

**GUIDELINE  
CONTRACTING OUTSIDE  
THE NETHERLANDS**

**PAR  
TOS**

## Table of contents

1. Introduction .....	3
2. Flowchart contracting outside the Netherlands .....	4
3. Elaboration aspects flowchart .....	5
<b>3.1 STEP 1: REMUNERATION .....</b>	<b>5</b>
<b>3.2 STEP 2: PERSONAL LABOR .....</b>	<b>5</b>
<b>3.3 STEP 3: RELATIONSHIP OF AUTHORITY .....</b>	<b>5</b>
3.3.1 STEP 3A: Management and supervision .....	5
3.3.2 STEP 3B: Other relevant aspects .....	6
<b>3.4 STEP 4: EMPLOYMENT TYPE .....</b>	<b>7</b>
4. Contract of services (contractor).....	8
5. The importance of the right form of contract .....	8
5.1 Labor law.....	9
5.2 Payroll administration .....	9
5.3 Social security .....	9
5.4 Wage tax .....	10
5.5 Immigration .....	10
5.6 Insurances.....	10
5.7 Corporate income tax .....	10
5.8 Occupational Health and Safety Services.....	11

## **1. Introduction**

Many members of Partos (hereafter ngo's) collaborate with people abroad. However, there is no guideline that can provide guidance on determining an appropriate construction to be entered into in this collaboration. The guiding principles are to create equality between collaborators (depending on the ngo's policy, this could include the same type of contract with similar conditions for similar work or a similar cost of living level depending on an index per country), compliance and limiting costs. The purpose of this guideline, therefore, is to provide clarity and frameworks so that the right choice is made for each situation with regard to the way in which the collaboration is designed.

There are several ways to cooperate with persons abroad. We distinguish the following in this guideline:

1. Employees: based on an employment contract with the ngo.
2. Employees EOR: based on an employment contract with an employer of record.
3. Independent contractors: on a contract of services basis.

Cooperation with an independent contractor is usually the easiest solution. However, it is not the best fit in all cases. There are major differences between countries in how the contracting of the independent contractors is handled and how the collaboration in question is assessed (depending on local national legislation). Collaboration with an employee involves more obligations.

These include the effect of the applicable labor law, the obligation to start a payroll, the payment of (wage) tax and the practical implementation of the health and safety policy. In the case of an EOR employee, these obligations are the responsibility of the party engaged for this purpose, the employer of record<sup>1</sup>. This does usually involve significantly higher costs.

To make the right choice in how to cooperate with persons abroad, it helps to have a step-by-step plan. Such a roadmap is included in Chapter 2 and explained in Chapter 3 of this guideline. Chapter 4 briefly discusses the contract of services and Chapter 5 further explains the importance of working via the right way of cooperation by means of various points of interest.

Please note that this guide does not address the possibilities of secondment. Such a situation should therefore be dealt with separately from this guideline.

