to circumvent the difficulties for a foreign individual to work remotely from Thailand through the use of a freelance contract? A branch or regional office? An employer of record?

(a) Freelancing – self employment

On the one hand, the foreign freelancer may be considered as 'working in Thailand'. The definition of 'work' under the Foreigners Working Decree is extensive and includes "any profession regardless whether there is an employer [or not] but shall not include business operation of a licensee under the [Foreign Business Act]". The definition does not make any difference between working in Thailand or from Thailand. A Foreign remote freelancer will thus be deemed to work in Thailand, and therefore must hold a work permit (see Section 2.1 above).

On the other hand, the foreign freelancer may also be considered as 'doing business in Thailand' and must therefore comply with the Foreign Business Act which contains several prohibitions and restrictions for foreigners. Foreigners or foreign-owned companies are forbidden to carry-out activities enumerated under List 1 of the Foreign Business Act and are required to obtain a Foreign Business License to carry-out activities enumerated under List 2 and 3.

List 3 of the Foreign Business Act is particularly wide and counts numerous activities that may be carried by a remote employee:

- accounting services;
- legal services;
- architectural services;
- engineering services;
- brokerage;
- retail and sales of good;
- advertising business; and
- other business services.

To our best knowledge, the Department of Business Development has never granted a Foreign Business License to a foreign individual.

Conclusion: a foreign remote freelancer, regardless the activity conducted, must (i) hold a non-immigrant visa and a work permit and therefore be employed by a company established in Thailand, (ii) hold an LTR visa or (iii) incorporate a company with at least two other shareholders (this will be reduced to at least one other shareholder as from February 2023).

(b) Representative office/Regional office

The activities authorised to be carried out under such establishment are limited and represent an important investment in terms of administration and cost (minimum investment for the representative office must be THB 2,000,000 (however, in practice, to apply for a work permit, the DoE generally requests that the representative office invests at least THB 3,000,000).

(c) Employer of record

As discussed above, a foreign individual working remotely for a foreign-based employer cannot apply for a work permit and for a non-immigrant visa unless the employer has an establishment in Thailand.

Aware of this issue, numerous operators (employer of record or EOR) in Thailand, including foreign chambers of commerce, are offering 'host services' to overseas companies or foreign

individual to sponsor visa and work permit application. The EOR will formally appear to be the employer of the foreign remote individual/employee for the concern of the authorities.

Without being formally illegal, using an EOR to obtain a work permit and visa for a foreign individual or the foreign employee of foreign-based companies could be considered fraudulent and expose the EOR, the employer, and the employee to criminal prosecution in Thailand (see *above Section 2.3*). In addition, the visa and work permit may be revoked, and the employee deported.

Conclusion: EOR are not yet formally recognised in Thailand. Therefore, foreign employees and employers shall be aware of the risk when using such services.



2.6 What tax consequences would such a structure for the employer and employee have?

(a) Tax residence status for individuals in Thailand

Tax residency in Thailand is defined by Section 41 of the Revenue Code.

Any person staying in Thailand for a period or multiple periods aggregating 180 days or more in any tax year shall be deemed a resident of Thailand. Persons staying in Thailand for a period of time below this threshold are considered non-residents.

As a consequence, a remote worker working from and/or staying in Thailand for 180 days per calendar year will be deemed a tax resident in Thailand.

Under the Revenue Code:

- residents are taxed on:
 - all income derived (earned or generated) in Thailand, irrespective of it being paid (received) in Thailand or outside of Thailand; and
 - income that is derived (earned or generated) outside of Thailand, when it is remitted into Thailand in the year in which it is derived.
- non-residents are taxed only on income that is derived (earned or generated) in Thailand, irrespective of it being paid (received) in Thailand or outside of Thailand.

In addition, remote workers may face double taxation in Thailand and in other countries where they are working/staying or have the citizenship. Double taxation agreements (DTA) could intervene and help fix the tax residency status and place of taxation to avoid double taxation. Thailand has entered into such agreements with 61 countries, including Singapore, France, Germany, the UK and the United States.

Residents who derive income from abroad are taxable on that income if remitted into Thailand in the year in which it is received.

(b) Permanent Establishment

A permanent establishment, commonly referred to as a PE, is considered a separate taxable entity of a foreign company in a country where it has a physical presence and operates. As consequence, the profits generated by the PE are subject to tax in that country. This allows the host country to tax the foreign company on its income earned through the PE within such country. The definition of PE in Thailand is specified in both the Revenue Code and the various Double Taxation Agreements (DTAs) that Thailand has signed with other countries.

(i) Revenue Code

Tax residency for corporation is defined by the Revenue Code. According to Section 66 and 76 Bis, a foreign company which has an employee, an agent or a go-between carrying-out business in Thailand and who receives income or profits in Thailand, is liable to file a tax return and tax payment with respect to corporate income tax (CIT), value-added tax (VAT), withholding tax (WHT), business specific tax (SBT), and stamp duty (STD). The amount subject to tax is the net profit arising from the business carried on in Thailand.

