

# GMS Flash Alert

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## OECD – Examining Cross-Border Employment/Tax Issues in Time of COVID-19

The Organisation for Economic Cooperation and Development released an analysis<sup>1</sup> addressing the tax implications of the coronavirus (COVID-19) pandemic on cross-border workers and other related cross-border matters (e.g., tele-work and right of taxation, residency, permanent establishment). Due to travel restrictions imposed by countries around the world,<sup>2</sup> many cross-border workers:

- have remained in the host country and are working from their host country home/accommodation (not in the office);
- have been moved back to their home countries (and are working from home);
- have been relocated to third countries (and are working from temporary accommodations); or
- have been furloughed or laid-off.

All the above indicate a change in regular work patterns and routines, which raises several tax-related issues for cross-border workers and can have an impact on the right to tax between countries. The OECD has examined the implications of these changes under the extraordinary circumstances of the current global health pandemic and has put forward some guidance.

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### WHY THIS MATTERS

The OECD observed that companies are concerned about: (i) the changes in the working patterns of cross-border workers potentially triggering “permanent establishment” (PE) and thereby creating new filing requirements and tax obligations in those countries, (ii) whether the residence status for a company in relation to its effective management changes, (iii) if an employee’s tax residence status changes, and (iv) what impact a state payroll subsidy might have on taxes.

Therefore, the OECD has provided an analysis of the impact of remote work on the right to tax between countries, which is currently governed by international tax treaty rules that delineate taxing rights.

## OECD Publishes Guidance, Looks at Cross-Border Scenarios

The OECD guidance<sup>3</sup> looks at a few “real-life” potential situations.

### Tax Residence for Cross-Border Workers

For employees in many circumstances, it is unlikely that the COVID-19 pandemic will lead to a change in tax residency. The OECD guidance illustrates this assumption through some examples:

- Mr. X, is stranded for a period in a country that is not his country of residence due to the travel restrictions and quarantine measures. The challenge here is to determine the place of residence of individuals for tax purposes. In this case, the OECD Secretariat’s general view is that, under the bilateral tax treaty between the two countries, Mr. X’s residence will not change due to such temporary dislocation. The OECD recommends countries of temporary residence apply their domestic rules accordingly.
- Ms. Z, is working in the current home country where she has acquired residence status. Due to the COVID-19 situation, she returns temporarily to her previous home country. Here, it is unlikely that Ms. Z would regain residence status for being temporarily and exceptionally in her previous country of residence.

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### KPMG NOTE

Several countries appear to be formally or tacitly overlooking or “forgiving” sudden changes in assignment length and residency status, sympathetic to the exceptional nature of the changes resulting from the COVID-19 crisis. However, in some cases, the period for forgiveness is limited. Once that limited period ends, the assignee’s situation vis-à-vis the host country’s authorities must be regularised.

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### Tax for State Payroll Subsidy to Cross-Border Workers

In a situation where the government provides subsidies to help keep an employee on his or her company’s payroll, the income that an employee receives from an employer should be attributed to the place where the employment had been exercised.

- Ms. F, who is a cross-border worker, is quarantined in her country of residence and temporarily out of work due to the COVID-19 crisis. Thanks to the stimulus package adopted in the country of her employer, she continues to receive her salary from her employer. The challenge in this case concerns the taxation of her salary received due to a stimulus package. In this case, the OECD Secretariat’s general view is that her income will continue to be taxed as it was prior to the COVID-19 crisis, that is, in the country where she used to exercise her employment.

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### KPMG NOTE

Many countries are rolling out COVID-19-related fiscal stimulus measures. The intention is to mitigate the economic impact of the crisis and help avoid massive lay-offs, keep employees on payrolls, and inject liquidity into the marketplace, by putting checks, credits, rebates, etc. in the hands of individuals. However, this can impact the many variables of international assignee compensation and companies’ tax reimbursement practices. Sorting through the compensation and tax consequences of government stimulus measures that fill the gap in lost compensation or increase an assignee’s compensation should be discussed with your qualified tax professional.

