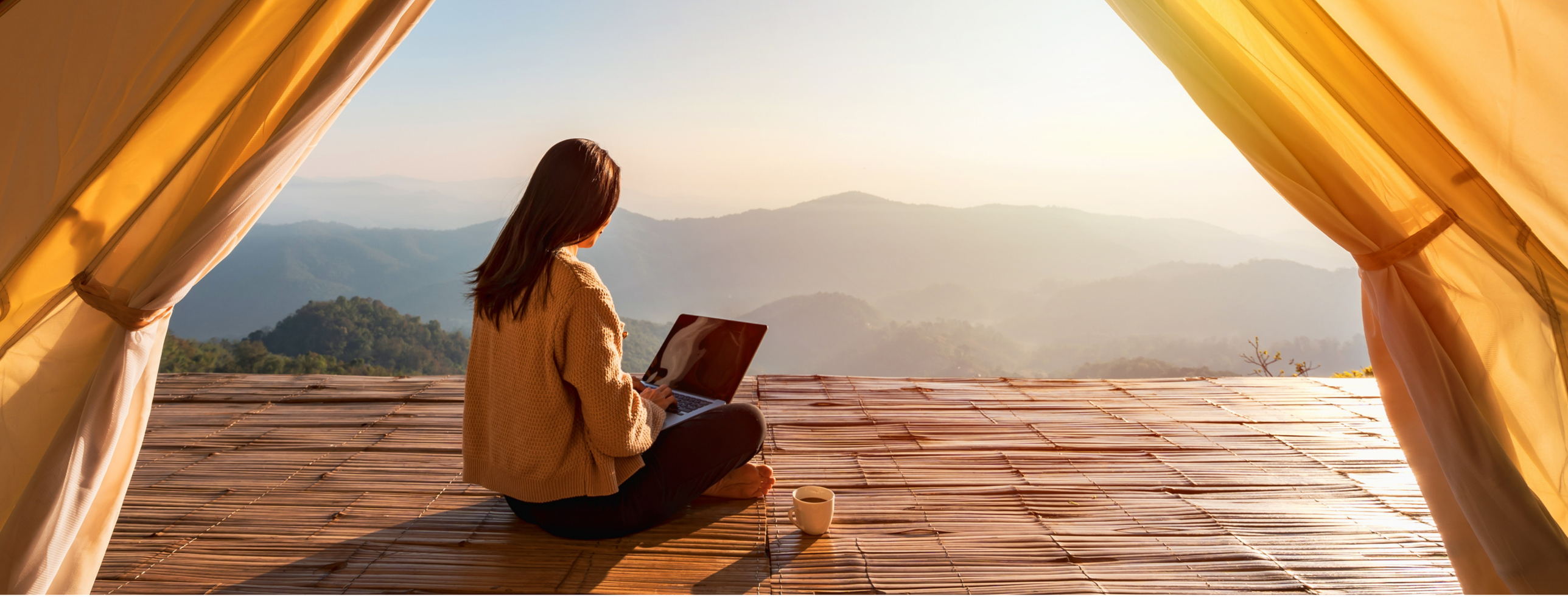
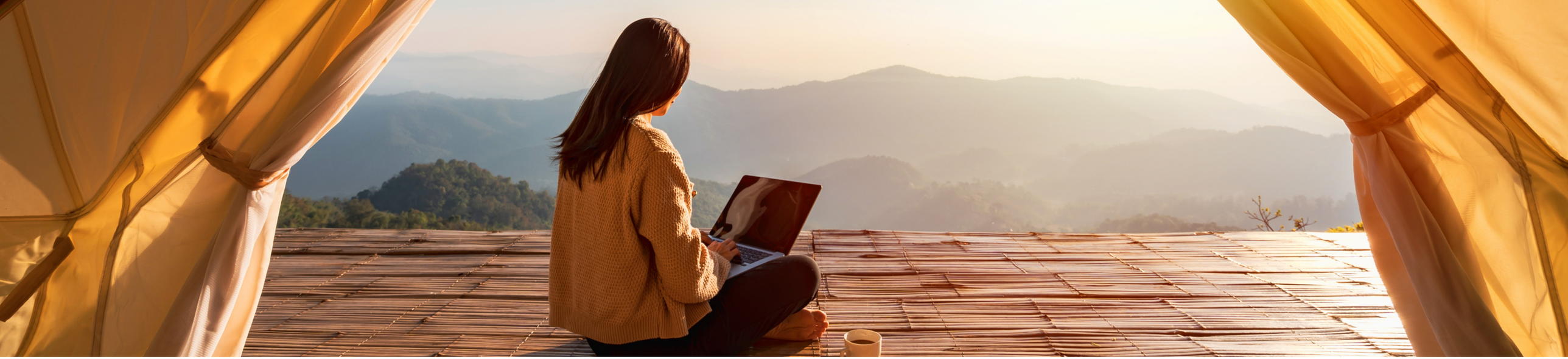


Workation
Germany & Italy

ELLINT NEXT



Workation, i.e. working in one place while on holiday, is one of the positive leftovers of the pandemic. Initially, it was the exclusive working from home that showed employers and employees that more flexible working methods work and even lead to greater employee satisfaction. As travel restrictions began to ease, homeworking began to spread across national borders. This development led to what is now widely known as Workation. From an employer's point of view, this is a recruitment and image tool that should not be overlooked given its widespread popularity.

