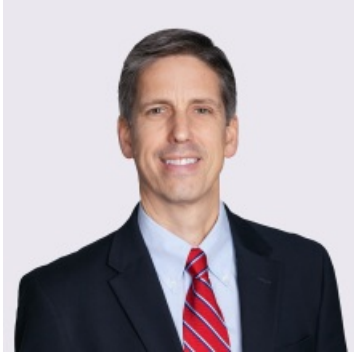


Navigating SOFAs + Remote Work: Dependents of Military, USG Personnel, and Civilian Contractors Abroad

By Christopher V. Anderson, Michael R. Watts & Beth E. Boyer

January 28, 2025

Meet the Authors



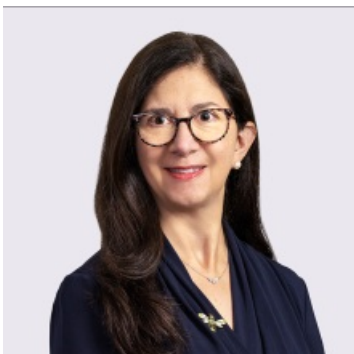
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Details

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Status of Forces Agreements—(SOFAs)—are designed to delineate the jurisdiction of military personnel and their dependents when stationed in a foreign country.



Transcript

INTRO

Status of Forces Agreements—(SOFAs)—are designed to delineate the jurisdiction of military personnel and their dependents when stationed in a foreign country.

On this episode of We get work[®], we delve into the intricacies of SOFAs and how these agreements apply to immigration, taxation, and other employment law issues for military spouses who want to continue working for their U.S. employer.

Our hosts today are Chris Anderson, principal in Jackson Lewis' Greenville office; Michael Watts, of counsel in the firm's Los Angeles office; and Beth Boyer, associate in our White Plains office. Chris counsels' clients in international employment law matters in over 100 countries. Michael is a Judge Advocate General in the U.S. Army Reserve and former U.S. Secret Service Special Agent. Beth advises businesses on how to secure work authorization and retain non-U.S. citizen or permanent resident employees.

Chris, Michael, and Beth, the question on everyone's mind today is: How can SOFAs help U.S. employees maintain their positions while their spouses are deployed to serve or support the military, and how does that impact my business?

In today's podcast, you may hear the speakers express some opinions about military operations or military legal practice. These opinions are the attorney's opinions and are not reflective of the official position of the United States Department of Defense or any United States government agency. Thank you.

CONTENT

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International Employment

I'm glad to be here with my colleagues and friends, Michael and Beth. I just want to give a quick introduction to myself, just my practice area. Then I'm going to kick it over to Michael and Beth to do the same. My name is Chris Anderson. I'm one of the members of the International Employment Team here at Jackson Lewis, and for the past 11 years, I've been helping clients around the world solve employment problems on a global scale. That's anything satelliting around employment we get involved with.

Over the last four years, remote work has become a huge piece of that for me, generally speaking. So, I just deal with a lot of U.S. personnel and other personnel from around the world who are going to another country. We have to look into employment, immigration, tax and all those issues that surround remote work. One piece of remote work that I've particularly developed some experience with over the last years has been with what's called the Status of Forces Agreements, which we'll call SOFAS in our conversation today. It's where spouses of U.S. military members, civilian defense contractors and/or other government subcontractors, their spouse is working for typically a U.S. company, and they need to go overseas with their spouse who's being stationed or going on a government contract overseas.

The question becomes, how do I keep working for my U.S. employer? Or the U.S. employer comes to us and says, how do we keep employing this person? We love them, and he or she is really great. We want to continue this. How do we do that? So, it opens up a whole host of issues that are fun to talk about but not always easy to figure out. That's why we have Beth and Michael here today. So, Beth and Michael, please take turns introducing yourselves, and then we'll go from there.