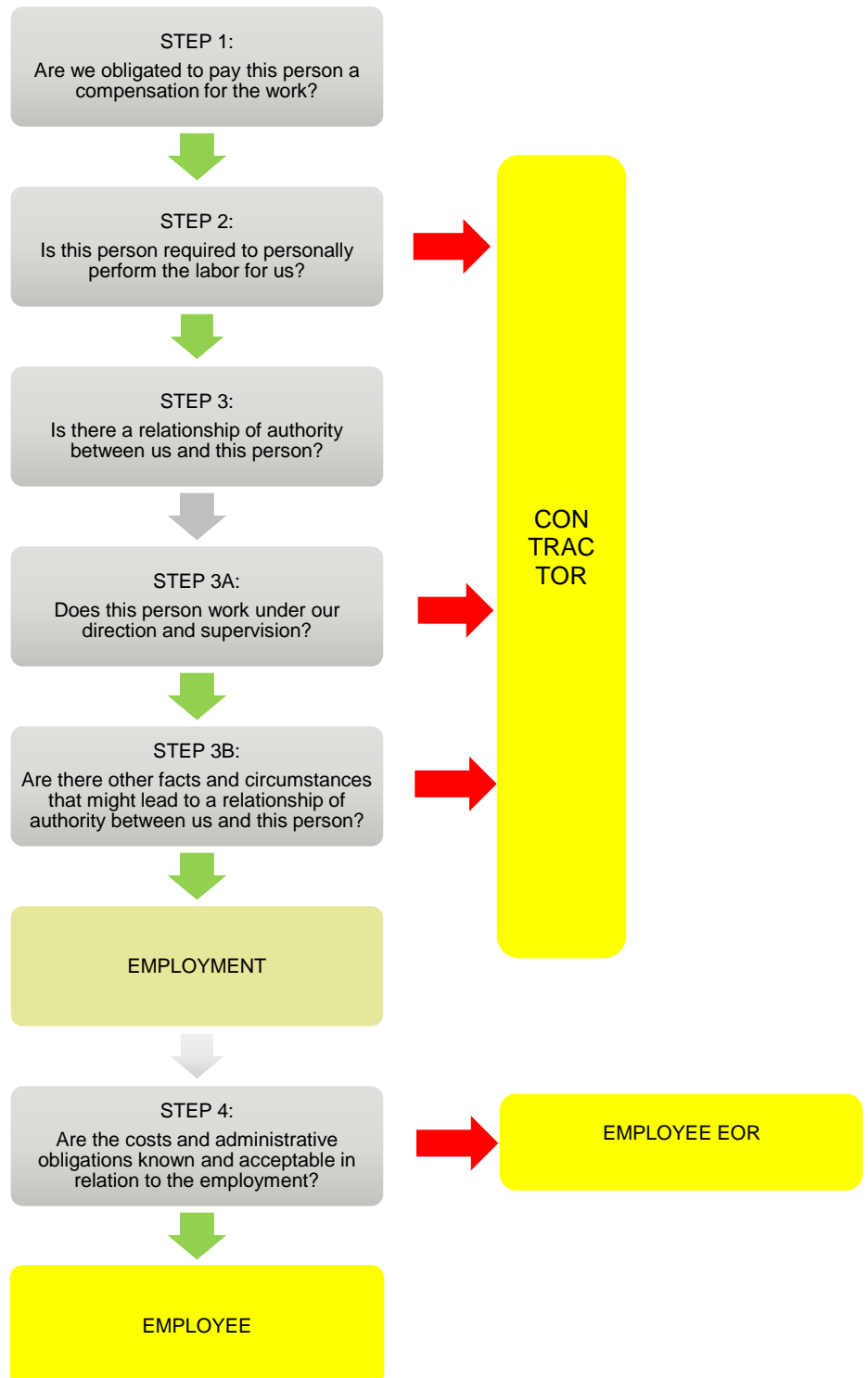
Finally, we note that this guideline is a living document, which is constantly subject to change due to changes in laws, regulations and case law. This guideline is also based on Dutch law, including the assessment of whether an employment relationship exists. No rights can therefore be derived from the contents of this guideline. This guideline does not constitute (tax) legal advice, but serves to support the decisions to be made at the start of a cooperation with a person abroad. If in doubt, always contact a specialized advisor.

---

<sup>1</sup> An employer of record (EOR) is a third party that allows employees in other countries to be legally employed. The EOR takes care of payroll, fringe benefits, taxes and compliance with local laws, while the day-to-day management of the employee remains with the ngo.

## 2. Flowchart contracting outside the Netherlands<sup>2</sup>

The flowchart below serves as a guideline in determining the appropriate form of contract when entering into a collaboration with a person living and/or working abroad. This involves first determining whether there is an obligation to pay compensation (STEP 1) and personal labor (STEP 2) and then whether there is a relationship of authority (STEP 3). If both personal labor and a relationship of authority are present, an employment relationship will usually exist and consideration will be given to entering into an employment contract, with a choice between direct employment or employment via an Employer of Record (STEP 4).



<sup>2</sup> A green arrow represents the answer yes, a red arrow represents the answer no.

### **3. Elaboration aspects flowchart**

An employment contract defines the conditions under which an employment relationship is entered into. It depends on the (principles of the) cooperation whether someone is an employee or can be contracted as an independent contractor.

An employment relationship exists when the following three elements are present:

1. The employee is obliged to personally perform work for the employer for a certain period of time.
2. The employer is obligated to pay the employee compensation for the work.
3. A so-called "relationship of authority" must exist between the employee and the employer.