It is therefore worth taking a closer look at the key legal points that need to be considered from an employer's perspective in the context of a workation. At first glance, little may change when employees open their laptops in a different location. However, employers may face several risks that can be minimised in advance through so-called workation or mobile work agreements/policies.

In this article, our experts from **Lexellent** in Italy and **Altenburg** in Germany focus on 5 key questions and give us an overview of how things are done in their respective countries with respect to workation.

ELLINT NEXT

What types of mobile working are common in your respective countries?

In German labour law, telework as a form of mobile working has also been regulated by law since 3 December 2016 (see Sec. 2 ArbStättV). However, this form of mobile working is not very popular in actual practice, as the law defines it as a very narrow form of remote working. This is because the employer provides the employee with a fixed workplace in the employee's home for pre-agreed weekly working time.

There are no legal requirements in German law for working from a home office or mobile office, i.e. working from any location, including abroad. The existing regulations are therefore based on company practice or works agreements.

In Italy, two different forms of remote work are provided for and regulated: (a) the so- called "lavoro agile", i.e. mobile work, which is carried out partly inside the company's premises and partly outside (regulated by Articles 18-23 of Law 81/2017) and (b) the so-called"telelavoro", i.e. telework, which is carried out entirely outside the company's premises, normally at the employee's home (regulated, for the private sector, by the Interconfederal Agreement for the Implementation of the European Framework Agreement on Telework of June 9, 2004).

What are general and country-specific labor law implications that need to be considered for a workation?

In general, the labour law implications in the context of a workation are generally transparent, as German or Italian law generally continues to apply to the employment relationship due to the stipulation in the employment contract. However, national law continues to apply, as the Rome-I Regulation stipulates that the law of the habitual place of work applies. In the case of a temporarily change of place of work, such as a short-term Workation in another country, the habitual place of work therefore remains in the home country.

This means that, in principle, the provisions of the employment contract applicable in the home country continue to apply during a workation. Nevertheless, employers have a particular interest in specifying the framework conditions for mobile work abroad, which can be combined with vacation, in individual contracts or guidelines.

ELLINT NEXT

For German employers, two issues are relevant from a labour law perspective: First, there is the question of the **maximum permissible duration** of a workation. The first is the question of the maximum duration of a workation. A workation should be a benefit for the employee, but at the same time should not have an impact on the company's processes. For this reason, German employers favour a maximum limit of 30 days per year (partly also for tax reasons, see below).

Second, occupational health and safety regulations, such as minimum rest periods and maximum working hours, must be considered. German law provides for high occupational health and safety standards, which also apply if work is carried out in the mobile office in Germany. However, if the mobile office is located abroad, the mandatory local protective provisions apply. The employer remains responsible for compliance with health and safety regulations even in the case of Workation. It is not possible to fully delegate this obligation to employees.
For popular Workation countries such as Italy, Spain and Greece, it is therefore increasingly common for German employers to provide their employees with information on the essential health and safety regulations.

For example, the Italian health and safety regulations (D.Lgs. 81/2008) stipulate that employers must provide the employees and their representatives at least once a year with written notification of the general and specific risks associated with their working arrangements. Moreover, in the case of mobile work performed far from the company's premises, the employer can appoint a competent doctor, different and additional to that already appointed for in-house work, close to the place where the agile work takes place.

Apart from labour protection, mobile work in Italy always requires a specific agreement between the parties, which can be temporary or permanent. Italian law does not stipulate any requirements regarding the place of work, which can be freely chosen by the employee, thus even including a vacation or touristic location, as long as it guarantees the regular work performance, in conditions of security and confidentiality. Only collective agreements can specify workplaces that are not suitable for agile working for reasons of safety or data protection.

However, Italian law prescribes specific termination conditions for mobile work agreements: in particular, a fixed-term contract can only be terminated before the end of the term for good cause. An open-ended contract can be terminated with a notice period of 30 days (this notice period is extended to 90 days for employees with a disability) or without notice in case of just cause.

What are the general and country-specific social security implications for a workation?

The social security consequences of a workation within the EU are regulated by Regulation No. 883/2004. According to this regulation, employees who do not regularly work in one or more other Member States remain covered by the social security system of their country of employment. The principle of the place of employment applies. Even though the insurance systems are mutually recognised and there should therefore be no gaps in coverage, some work/mobility agreements provide for employees to take out additional private health insurance.

European law also requires the employee to obtain an A-1 certificate from the relevant sickness insurance institution, which must also be carried abroad.

ELLINT NEXT

As the benefits of harmonisation under European law do not apply when employment takes place in a third country, German employers therefore often limit a Workation to European countries. This is because German social security law stipulates that the employer must pay for the medical costs of its employees abroad. The employer can receive reimbursement from the health insurance fund in the amount of the usual costs for an insured event in Germany. However, there is still a considerable cost risk, as treatment abroad can be very expensive.