Beth E. Boyer

Associate, White Plains

Okay, I'll start. I'm Beth Boyer. I'm an attorney in Jackson Lewis' White Plains office, and I practice immigration law. I do the inbound work. So, we've got Chris handling people who are dealing with global mobility issues. They're outbound; they're going all over the place. I'm helping U.S. companies bring people who are foreign workers into the U.S. I also happen to be part of a military family and do a lot of military immigration work on a pro bono basis.

So, when we get some of these questions from our firm clients, hey, we've got this ace accountant, and they're going to be moving to Yokosuka, Japan with their wife who's a Navy officer, and we need to try to keep this guy employed. How can we do that? The questions would come to me because people knew that I had a military background and experience with military families. So, it has broadened my practice to include not only the inbound work but also the outbound, specifically related to spouses on a status of forces agreement or a SOFA.

Michael R. Watts

Of Counsel, Los Angeles

Hello everyone, my name is Mike Watts. I'm an of counsel in Jackson Lewis' Los Angeles office. My practice is mainly traditional labor, and I'm here today based mainly on the fact that I do some work with the International Employment Team. I also am a current drilling reserve U.S. Army Judge Advocate. I'm a lieutenant

colonel assigned to a Legal Operations Detachment in Nashville, Tennessee. I started my career as an Active-Duty Judge Advocate or JAG stationed in Germany. I was working with spouses, other contractors and contractors' families on these very issues of employment, spousal employment and other types of remote work--- home-based businesses, which back in my day that was all selling Tupperware, Mary Kay, Avon or things like that. Now, this has obviously changed a great deal in the past 20 years. So, it's a pleasure to be here with you today.

Anderson

Thanks, Mike, and thanks, Beth, as well. So, you can see I have some heavy hitters with me who have a lot of varied and great experience with this issue. Glad to be together to talk about this. Before we go any further, let's define what a SOFA is to make sure that everyone who's listening understands what a status of forces agreement is. Then let's add to that, just to tack onto that, the issues that often arise from SOFAs and how they apply specifically to spouses of active-duty military and/or indoor civilian government subcontractors who are going overseas and whose spouses want to continue working for their US employer. Who wants to jump in first?

Boyer

Mike, do you want to just say what a SOFA is?

Watts

Sure. So, a SOFA, as you both said, is the 'Status of Forces Agreement,' typically called a SOFA. I am very familiar, for example, with the NATO SOFA. So, SOFAs can be either multilateral, such as the NATO SOFA, or bilateral, such as Beth had mentioned with the SOFA in Japan. There are also agreements that supplement SOFAs. For example, I'm very familiar with the German Supplemental Agreement, which supplements and adds context and nuances about Germany's specific laws to the multilateral NATO SOFA. Again, these agreements are long-running treaties that were signed in the case of the NATO SOFA back in the mid-century and then updated over the decades in the case of some of the supplemental SOFAs.

Boyer

Right. So, what these SOFAs are is a treaty between the U.S. and the country where we have military forces stationed, and it delineates and explains what the jurisdiction is over the people that are going to be there. For example, a person who's stationed in Germany doing work is in the army, is working on base and is going to be subject to U.S. jurisdiction. But their spouse wants to work, is that going to be permitted? Is that allowed as part of the Status of Forces Agreement?

Something that might indicate that these were, many of them, written mid-century, most of them somewhere in the decade following World War II. At that time, almost all spouses of military members were women, and most women didn't work. There was no such thing as remote work other than home-based sales, perhaps. Computers weren't in everybody's pockets. So, we didn't have this kind of an economy that would allow for that. So now what do we do? The SOFAs, for the most part, are silent. These agreements don't say spouses can work. If they do, they are

subject to local taxes or U.S. taxes. They don't describe what employment laws will cover them. Will it be U.S. employment law if they're working remotely from the U.S.? Will it be the Italian employment law if they're stationed in Italy? So, all of these things are not in these SOFAs.