If at least one of these elements is missing, a collaboration can be entered into on the basis of a contract of services. The facts and circumstances of the specific situation are relevant here and must be assessed. In particular, the assessment of the presence of a relationship of authority requires additional explanation. The relevant aspects here, as well as the element of personal labor, are explained in this chapter.

#### **3.1 STEP 1: REMUNERATION**

There is so-called "salary" insofar as there is an obligation to pay compensation for the agreed work. This means that there is an obligation to pay compensation, which is (significantly) higher than a mere reimbursement of expenses

#### **3.2 STEP 2: PERSONAL LABOR**

The employment contract is personal and, as mentioned above, the work must be performed personally. This means that an employee cannot simply be replaced by another person. If this is the case, there is in principle no employment contract. The obligation to perform work personally can also be a contract of services. In that case, however, the assessment of the presence of a relationship of authority is decisive.

#### **3.3 STEP 3: RELATIONSHIP OF AUTHORITY**

When assessing whether there is a relationship of authority, all elements and their mutual relationship should be considered. It is not possible to define all possible elements beforehand. The following provides a comprehensive overview.

##### **3.3.1 STEP 3A: Management and supervision**

This looks at the influence the ngo has on the way the person performs the work. A relationship of authority is likely if the ngo can give orders and instructions which the person has to follow when doing the work and which go beyond determining the purpose of the assignment. These include, for example, instructions on how the work is to be performed and not just on what is to be delivered (the result). Whether the ngo actually gives orders and instructions is not decisive. What matters is that the ngo has the right to give those orders and instructions. The extent to which the ngo can give instructions also depends on the nature of the assignment. If there is an obligation to achieve a result, that may be an indication that the person has the freedom to determine how to achieve that result. The more concrete the result and duration of the assignment are described, the more plausible it is that the person is working outside the scope of authority. If there are (for example, legal) regulations that apply to everyone, having to comply with these does not count when assessing whether there is a relationship of authority.

Indications of the presence of a relationship of authority:

- The ngo may give directions, instructions on how the person is to perform the assignment (i.e., the how), not just the result it is to produce (the what).
- The result of the assignment is not clearly defined.
- The starting and ending points of the assignment are not clearly defined, and the agreement continues for a long period of time.
- The person is supervising employees within the organization, or is supervised by someone within the organization.
- The person does not have the legally required certificates needed to perform the work, but the ngo has these certificates.
- Third-party regulations make it impossible for the person to perform the work "outside authority," i.e., without direction and supervision.

Contra-indications for the presence of a relationship of authority:

- There is an obligation to achieve a result, where the person is free to determine how to achieve this result.
- The person has specific knowledge/skills that employees within the organization do not have.
- A financial interest of the person in the company of the ngo makes a relationship of authority more unlikely (with the exception of the statutory director because in this case, based on case law, a relationship of authority is assumed).

### **3.3.2 STEP 3B: Other relevant aspects**

In addition to the aforementioned elements that are almost always considered in determining whether there is a relationship of authority, there are a number of other aspects that can be taken into account in this assessment. These include:

- **Comparability of personnel:** this looks at the relationship between the ngo and the individual and to what extent this relationship is comparable to personnel employed by the ngo. Authority is more likely to exist if the work the person performs is an essential part of the ngo's operations. Case law shows that it is difficult to imagine that there is no authority in activities that are an essential part of the business operations (core activities). Often, therefore, the activities are structurally embedded in the ngo's business operations.

Indications of the presence of a relationship of authority:

- The person has previously been employed by the same ngo for the same work.
- The work that the person performs at the ngo is also performed at this ngo by people in employment.
- The working conditions and agreements and regulations that apply to the person are similar to those that apply to employees employed by the ngo.
- The person's work consists of absorbing crowds at peak work times or due to illness of other personnel, provided that such work is also normally done by persons in employment.
- The work is an essential part of the ngo's operations.
- The person will have performance reviews with the ngo.
- The person must attend (mandatory) company training or continuing education courses.
- The person participates in company activities, such as team activities.

Contraindications of the presence of a relationship of authority:

- The person has specific knowledge/skills that employees within the organization do not have.
- The person receives significantly higher pay for the work than employees doing similar work as employees.

- **Outward appearance:** this considers the extent to which the person is actually part of the organization for which they work. The more there is reason to believe that the person is part of the organization, the more likely it is that a relationship of authority exists.

