

GMS Flash Alert

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European Union – Revisions to Social Security Coordination Regulations Postponed

The European Union has been working on an update to the European Social Security Coordination Regulations which determine the contributions liability and benefits entitlement of workers moving between EU countries (including Switzerland, Norway, Iceland, and Liechtenstein). The revisions were agreed by the European Parliament, Commission, and Council in early 2019 and were expected to be passed into law before the European Parliament elections on 22 May. However, at a meeting on Friday, 29 March, the proposals were rejected by a meeting of European diplomats and on 18 April, the Parliament took the decision to postpone further discussion of the proposed changes until the autumn.¹

WHY THIS MATTERS

The proposed changes included measures to tighten up the EU rules governing when an employee may remain subject to the home country social security system when sent temporarily to work in another country. They also contained a relaxation in the requirement to obtain A1 certificates for business travelers, which employers of mobile workers would have likely found beneficial.

It is still possible that some of the proposed changes will pass, potentially with the removal of the most contentious revisions to the rules governing entitlement to unemployment benefit. Employers should therefore understand the potential impact of the changes on their mobile workforce and plan accordingly to help ensure they remain compliant.

Employers may find it worthwhile to consider the appropriateness of their social security policies and review the fitness of their related processes.

Key Changes

Changes were proposed both to the rules governing the contributions liability of workers sent from one country to another for a limited period, and to multistate workers, who work regularly and frequently in more than one European country. Revisions were also proposed to strengthen monitoring and compliance.

Posting

The existing Regulations require an employee who is posted to work for up to 24 months in another member state to remain covered by the social security system in the country from which she or he is posted. The proposed revisions would shorten this period to a maximum of 18 months, and impose the following conditions:

- The duration is not merely intended to be less than 18 months, but is actually less than this in practice;
- The worker is subject to the legislation of the home country for at least three months prior to the start of the posting (increased from a current guideline of one month);
- The application for an A1 certificate has been submitted prior to the start of the posting.

KPMG NOTE

The first condition would arguably create unwelcome uncertainty for employers where the duration of an assignment is unexpectedly extended. It is not clear whether there would be a genuine expectation that the employer should claim repayment of the home country contributions paid during the first 18 months and make a disclosure of unpaid contributions in the host country, as this would seem impractical.

The restrictions imposed on the posting provision would likely increase the application of the individual agreements concluded between the member states under article 16 of the Regulation. This procedure is administratively burdensome for applicants, and administration and process times are much longer and vary from a few months to (sometimes) years before an agreement is concluded.

The second condition would require an employee to have more extensive ties with the social security system in the country from which he or she is posted. This condition appears clearly designed to reduce “cherry-picking” of less expensive social security systems.

The final condition would require employers to be more timely with their compliance than they are in many cases at present, since it would eliminate the possibility of making retrospective applications. This would be challenging for most employers and employees, especially those who are posted on short notice. This would likely also increase the application of agreements concluded between the member states under article 16 of the Regulation in order to avoid unnecessary and frequent shifts in social security coverage of posted workers.

Based on the above, it is questionable whether these initiatives correspond with the objectives of the posting provisions to secure stability in social security coverage and whether they are designed to support and promote free movement of workers.

However, the proposed revisions do include an exemption from the requirement to obtain A1 certificates for business travelers, albeit this is restricted to travelers who are not involved in the delivery of goods or provision of services, but are instead attending meetings, undertaking training, or other ancillary activities.

KPMG NOTE (cont'd)

The important factor here is the substance of the work performed abroad rather than the duration. The question is whether there is enough clarity on what constitutes a provision of services in this context, as an employee who participates at a meeting in one country can then travel to another country where she or he participates in a project implementation. Further, it is questionable if there are any mobile workers whose work is either purely ancillary activities or delivery of services.

Even though this would arguably be a welcome relaxation for employers, but the limitation in the scope would not remove the need to obtain A1 certificates for all those whom employers currently categorise as business travelers.

Multistate Workers

The existing Regulations determine the contributions liability for a multistate worker by considering firstly whether the worker spends 25 percent or more of his working time in his country of residence. If he does, the contributions liability arises in that country; but if he does not, the liability arises in the location of his employer.

The proposed revisions continue to apply the first of these tests, but then specify that if the employee does not carry out a substantial part of his activity in the country of residence, the liability will arise in the country in which he performs the largest share of his work activities.

KPMG NOTE

Arguably, this would create uncertainty, as the country in which the employee carries out the largest share of his activities is a factual finding, which can only be determined with certainty after the fact. It would likely lead to frequent shifts in the applicable law, unless the employee has a constant working pattern.

As with the amended rules for workers sent from one country to another, it appears to oblige an employer to claim a refund of contributions paid in one country and pay them to another country in the event that the work pattern supports this.

Monitoring and Compliance

The draft Regulations set out a number of measures designed to enhance cooperation between authorities, improve responsiveness, and allow for better monitoring of companies' compliance with the Regulations.

In particular, authorities would be required to issue A1 certificates within a period of 20 working days, which would clearly be challenging for some countries where processing times currently materially exceed this. On the other hand, the forthcoming implementation of Electronic Exchange of Social Security Information (EESSI) across the EU is intended to facilitate quicker decisions and issuance of A1 certificates.

Finally, the proposed changes would give host country authorities the right to challenge the validity of an A1 where they believe the home country authorities have issued it based on a fraudulent application or an incomplete understanding of the facts. The home authority would be required to respond within 25 working days, either revoking the A1 or providing evidence to justify its issuance. Controversially, where the home country authority failed to respond, the host country

would have the right to request of the home country a deposit equal to the employee and employer contributions it believed to be due in its location.

KPMG NOTE

This change would create uncertainty, as the definition and threshold for fraud varies drastically from country to country. It appears, too, that inefficiency of an authority to process a request within a given time limit would lead to severe consequences for the employee and the employer and likely lengthy administrative procedures to resolve the case fully.

There are at times significant differences in the interpretations of the provisions of the applicable law between the member states. An employee and the employer can therefore be caught in the “cross-fire” where the issuing state concludes that the application is in order and the receiving state concludes that the application is not in order and the way in which the information is filed is fraudulent.

Things to Consider and Next Steps

A number of other changes were contained in the draft, including changes to the rules on eligibility for unemployment benefits. These proved extremely unpopular with a number of European countries and were the driving force behind the vote to reject the revisions and postpone further discussion until after the European elections.

When the negotiations restart in the autumn, it is likely that further changes to the proposals will be required to arrive at a draft that all countries can accept. There is therefore some uncertainty about which of the provisions set out in this newsletter will appear in the finalised legislation.

Nevertheless, it would be timely for employers to consider whether their social security policy remains appropriate given the clear intent of the current draft to limit home country social security coverage, both by duration and where an individual’s existing links with the home country system are weak. Employers should also review their current social security compliance process to help ensure that it is sufficiently robust to deal with the changes which ultimately come, including the requirement to obtain A1 certificates before assignments begin.

FOOTNOTE:

1 For additional information on the European Parliament’s “Think Tank” website, click [here](#).

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Contact us

For additional information or assistance, please contact your local GMS or People Services professional or one of the following professionals with the KPMG International member firms in Denmark or the United Kingdom:



Daida Hadzic
Director
Tel. +31 6 532 54 599 (m)
Hadzic.daida@kpmg.com



Laura Hutton
Senior Manager
Tel. +44 (0) 20 7694 1568
Laura.hutton@kpmg.co.uk

The information contained in this newsletter was submitted by the KPMG International member firm in the United Kingdom.

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