## Permanent Establishment (PE)

Generally, it is unlikely that changes in the working patterns of employees due to the COVID-19 pandemic will create changes to the determination of a PE. During the COVID-19 crisis, if an individual finds himself in a position to (temporarily) conclude contracts while in his home office in the host country, this will not affect the determination of a PE (whereas under normal circumstances, it would). On the other hand, a construction site PE would not be regarded as ceasing to exist when work is temporarily interrupted.

The national/local threshold for presence that necessitates tax registration may be lower than those applicable under a tax treaty. National tax administrations are therefore encouraged to provide relevant guidance, given that the changes caused by COVID-19 might trigger requirements for a corporate income tax registration.

For example, Ireland's Revenue has issued guidance<sup>4</sup> in which the presence of an individual in Ireland or any other jurisdiction, as a result of COVID-19 travel restrictions, is disregarded during the COVID-19 pandemic for the purposes of corporate income tax.

### *Home Office PE*

Working from home during the COVID-19 outbreak normally results from governmental directives rather than from a requirement from an enterprise. Working from home during the COVID-19 crisis does not have a sufficient degree of permanency, the worker has an office in normal circumstances, and the enterprise has no access or control over the home office. In order to qualify for a PE, an individual's activities must contain a certain degree of permanency and must not be temporary or transitory. Under the assumption that remote work is a temporary circumstance and it does not become a permanent arrangement over time, working from home during the pandemic should not create a PE for the company.

### *Agency PE*

A worker who works from home temporarily for a nonresident company can give rise to a dependent agent PE if a worker habitually concludes contracts on behalf of the company. The key word in this context is "habitually." If work from home is a result of the governmental directives during the COVID-19 pandemic, then the work from home would not be regarded as being performed "habitually." However, if the worker was habitually concluding contracts on behalf of a company in the home country before the pandemic, then the work from home required by the pandemic would not change the assessment.

### *Construction Site PE*

Generally, a construction site constitutes a PE if it lasts more than 12 months under the OECD Model or six months under the UN Model. If the activities at a construction site are temporarily discontinued, the temporary interruptions should be included in determining the duration of a site. Even though the COVID-19 pandemic is an extraordinary circumstance, the time of discontinuation of activities on a site due to the pandemic should be included in an assessment of a PE.

## Residence Status of a Company

Companies are concerned whether the inability of senior executives or chief executive officers to travel might lead to a change of country where the executive management is located, which might in turn change a company's residence for tax treaty purposes.

A change in location of the senior executives and chief executive officers is an extraordinary and temporary situation if due to the COVID-19 pandemic. Such change of location should not trigger a change in residency for the company, especially when the tax treaty tie-breaker rule is applied.

The tie-breaker rules found in tax treaties help ensure that only one country can be country of residency for a company. Competent authorities assess situations where there is dual residency and come to a mutual agreement about which country is that company's residence.

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## KPMG NOTE

Taking into account the extraordinary circumstance of COVID-19, it is unlikely that the changes that occur exclusively due to and during the COVID-19 pandemic will lead to a change of a company's country of residence.

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## FOOTNOTES:

- 1 See the OECD's The Forum Network webpage "[OECD issues recommendations on implications of the COVID-19 crisis on cross-border workers and other related cross-border matters.](#)"
- 2 See GMS [Flash Alert 2020-084](#) (20 March 2020) "Countries Taking Extraordinary Measures on Borders, Travel, Health"; GMS [Flash Alert 2020-077](#) (19 March 2020) "Border Security Guidelines to Protect Health, Foster Economic Continuity"; and tax-related and immigration-related COVID-19-themed GMS *Flash Alerts* at: <https://home.kpmg/xx/en/home/insights/2020/03/flash-alert-covid19.html#01> .
- 3 See "[OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis](#)" (2020).
- 4 See: <https://www.revenue.ie/en/corporate/communications/covid19/corporation-tax.aspx> .

As the OECD points out: "For example, Ireland's Revenue has issued guidance to disregard the presence of an individual in Ireland – and where relevant, in another jurisdiction – for corporate income tax purposes for a company in relation to which the individual is an employee, director, service provider or agent, if such presence is shown to result from travel restrictions related to COVID-19.

The individual and the company should maintain a record of the facts and circumstances of the bona fide relevant presence in the State, or outside the State, for production to Revenue if evidence that such presence resulted from COVID-related travel restrictions is requested." (Source: "OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis," p. 2.)

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## Contact us

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