A foreign company will be subject to tax in Thailand if the company “*carries on business in Thailand*”. Section 76 Bis of the Thai Revenue Code establishes broad criteria for determining when a foreign company is engaged in business activities within Thailand, stating that if the foreign company has an “*employee, a representative or a go-between*” that carry on the business in Thailand, then that company itself will be deemed carrying in business in Thailand.

The triggering factor is the generation of income or profits in Thailand through the employee, representative or go-between. The foreign employer should not derive any profit because of having an employee based in Thailand (for example: the remote employee should not negotiate or enter into any contract in Thailand, or perform management functions otherwise, the employee may be deemed to be the representative of the foreign employer in Thailand and the latter would be subject to taxation in Thailand).

Additionally, the Revenue Code does not establish a time threshold beyond which an employee in Thailand would cause their foreign employer to be considered as having a taxable presence in the country.

(ii) Double Taxation Agreement

Double taxation agreements (DTAs) are agreements between two countries allocate the right of taxation for profits between the countries that are signatories of the DTA. Generally, the right of taxation for profits incurred by a PE is allocated to the country in which the PE is deemed.

For instance, article 5 of the DTA between Thailand and Singapore provides a list of activities (ex: *place of management, workshop, office, factory*) etc. and time threshold (*more than 12 months*) that shall be considered as creating a PE in Thailand. It also indicates what should not be considered as PE (ex: *maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have preparatory or auxiliary character, for the enterprise*). It, e.g. specifically defines the conditions under which a person acting on behalf of an enterprise in one contracting State (e.g. Singapore) would be considered to have a PE in the other contracting State (e.g. Thailand): a person to be deemed as having a PE in Thailand, the person must have and habitually exercise an authority to negotiate and conclude contracts for or on behalf of the enterprise, or habitually maintain a stock of goods or merchandise belonging to the enterprise in Thailand, or habitually secure

orders in Thailand wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlled by it or having a controlling interest in it. It also specifies that brokers, general commission agent or any other agent of an independent status to whom paragraph 5 applies, shall not be considered as having a PE.

Illustration: a Thai company contracts with a Singaporean based company, that does not have a branch or business office in Thailand, to provide design and supervision services. The Singaporean based company sends an employee to Thailand to undertake the contract. Under Section 76 Bis of the Revenue Code, the Singaporean based company will be deemed carrying business in Thailand through its employee, as consequences considered as a PE and therefore be liable to taxation and other regulatory requirement in Thailand. However under Article 5 of the Singapore-Thailand DTA, such employee will not be considered as a PE of the Singaporean based company in Thailand, as long as the employee does not exercise an authority to negotiate and conclude contracts for or on behalf of the Singaporean based company, or habitually maintain a stock of goods or merchandise belonging to the Singaporean based company in Thailand, or habitually secure orders in Thailand wholly or almost wholly for the Singaporean based company.

Conclusion: Foreign based companies that employ remote employees based in Thailand must be mindful of the potential risk for those employees to create a PE in Thailand. To mitigate this risk, foreign based companies are recommended to carefully review the provisions of the applicable DTA (if any) regarding PE.



2.7 Are there any social security issues that need to be taken into consideration?

Under the Social Security Act B.E 2533 (1990) (Social Security Act), the definition of employer and employee does not differ from the Labour Act and Foreigners Working Decree (see section 2.1 above). Therefore, foreign remote workers will be considered as working in Thailand and the employer based overseas must register with and contribute to the Thai social security fund and make other contributions as required under the Social Security Act.

However, the Ministerial Regulation prescribing requirements and procedure for social security registration and certificate of Social Security B.E. 2549 (2003) (Social Security Registration Regulation) and the Social Security Office Announcement Re: prescribing form for Social Security registration according to Social Security Act B.E. 2533 (1990) (Social Security Office Announcement) do not recognise employers who are based outside of Thailand and do not have any establishment here.

Please note that the abovementioned regulations do not prohibit directly foreign employers from registering with the Social Security Office, however it can be construed as indirectly prohibiting such registration because the format and procedure do not support foreign employer registration. Hence, there is currently no procedure with the Social Security Office supporting the registration of an employer based outside Thailand and employees working remotely.

Conclusion: In theory, foreign remote workers working in Thailand for a foreign based company are liable to contribute to the social security and employer's compensation funds. In practice, however, given that the social security registration system does not recognise (yet) employers based abroad, foreign based employers are not complying with this requirement.