Indications of the presence of a relationship of authority:

- The person is required to wear work clothes, corporate clothing, a uniform of the ngo with a corporate logo of the ngo on it.
- The person is required to use business cards, or a signature on emails of the ngo.

Contraindications of the presence of a relationship of authority:

- The person may use a logo, company clothing, company bus or other features of his/her own company when the person comes in contact with clients.

- **Working hours and location:** here the extent to which the person can determine working hours and the location of the work is important. The influence the ngo has on materials and resources is also considered.

Indications of the presence of a relationship of authority:

- The person is not free to determine the location where the person performs the work.
- The person is not free to determine working hours.

- The ngo generally determines what materials the person uses for the work and/or provides them.
- The ngo generally determines what other resources the person must use for the work and/or provides them.

There is no automatic indication of a relationship of authority if the nature of the work entails that the person must work at a certain location or at a certain time.

Contraindications of the presence of a relationship of authority:

- The person uses own company resources (other than tools), e.g., own company car, laptop, etc.
- The person pays a fee for (being able to) use company resources of the ngo.

- Liability for risks: this includes consideration of the allocation of risks between the individual and the ngo in cases of damage (to third parties), illness and accident, among others.

Indications of the presence of a relationship of authority:

- The ngo is liable for damages (to third parties) caused by the person.
- The ngo continues to pay income to the person in the event of illness and accident.
- The ngo initiates a sick leave program when the person is ill.
- The ngo obliges the person to take out business or professional liability insurance (note: the obligatory nature is contrary to the entrepreneurial freedom of the person if there were truly independent entrepreneurship).

Also considered is the extent to which the ngo is responsible for the quality (or lack thereof) of the result.

Indications of the presence of a relationship of authority:

- If the person has to correct any mistakes, the ngo pays for the extra cost and time.
- The ngo (and not the person) is held accountable by third parties for the quality of the result.

If the risk and liability on these points lie with the person, that is precisely what gives a contraindication for a relationship of authority.

- Non-competition and non-solicitation clause: furthermore, the influence of the ngo on the person's acceptance of assignments with another client is being considered.

Indications of the presence of a relationship of authority:

- The person may not accept other assignments from other clients.
- A non-competition clause unreasonably restricts the person from taking and performing assignments with other clients.
- A non-solicitation clause unreasonably restricts the person from taking and performing assignments with other clients.

- Remuneration: remuneration considers the extent to which the remuneration differs from that for employed persons.

Indications of the presence of a relationship of authority:

- The person receives continued pay when on vacation.
- The person accrues paid leave.
- The person continues to be paid if there is (temporarily) no work, or if the person is sick/disabled.
- Study costs of the person are borne by the ngo.

### 3.4 STEP 4: EMPLOYMENT TYPE

Once it is clear that the correct form of contracting is an employment contract, the next step is to determine whether to enter into direct employment or to use an Employer of Record setup. While cost and the need for the "we and/or team feeling" usually favor direct employment, there are many situations imaginable where, because of all the administrative obligations (and consequently potentially one-off high costs), it is better from a practical standpoint to contract with an Employer of Record. The duration of the period for which the employee will be working abroad may also be

relevant. In the case of a long-term period, for example, direct employment will usually be preferred. This choice can be facilitated if ngo's can start sharing their experiences in the various countries, thus gaining more insight into the obligations and points of attention in the countries where other ngo's have already gained experience.

If the answer to any of the following can be yes, entering into a direct employment is possible:

- The ngo is already registered as a foreign employer in the country concerned and has already set up a payroll;
- In the country, it is relatively easy and/or at limited cost to comply with obligations as an employer (if necessary, ask a legal advisor or HR colleagues for advice)
- Other information shows that the obligations and costs are commensurate with employing the employee directly.

Is a yes to the preceding statements missing? Then contact an EOR party to further elaborate and arrange the collaboration. An additional advantage is that all risks and liabilities are placed with this third party, so the ngo knows exactly where it stands.

#### **4. Contract of services (contractor)**

When working with a contractor through a contract of services, it is very important to rule out the existence of an employment relationship. This should be based on either the absence of the obligation of personal work (STEP 2) or the absence of a relationship of authority (STEP 3). The Dutch tax authorities have provided models for this purpose<sup>3</sup>, the use of which (insofar as also complied with in practice) from a Dutch perspective can provide certainty about the qualification of the employment relationship. It is therefore advisable to make use of these models in order to exclude possible risks as much as possible.