In individual cases, mobile working in third countries may be permitted by German employers if there is a bilateral social security agreement with the country that covers all branches of employment. These agreements fulfil the same purpose as the European regulation: they lead to the mutual recognition of insurance periods and costs. For example, Germany has concluded an agreement with Brazil that covers health, pension, accident and unemployment insurance.

In Italy there are no special features and the above mentioned EU discipline applies, as well as the bilateral social security agreements between Italy and the host country, which may set specific rules for determining where contributions are to be made, and thus need to be analyzed on a case-by-case basis..

What are the general and country-specific tax law implications for a workation?

The magic number of 183 days stems from tax law, which is why the myth is widespread that it is possible to work abroad for this length of time without any problems. However, the 183-day rule initially only states that employees are liable to pay income tax in their country of employment if they spend 183 days there within a 12-month period. The tax jurisdiction therefore changes if employees work abroad for more than 183 days.

However, the permanent establishment risk and the representative permanent establishment risk must also be taken into account. Whether a foreign permanent establishment is established by an employee working abroad is primarily determined by national tax law, to which domestic employers are generally not familiar with. In some cases, there are also double taxation agreements that assign the right of taxation to one country in order to avoid double taxation.

ELLINT NEXT

In order to avoid the risk of a permanent establishment, many employers in Germany limit the posting of their employees to 30 days.

In all national regulations, the time factor is one of the key criteria for determining whether a permanent establishment exists. A permanent establishment is assumed to exist if it is designed for a certain duration and continuity. There is no accepted time limit after which a permanent establishment can be assumed to exist. Based on the OECD-Model Agreement it should in principle be possible to allow employees to work remotely for up to six months in a calendar year without establishing a permanent establishment. In these cases, however, there is a risk that national law will assume the existence of a permanent establishment after a much shorter period. A case-by-case assessment must therefore be carried out in each case.

German employers therefore generally limit a posting to 30 days, as the permanent establishment risk under tax law is then also excluded for countries that assume the existence of a permanent establishment after just one month. Furthermore, a case-by-case assessment can be waived.

The risk of establishing a representative permanent establishment can be avoided by prohibiting employees from acting as representatives of the company and concluding contracts abroad. This can be done by means of a separate declaration of commitment through separate clauses in labour/mobile working agreements.

Tax residence is calculated based on the ordinary criteria set forth in Article 2 of D.P.R. No. 917/1986, according to which the above mentioned ‘183 days rule’ applies.

By Circular no. 25/E dated August 18, 2023, the Italian Revenue Agency provided some examples of mobile workers who should be considered tax resident in Italy:

- a foreign citizen who works from Italy in agile mode for a foreign employer and maintains his/her domicile in Italy for most of the tax period;
- an Italian citizen who has moved abroad, where he/she works in agile mode, and has maintained registration in the Italian resident population registries for most of the tax period, even though he/she has moved his/her domicile abroad;
- an Italian citizen registered with AIRE (i.e. Registry Office of Italians resident abroad) for most of the tax period, who works for a foreign employer with an ordinary place of work in the country resulting from AIRE, but works in Italy in agile mode and has his/her domicile in Italy.

What are the most important aspects that can be derived from the three areas of law mentioned above for the drafting of workation agreements/policies and the handling of workation?

Flexible working, both at home and abroad, has become an integral part of today's working world. Employers are therefore well advised to consider the extent to which they enable their employees to work from abroad and to combine this with their vacation to a so-called workation.

In view of the various relevant regulations, particulary from labour, social security and tax law, employers should make a conscious decision in favour of regulating and structuring mobile working from abroad. Within the framework of a mobile work agreement/policy, not only the essential content-related issues, but also the application procedure can be regulated.

The following key aspects can be derived from the three law areas discussed here:

- **Setting a time limit to avoid the risk of establishing a permanent establishment abroad.**
- **Consideration of local health and safety regulations (working hours, job security, rest breaks, public holiday regulations);**
- **Regulation and consideration of termination options (termination, fixed term, etc.).**
- **Territorial restriction, e.g. to the EU to benefit from harmonised social security protection.**

ELLINT NEXT

Dr. Luise Brunk
Attorney
Altenburg
l.brunk@altenburg.net

Dr. Luise Brunk is an attorney at our German member firm Altenburg. She is specialised and focuses on social law (company audits, status determination procedures), new work models (mobile working, workation), employment and service contract law and dismissal protection law and on works related to constitution law.

She has completed her law studies in Freiburg i. Brsg. and Paris and obtained a Doctorate in 2020.
She speaks German, English, French, and Greek.

She is a member of ELLINT Next, a working group within ELLINT.

Valentina Boscarino
Junior Associate
Lexellent
valentinaboscarino@lexellent.it

Valentina Boscarino is a Junior Associate at our Italian member firm Lexellent.
She is a graduate of the University of Roma Tre and a member of the Milan Bar Association.
She is part of the law firm's Privacy & Corporate Compliance Department and provides assistance, both in and out of court, in data protection, compliance and corporate law matters.

She is involved in research and updating activities for the publication of scientific and general articles.
She also participates in ELLINT Next working group.

ELLINT NEXT