Anderson

That's a great word. That definitely crystallizes the issues here for all three of us. The clients and employers that are listening to this podcast, the thing that you're thinking is, if that's true, what Beth just said, and it is, that the SOFAs are not drafted with that in mind because that wasn't a reality at the time they were drafted, what do we do? How do we change that? How can the government change that? Is there any movement with that? What we want to talk about now is what we're seeing. We won't use the word trend necessarily, although we're seeing some positive movement in certain countries, but we wanted to speak about a few of those things and give some concrete examples. This is an issue that, from my experience, in dealing with this many times over the last four or five years, it's just something that many employers are thinking about if they have that person or spouse who they want to continue employing and trying to figure out those things.

If I could just lay out a few things and Beth and Mike, tell me if you agree or disagree or chime in. But when I think about these issues and think first and foremost about any remote work issue, it is immigration. Then, you have to look at taxation, employment and the application of employment law. Those are the big three that come up for me time and time again. We're not claiming to be tax experts. We're not tax attorneys, although we get involved with tax treaties and those kinds of things. So, we always want to just claim that and say seek some tax advice. When you think about those three things, immigration, taxation and employment, in your experience, how have you seen the SOFAs deal with those issues or not? Maybe more importantly, what has been done in any specific countries to address that lack of clarity in some cases?

Boyer

Well, right now, there's only one country in the world where the U.S. has forces stationed where there's been a very clear update to the SOFA about this, and that's Italy, which signed a series of side letters. Again, this is an appended document to this bilateral treaty that the U.S. has with Italy, and it's very clear. It says that a spouse working remotely from a U.S. company and present in Italy with this SOFA status is able to work. So, they've got work authorization. They're taxed as though they're going to be in the U.S., and the employment laws that we'll cover are those of the U.S. That's really important because if you're in another country, let's say Germany, U.S. employment law will not be the law that governs that employment relationship. Is that right, Mike?

Watts

That's a great point. For me, coming from my particular background, Chris, you highlighted how we think about this, advising our clients and also other potential clients that are employers. My experience is the flip of that. I would advise the employees who would come to me as a legal assistance attorney and say, I want to

work for this particular location. How do I go about doing that? Or I want to start up a home-based business, which is now much more likely to be a remote business.

As a Judge Advocate and a military professional, I'm trained to think in a very flow chart-esque manner. One of those issues is what's their status. It's very similar to the question that we would potentially ask about, for example, a prisoner of war: What is their status? That's the question also for an employer who's going to potentially send an employee forward. What is their status? Are they going to be working? Are they going to be living on post and working remotely for a U, S. company? Is that U.S. company headquartered here? Several of the employment laws talk about various tests of, for the employment law perspective, Beth, that you're talking about, is it the center of gravity test that we're going to apply? Is it the primary workstation tests that we're going to apply? What are they doing, and who are they doing it for?

For example, if you are a U.S. spouse stationed overseas working for AAFES, the Army and Air Force Exchange Service, which is a quasi-government organization, and you're working on post.

Anderson

Thanks for defining that. I'm glad you defined that. I didn't know what that was.

Boyer

PX.

Watts

The PX exactly, which is the post exchange. Of course, it wouldn't be a military podcast discussion if we weren't speaking mostly in acronyms.

If you're in a spouse living or working on post for a quasi-government organization, then that's one set of facts, Beth. Whereas I've definitely dealt with spouses who either wanted to work on post for German companies that were permitted to work on post, even down to as small as the local barber who has an approved application as a German citizen cutting hair on post. Versus I've worked with spouses who wanted to work for German versions of defense contractors who are working on American posts. So, that's the critical question that you have to answer, and you have to look at who is going to be doing what work, where and for what type of employer.

When you start with that framework in mind, then you can look at the German Supplemental Agreement, for example, and see, okay, are they going to be paying only the German taxes for the work they perform in Germany? For example, if they fly back home, work back home and then fly back to Germany for a period of time, the Germans, the tax treaty and the German SOFA treaty might deal with those incomes very differently. So, it can create a whole host of issues, but starting from that analytical framework is where we always have to begin.