#### **5. The importance of the right form of contract**

Contracting persons outside the Netherlands can have a lot of impact for a ngo in several areas. By not entering into collaborations in the right form, a ngo can face many risks. Consider, for example, the following areas of concern:

- Labor law
- Payroll administration
- Social security
- Wage tax
- Immigration
- Insurances
- Corporate income tax
- Occupational Health and Safety Services

When an contract of services is wrongly concluded with a person, while the collaboration actually qualifies as employment, the ngo can face risks in these areas, not even considering the impact on the person himself, as well as possible media attention. Consider, for example, tax assessments, fines, foreign jurisdictions that may unintentionally apply as well as the impact this may have on benefit situations in the event of illness and/or unemployment. The individual in question may be disadvantaged by not being treated appropriately. The importance of properly regulating foreign collaborations is therefore significant.

If the employment contract is entered into with an EOR, the EOR ensures that all of these concerns have been taken into account. If the ngo enters into an employment contract directly with the employee, then the ngo itself is responsible for securing these points of interest. Any risks regarding these points of interest can then be secured at the front end.

---

<sup>3</sup> <https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/ondernemen/modelovereenkomsten-in-plaats-van-var/modelovereenkomst-zoeken/algemene-modelovereenkomsten-downloaden>



### 5.1 Labor law

The main rule is that the parties can make a choice of law, i.e. "the individual employment contract shall be governed by the law chosen by the parties." However, the choice made in the employment contract may not have the effect of depriving the employee of the protection that the employee would have had if no choice of law had been made in the employment contract. Without a choice of law, the law of the country in which the employee habitually performs work in performance of the contract applies. This "country where the work is usually<sup>4</sup> performed" does not change when an employee temporarily works in another country.

If - from all the circumstances - it appears that the employment contract has a manifestly closer connection with a country other than the country in which the work is habitually performed, or in which the employer is established, the law of the country with which the manifestly closer connection exists applies. When answering the question of whether the employment contract has a manifestly closer connection with a country other than the usual country of employment, all factors characterizing the employment relationship must be taken into account. Important factors are in which country the employee pays taxes on earned income, and in which country the employee is affiliated with social security and the various pension, health insurance and disability schemes.

It is therefore important to obtain an understanding, based on the facts and circumstances, of the employee's usual country of work and the country with which the employee's employment contract has the closest connection. If either may not be the Netherlands, this may have consequences for the ngo as the hard core labor law of that country may apply. In such cases, the impact of this labor law on the position of the ngo should be examined, as well as the possibility and desirability of bringing the employment contract into line with local labor law (and having Dutch labor law no longer applicable). It is usually recommended to avoid having (the hard core of) the labor law of two countries apply and it is desirable to have the applicable labor law aligned with the social security system.

Another point of attention is to verify any **obligation to report** the employment to the local authorities. If this is the case, the necessary administrative actions must be taken.

The possible mandatory affiliation with a pension scheme should also be checked, as not all pension funds and/or schemes offer (or require) the possibility of exempting employees in a foreign situation from participation.

### 5.2 Payroll administration

In principle, if a withholding and remittance obligation arises on the employer's side in the country in question, the ngo must set up a payroll administration. Including all the necessary registrations and set-up and processing costs this entails.

### 5.3 Social security

#### *Application EU social security regulation (in EU situations only)*

The countries belonging to the European Economic Area, together with Switzerland, have drawn up a regulation on the basis of which it is determined where a person is socially insured. It follows from this regulation that if an employee works in two or more of these countries, they remain socially insured in their country of residence, provided that the employee works at least 25% of the working time physically in the country of residence. In principle, this should be assessed per 12-month period. If it appears that the employee works less than 25% in the country of residence, in principle, the social security system of the country where the employer is located applies. Under the Regulation, a person is always socially insured in only one country within the European Union.

