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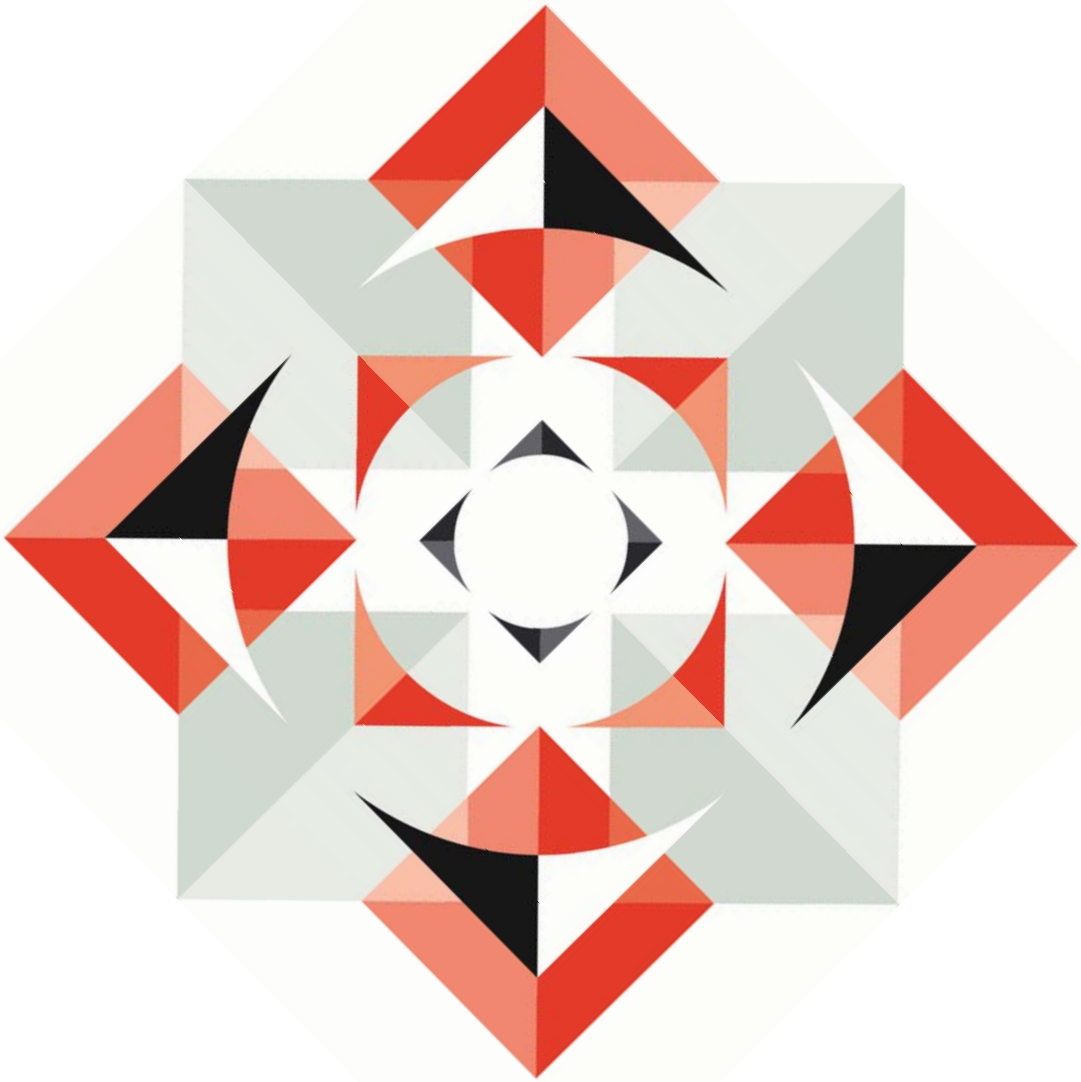
EU Social Security Rules



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Introduction

If you have employees who are sent on secondment to work in other countries and/or employees who work in two or more countries simultaneously, you need to ensure that you and your employees are complying with your social security contributions obligations.
This inbrief summarises the EU social security rules ("SSR") determining where social security should be paid for an EU national who is seconded to another member state or carries out employment duties in two or more member states.

The social security contribution rates vary considerably across Europe. For this reason employers typically try to minimise their social security contributions obligations by establishing liability in a low cost member state. For UK employers this often means trying to ensure that UK NIC rules continue to apply.

The general rule

The general rule is that an employee and their employer are only subject to the social security rules of one member state at any one time and this is generally the member state where the employment duties are actually carried out. There are two main exceptions to this rule:

- Where the employee is sent on a short-term secondment, i.e. a secondment of up to two years; or
- Where the employee works in two or more member states simultaneously.

In addition, member states may agree further exceptions to the general rule where it is in the interests of the employee to do so ("Article 16 Exception").

Secondments not exceeding 24 months

If an employer established in one member state (home member state) sends an employee who normally works in the home member state on a secondment for a period not exceeding 24 months to another member state (host member state), the employee and employer remain liable to pay contributions in the home member state.

There are a number of conditions which must be satisfied for this exemption to apply including:

- There must be a continuing direct relationship between the employer and employee. In particular, the employer must remain responsible for matters such as the employee's discipline and dismissal and the nature of the employee's work.
- The employer must ordinarily carry out significant activities in the territory of the home member state. In relation to UK employers, HMRC will generally consider factors such as:
  - where the employer has its registered office
  - the number of administrative staff working in each member state
  - where the majority of the employer's contracts are concluded
  - the employer's activities; and
  - the employer's turnover
- The employee should have been subject to the social security legislation of the home member state for at least one month immediately before the posting abroad.
- The employee generally must not be replacing another seconded employee whose employment in the host member state has finished.

