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GMS Flash Alert

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European Union – Court Scrutinises "Employer" Concept in Social Security Context

On 17 July 2020, the European Court of Justice (ECJ) ruled[1] that for social security purposes and in situations where an employee works in several countries, the substance of the employment relationship must be assessed in order to determine who the actual (economic) employer is. A formal (contractual) employer does not necessarily constitute an actual employer.

Furthermore, the ECJ specifies that the definition of employer for social security purposes must be uniform in all member states, as the EU legislation for social security does not refer to national law for this definition.

WHY THIS MATTERS

Determining who is the actual employer when an employee works in two or more European Union (EU) countries has implications for where employer and employee social security contributions are due.

Employees who work in two or more EU member states are covered by social security in either their country of residence or the country where their employer is located. If an employee is, for example, seconded, posted, hired out by/to another company in another member state, as a result of this ruling this might lead to a change in who is considered to be the actual employer for social security purposes, irrespective of who has signed the contract as the formal (contractual) employer.

Most EU member states have not applied a uniform definition for an employer in situations where employees work in two or more countries. Therefore, there may be employees who are affiliated to a social security system in an EU member state that is not "competent," which can lead to difficulties with obtaining benefits at some point in the future. Furthermore, making retroactive changes can be a very complicated process.

The assessment of who is the actual versus formal employer applies to every employee, including executives, "blue collar" workers, "white collar" workers, and all employers, including group companies, recruitment agencies, etc.

Description of Case C-610/18

The defendant – we will call "Company X" here – is a company formed in Cyprus that entered into fleet management agreements with transport undertakings established in The Netherlands. Company X undertook to take charge of the management of the heavy goods vehicles operated by the Dutch undertakings. Company X also entered into employment contracts with long distance lorry drivers residing in The Netherlands. Company X was stated as the employer in the contracts and Cypriot employment law was deemed as applicable for purposes of the contracts.

Company X applied for certificates for social security coverage in The Netherlands, where the employees resided, in an expectation that the Cypriot legislation for social security would be determined as applicable. However, the Dutch social security institution ("Svb") ruled that in fact Dutch social security was applicable, claiming that Company X was not the actual employer and that the employer, or rather employers, were the Dutch undertakings.

Highlights from the content of the employment relationships:

1. The drivers were at the disposal of the Dutch undertakings;
2. The Dutch undertakings are executing actual authority over the drivers;
3. The Dutch undertakings bear the relevant wage costs in reality.

The issues surrounding Company X, the Dutch undertakings, the drivers, and the Dutch social security authorities had been considered by various lower courts in The Netherlands. The Centrale Raad van Beroep (Higher Social Security and Civil Service Court) finally decided to obtain clarification as to who constitutes the "employer" of the drivers during the periods at issue by referring the matter to the ECJ.

ECJ Ruling

The ECJ ruled that the Dutch undertakings are the actual employers and Company X is merely a formal employer. Therefore, Dutch legislation on social security applies for the employees who reside in The Netherlands.

The ECJ took into account, among other things, the fact that the Dutch undertakings paid the wages and could dismiss an employee on grounds of infringements (negligence, at fault, etc.) the employee might have committed while working.

The Court also stressed that if it is apparent from relevant factors other than contractual documents that an employed person's situation in fact differs from that described in such documents, the EU Regulation must be applied to the actual situation rather than what is outlined in a contract.

Furthermore, the Court noted that the definition of "employer" in the EU Regulation for social security must be interpreted and applied uniformly in the EU member states, and that EU member states should not be applying their own interpretation and national law when they identify an actual employer for the purposes of determining social security coverage.

KPMG NOTE

If companies have employees who are sent between business undertakings, whether it be within a group of companies or between independent undertakings, the substance of the employment relationship must be assessed in order to determine which country's social security applies.

The concept of "employer" is assessed according to numerous criteria when an employee is posted from one EU

KPMG NOTE (cont'd)

member state to work temporarily in one other EU member state. However, for employees who work in two or more EU member states, the EU authorities and institutions have been much more lenient when determining who the employer is, because the criteria in the provision for multi-state work under the EU Regulation's provision for multi-state work are not as extensive and detailed as those in the provision on posting.

This ruling brings about a significant change as to how the EU legislation for social security will be implemented henceforward, in cases of work in two or more EU member states. We can expect considerably more scrutiny by the authorities when they determine which legislation applies when there is more than one company involved in a working engagement.

It is important to be transparent about the structure around an employment relationship and contract, for the content of the contract will not be determinative for social security purposes if the actual circumstances and the content of the employment relationship are not entirely replicated in the employment contract. The factual circumstances will always have priority.

FOOTNOTE:

1 ECJ ruling in the case C-610/18 AFMB Ltd and Others, C-610/18. Also see the Advocate General's opinion of 26 November 2019.

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Contact us

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