Anderson

That's a great word. I like that you said that you have to start with what they are actually doing in the country. Beth, you alluded to it as well.

There's a phrase we use a lot when we advise clients on this. It's, are you working on that economy? Are you engaging in that economy? That could be, as Mike just said, through a subsidiary of the U.S. company. Maybe a client comes to us and says, this spouse wants to go to Germany, Korea, Japan or any of the countries that have SOFAs with the U.S. They want to go, and we have a subsidiary there, and while they're there, they can have a seat in that company. That's a bit of a different analysis in many ways versus the classic example that I get from many of my clients, and maybe you're listening to this and thinking this now as well, which is we don't have any international operations or we definitely don't in that country, but we want to know how we can continue to support this all-star wonderful employee that we have. If that's the case, now, while we can't say hook, line and sinker, it's always fine to, by any means, just keep employing someone remotely when they're a spouse of a service member or civilian contractor of the government. You need to look at each country, and we all agree on that, but the SOFAs do speak to it increasingly, like Beth said, with Italy and Germany.

With the supplemental agreement that Mike just referred to, there's language in there that makes it at least more clear on the immigration side that you wouldn't have to have a work permit in Germany if you're going to be doing remote work. Also, if you're paid in U.S. dollars, then your employer wouldn't have any taxation duty in Germany, but you would have an individual tax duty. The person would have an individual tax duty in Germany. But that's just one example.

Then the German employment law that Beth spoke to, we can't say definitively that it wouldn't apply. I have some clients of mine, and Beth, you and I have talked about this in the past. Some of my clients have said we're just going to take the position that U.S. law continues applying. You can do that, but you need to understand that if challenged, German labor and employment law and the minimums that apply statutorily could apply. So, you just need to be aware of that. I think awareness is at least part of the battle, if not half the battle here, just being aware of what those risks are. That's where we help clients.

I want to kick it back to you guys. Beth, can you speak to Japan just briefly? Again, just one caveat to our listeners: there are many, many SOFAs. We'd love to talk to any of you about SOFAs and how they apply. It does need to have a case-by-case analysis. Italy has the most clarity now. Germany, as we've alluded to, their supplemental agreement provides more clarity than some other SOFAs. Then Japan is the third one that we wanted to raise. Beth, I'll kick it back to you.

Boyer

I just want to preface by making one point because this is something that comes up quite frequently when an employer calls us and says, I've got this issue. They tell us my employee is going to be living with their spouse on base, so that's U.S. soil, right? So, we don't have to deal with any of this. I just want to make clear that living on a base does not constitute U.S. soil. This person is still overseas. They're in the jurisdiction of this other country, and that's why all of these analyses need to be done. Even though it's a U.S. military base and they're married to a U.S. military service member, they still have to abide by the laws in that country, subject to this bilateral agreement, the SOFA.

With regard to Japan, now, a lot of these discussions about or some clarifications about what the rules are hard to find. You have to do a little digging to find the guidance to military dependents about Japan. We got this one through a little bit of a roundabout way. There was a woman who was posted to Japan with her husband. She wrote an article on LinkedIn. Chris and I actually started communicating with one another about this; I'm looking at the chat from three years ago before Chris was at Jackson Lewis. We were communicating because we both had clients who were dealing with a SOFA issue in Japan.

Anderson

Working very collegially there.

Boyer

Yeah, absolutely. Then here we are together, the same firm doing the same thing because we all need to try to figure this out.

So, remote workers, dependent on SOFA status in Japan, are allowed to work according to this military clarification. This comes from the Air Force, but it's valid for whether you're posted at Yokosuka or with the army or the Air Force in Japan; it's going to cover everyone. Taxes: if you don't derive your income from a Japanese source, you're not going to be subject to Japanese taxation. But it is silent on employment law. So, it addresses two big questions. Can I work? Yes. Do I have to pay taxes in Japan? No. What employment law is going to govern my relationship? Am I going to be subject to Japanese rules for my employees? This is often what the employers want to know. Are we going to have to follow Japanese laws with respect to leave, promotions, sick pay, and things like that? Even the new publications from the Department of Defense don't speak to that.