#### *Retained Dutch social security obligation*

When temporarily posted abroad, the employee may, under certain conditions, remain subject to the Dutch social security system. In order to be able to prove this social security status and avoid double taxation of social insurance contributions, an A1 declaration must be requested for the employee in question to prove that he/she remains insured in the Netherlands. This declaration must be requested in advance. This can be done via TWinternet or by mail (<https://www.svb.nl/nl/id/u-bent-werkgever/a1-certificatie-of-coverage-aanvragen>).

---

<sup>4</sup> Usual country of work should be defined as the country in or from which, taking into account all the elements characterizing this activity, the employee performs the main part of his obligations towards his employer.

### *Employment outside the EU*

For situations in which an employee is going to work in a country that is not covered by the EU Regulation, the social security position must be determined on the basis of bilateral social security treaties.

### 5.4 Wage tax

#### *Fiscal residency*

In the Netherlands, tax residency is determined based on all relevant facts and circumstances surrounding an individual taxpayer. Of importance is whether there is a durable connection of a personal and/or economic nature with the Netherlands, which connection need not be more durable than the connection with another country. This is based on the following facts and circumstances:

- where the individual habitually resides;
- where the individual works;
- whether the individual has a family and, if so, where the family lives;
- the place where medical treatment is given;
- the length of stay in a country;
- the place where bank accounts, insurance policies, subscriptions and memberships are held.

Note! This is a non-exhaustive list, all relevant facts and circumstances should be considered in the assessment. Tax residency then affects the determination of where tax is due on employment income.

#### *Wage tax*

Based on local legislation and applicable double tax treaties, it should be assessed where tax is due and to what extent the employer has a duty to withhold and remit tax.

For points 5.3 and 5.4, assistance can also be sought through one of Partos' Shared Services, Exterus. As a Partos member you will receive discounts of 20-25%.

### 5.5 Immigration

In principle, no residence or work permit is required for employees with Dutch nationality in countries of the European Economic Area (EEA) or Switzerland. For countries outside these countries, it must be assessed whether a residence and/or work permit is required and to what extent the conditions are met. In doing so, the procedural steps as well as the costs involved should be made transparent.

### 5.6 Insurances

It is important to ensure that foreign activities are covered by the insurance policies taken out by the ngo in its capacity as employer. Should this not be the case, consideration may be given to expanding existing coverage or obtaining additional insurance(s).

For example:

- travel insurance
- accident insurance
- health insurance (top-up)
- disability insurance

### 5.7 Corporate income tax

The presence of a permanent establishment<sup>5</sup> may, depending on the activities of an employee, arise in the country in which the employee performs its activities. Consequences of this are, for example, that corporate income tax may be due and a withholding obligation as an employer may arise (to the extent this was not already the case). The fact that corporate income tax is not due in the Netherlands is no guarantee that it is not due in the country in question. That depends on national legislation. It is therefore important in general to avoid the presence of a permanent establishment / permanent representation.

Under the provisions of tax treaties, a permanent establishment is presumed if the entity has a permanent establishment or a permanent representative (the other possibilities are not explained in this policy due to limited relevance): In general, the concept of permanent establishment includes the existence of an "establishment," i.e. a facility such as premises or, in certain cases, machinery or

---

<sup>5</sup> A permanent establishment is a space of a foreign enterprise, which permanently has sufficient facilities, such as personnel and technical resources, to function as an independent enterprise.

equipment. This establishment must be "fixed," that is, it must be located with a degree of permanence at a particular place. Furthermore, the conduct of the company's business takes place by means of this permanent establishment. A permanent establishment exists when the employee has at least some degree of access to premises, facilities or installations (e.g., office space, rooms, buildings). It is immaterial whether the premises, facilities or installations are owned by the taxpayer, leased or otherwise made available.

A home office may also qualify as a permanent establishment, this depends on the individual case. This is not likely to occur unless the ngo has (at least some) disposition rights with respect to this home office.

Furthermore, an employee as being a permanent representative can, for example, create a permanent establishment if this employee has a power of attorney or the right to conclude contracts on behalf of the ngo and actually "uses" this power/right. In addition, this employee must be physically operating in the relevant country and his activity must be habitually exercised in the relevant country, i.e. this employee must be operating repeatedly and not just occasionally.

#### 5.8 Occupational Health and Safety Services

During the period abroad, it is also important that the duty of care as an employer can be properly safeguarded by the ngo. Advice should be obtained from the ngo's occupational health and safety service on how sick leave management can take place in the relevant country.