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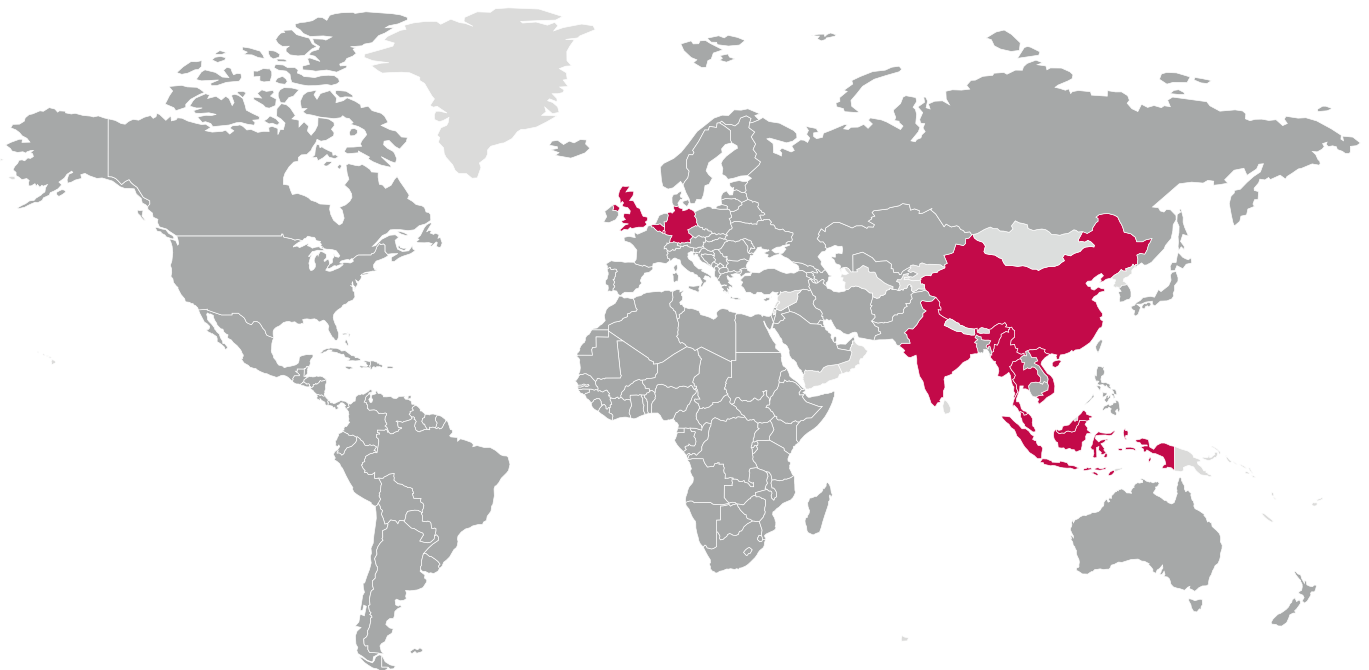
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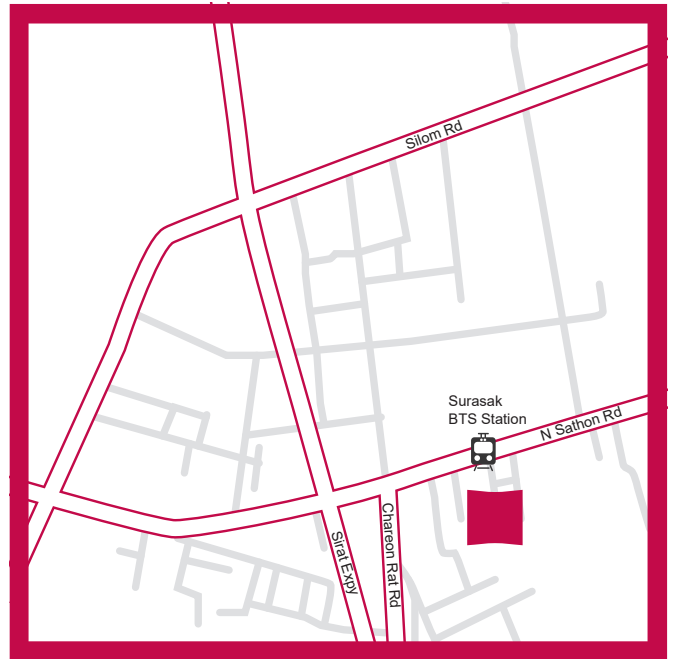
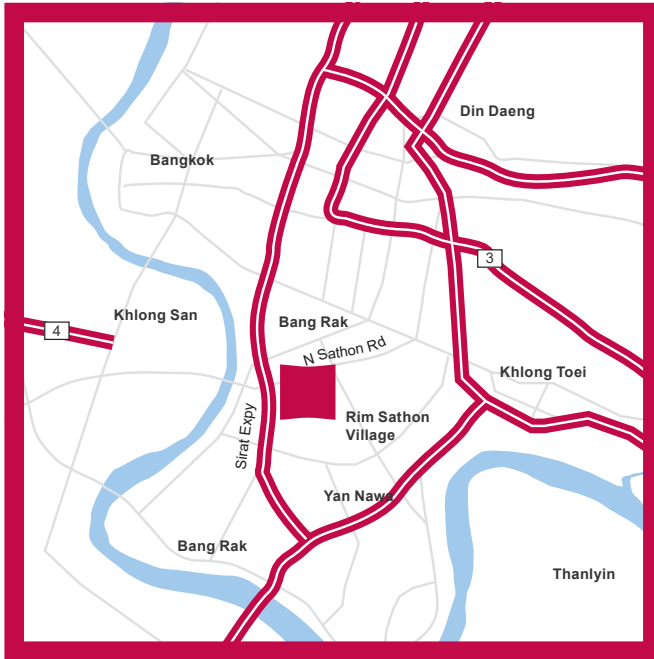


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