Anderson

I'm so glad you raised that because it's a trend that you see a lot of times. As an employment lawyer, it causes great consternation for me because I want to have clear answers to give clients. The client three years ago, Beth, whom I was advising at the time that you and I collegially worked together, and both reached out to this individual on LinkedIn. That client ended up taking the position that U.S. law applies. However, like with Germany, which I just mentioned a few minutes ago, we had to say eyes wide open. You have to know that if challenged, that would typically be the person, him or herself, bringing a claim, which the client then said that's probably not likely. This is probably true, but if it ever happened, you have to know that there's that chance in the absence of a definitive status on that, a definitive stance from the country or through the bilateral agreement. At least there's that ambiguity, that wiggle room that can be exploited. So, you just have to be aware of that.

Then you get into how long are they going to be there. What are they doing? Which country has a greater connection to the work? There are all these hosts of things, and every country is different. So, it has to be on a case-by-case basis, which, as attorneys, we say a lot.

Any closing thoughts, Mike and Beth, before we sign off?

Watts

Chris and Beth, as you both pointed out, no one's ever going to be able to give you a shield that you're going to be able to take to the German authorities and say, this is the locked-in 100 % answer to this question. I used to do that; from the client's perspective, I would write letters to their hopeful employers, to them, or even sometimes to the German authorities, saying, this is why the SOFA applies this way. I've worked with a lot of German attorneys in Germany who say this is our perspective of German attorneys as to how the German law would apply.

But Chris, as you pointed out, so for example, the German mother protection law is very different than the American protection law or FMLA. If an employee wanted to raise that, it could be a big issue for an employer. So, that is definitely something you do just have to go into with your eyes wide open. What do we think is likely versus what is the worst-case scenario? Then that goes to the risk analysis of whether we want to continue to employ this all-star accountant who's going forward with his or her family. These SOFA issues and these employment issues are so critical to the military community.

Being a judge advocate, we have pressed very hard in our community for laws, even state laws, that spouses are able to practice their professions, specifically the legal profession, wherever they are stationed in the continental United States or outside the continental United States as well. Being able to work with your spouse overseas is a huge recruiting and retention issue. America's military's number one issue right now is maintaining a force that can achieve the national security goals of the United States. That's why it's so critical for employers to feel comfortable to say there are solutions to these problems. We just have to get there.

There is a way to go into this risk with your eyes wide open. I had a friend who had left working with my wife at her location, went with that spouse, and went forward to Japan. She had to leave her job to go forward to Japan. That was not a position where she could have worked remotely. This impacts families every day. This is not some remote issue that esoterically comes up once in a blue moon. It is definitely a huge issue.

Boyer

Absolutely. What happens with some military families is that if my spouse isn't going to be able to work, that means that half or more of our family income is going to disappear. Maybe I won't re-up. Maybe I will resign my commission and leave the military. So, as Mike said, this is a retention issue, and military retention is not what it needs to be. Recruitment is not what it needs to be. Retention is that much more important. So, hopefully, to the extent that's possible, we'll see more side letter agreements like Italy's getting negotiated between the Department of State, Department of Defense and the countries where these folks are located to clarify these issues on the SOFA because this just was not anticipated. It wasn't even a possibility at the time that these agreements were originally signed.

So, in the absence of that, Jackson Lewis Attorneys are here for you. We'll look into it. We'll let you know what the deal is and if there are risks to try to quantify them for you and to help you make the decisions that you need so that you can keep

employing the people that you want.

Anderson

That is a great final word, Beth and Mike. Thanks so much for joining and doing this with me. It's a pleasure to be with you guys and all of our listeners. Thanks for listening.

As Beth said, please do reach out anytime. We're here for you, and we appreciate you listening. Thanks so much.

Watts

Thank you.

Boyer

Thanks.

OUTRO

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