What happens if the secondment will exceed 24 months?

If it becomes clear that the secondment is going to last beyond 24 months and there is a continuing desire to pay contributions in the home member state it may be possible to make an application under the Article 16 Exception if, broadly, it is in the interests of the employee and/or the employee has specialist skills or knowledge required to complete specific objectives in the host member state.

Alternatively, if the employee returns to their home member state it may be possible to treat any subsequent secondment to the host member state as a new secondment. HMRC would only treat the subsequent secondment as a new secondment if the employee worked in the UK for at least two months before being reassigned.

Working in two member states simultaneously

In determining whether an employee normally works in two or more member states, "marginal" activities are ignored. There is no definition of "marginal" in the SSR but a guidance note indicates that activities are marginal if they are "insignificant in terms of time and economic returns".

Substantial activity in member state of residence

Where an employee normally works in two member states at the same time, he will be subject to social security in his member state of "residence" if he pursues a "substantial amount of activity" there. "Residence" is defined in the SSR as the place where a person habitually resides. Case law suggests that habitual

residence means the place where the employee has the strongest personal connections. The factors that HMRC take into account in determining whether an individual is habitually resident in the UK include whether the employee has retained accommodation in the UK, whether the employee's immediate family have remained in the UK or whether they have accompanied the employee abroad, the length of time the employee will spend working abroad and the frequency and duration of visits to the UK.

A "substantial amount of activity" means that the employee must spend at least 25% of working time in the home state or receive at least 25% of remuneration for work performed there. The SSR require the relevant social security authorities to consider the employee's projected working time or remuneration for the next 12 calendar months. In addition HMRC will consider the employee's working time for the previous 12 months.

No substantial activity in member state of residence

Where the employee is not performing a substantial amount of activity within their home member state, the position is:

> If the employee has one employer, the social security system of the member state where the employer has its "registered office or place of business" applies

> If the employee has two employers, one of which has their registered office or place of business in the member state of the employee's residence and one of which has their registered office or place of business in a different member state, the social security system of the non-residence member state applies

> If the employee has multiple employers which all have their registered offices or places of business in the same member state, the social security system of that member state applies

> If the employee has multiple employers none of which have their registered office or place of business in the member state of residence, the social security system of the member state in which the employee is resident applies.

A "registered office or place of business" is defined as the place where the "essential decisions of the undertaking are adopted and where the functions of central administration are carried out". In other words substantive activities must be carried out here.

Employer deemed residence rules

An employer with no presence in the member state in which the social security contribution liability arises is deemed to be present in that state and accordingly will have the same social security obligations as an employer established in that member state. For these purposes it is irrelevant who pays the employee.

From a UK perspective, this generally means that non-UK but EU-based employers will need to register with HMRC and account for both employer and employee NIC.

Applying for an A1 certificate

It is essential for the employer and employee to apply for an A1 certificate (a certificate of coverage) from their home country social security authorities confirming where the social security contributions are payable.

In the UK the application is made to HMRC's National Insurance Contributions & Employer's Office ("NICEO"). For short term secondments/ multi-state employments it can take up to 12 weeks and for long term secondments it can take 6 months to obtain an A1 certificate so the application should be made well in advance, if possible.

Note that on a PAYE audit HMRC are likely to check that all A1 certificates have been obtained (whether from HMRC or other EU social security authorities) and that circumstances have not changed since the A1 certificates were issued. In the absence of a valid A1, the social security authorities in the host country may seek social security contributions in that country.

Which counties are covered by the SSR?

For social security purposes the EU member states are:

> Austria
> Belgium
> Bulgaria
> Cyprus
> Czech Republic
> Denmark
> Estonia
> Finland
> France
> Germany
> Greece
> Hungary
> Iceland (1June 2012)
> Ireland
> Italy
> Latvia
> Liechtenstein (1June 2012)
> Lithuania
> Luxembourg
> Malta
> Netherlands
> Norway (1June 2012)
> Poland
> Portugal
> Romania
> Slovakia
> Slovenia
> Spain
> Sweden
> Switzerland (1April 2012)
> United Kingdom

What impact will Brexit have?

The impact of Brexit on the application of the SSR is currently unclear, although we understand that some social security authorities are reluctant to grant any A1 certificates in relation to the UK for periods after March 2019.

Further information

Social security for cross-border employees is complex with many traps for the unwary. Careful planning is needed to achieve, where possible, social security liability in the desired EU member state.

Where non-EU countries are involved the position depends primarily on whether the UK has a reciprocal agreement with the relevant country. A list of the current reciprocal agreements can be found on the HMRC website - www.hmrc.gov.uk/nic/work/ss-agree

For further information on this subject please contact:

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[1] The SSR were significantly overhauled with effect from 1 May 2010. The SSR for multi-state employments were amended again with effect from 28 June 2012. There are transitional provisions for those employees who were subject to the rules prior to 1 May 2010 or prior to 28 June 2012.

Specialist advice should be sought if your employee is potentially covered by the transitional provisions.

[2] The term national is not defined in the SSR. Each member state must determine what is meant by the term. Broadly, an individual is a British national if the individual was born in the UK and at least one of the individual's parents was born in the UK. Note that many EU states other than the UK also apply these rules to third country nationals ("TCN"). Specialist advice should be sought if your employee is a TCN

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