

New multilateral framework agreement on the change of jurisdiction in the field of social security in cases of cross-border activity

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In the area of the coordination of national social security systems, in the case of a substantial activity in the country of residence within the EU/EFTA/CH, the insurance status can change from the employer country to the country of residence, provided that a substantial activity is carried out in the latter. This mainly occurs in cross-border constellations where, in addition to a work activity on the employer's premises, a home office activity is carried out in the country of residence.

Until the outbreak of the COVID-19 pandemic resp. the lockdown on 11 March 2020, a workload of 25% of the total activity on average was considered to be a substantial activity. Thus, up to a maximum of 24.9% of the total activity could be performed in the home office without a change of insurance status.

Due to the special situation in connection with the coronavirus, a flexible application of the subordination regulations was agreed within the EU/EFTA and in relation to Switzerland, according to which the insurance subordination should not change due to the pandemic-related restrictions. Thus, a person is considered to be employed in the country of employment (and thus subject to the social security system there) even if he or she is physically unable to perform his or her work there and must perform 100% of the working days in the country of residence in the home office. In principle, an A1 certificate was not required in such circumstances. Within the EU/EFTA/CH-States this flexible regulation was extended until 30 June 2023.

According to the old regulation before the lockdown, in the case of a 100% workload, a home office activity of 2 days (40%) would lead to a change of social security status to the country of residence and the employer would subsequently be liable for social security contributions in the employee's country of residence and for the payment of the corresponding social security contributions. An A1 certificate confirming the applicable social security legislation would also have to be applied for. Under the flexible application regime during the COVID-19 pandemic, however, there would be no change in social security status despite performing more than 25% of substantial work in the country of residence and no need to apply for an A1 form would arise.

In order to continue a facilitation of social security subordination after 30 June 2023, Switzerland and certain EU and EFTA states have signed a multilateral agreement. The agreement provides that persons working in the state in which their employer's registered office is located may perform up to 50% cross-border telework (maximum 49.9% of working time) in the state of residence without the subordination for social insurance changing from the state of the employer's registered office to the state of residence.

In order for the agreement to apply to their employees, Swiss employers must apply for an A1 certificate (maximum validity 3 years, renewable) from their OASI compensation fund via the ALPS platform (Applicable Legislation Portal Switzerland). The same applies to foreign employers whose Swiss employees wish to work from their home office. They must apply for an A1 certificate from the competent foreign authority.

This exception is only applicable to situations involving two states that have signed the agreement. In the case of home office in a state that has not signed the multilateral framework agreement, or for an employer based in a state that has not acceded to the agreement, the ordinary rules and procedures applied before the pandemic will apply again as of 1 July 2023 (materiality threshold of 25% of the activity, need to apply for an A1 certificate). The agreement is also not applicable if, in addition to teleworking in the country of residence, the employee carries out other activities there, such as visiting customers, or has an employment relationship in another EU/EFTA state.

It should be noted that the above regulations only apply to the area of social security. The tax perspective must be examined separately and based on the respective applicable double taxation agreements, the supplementary agreements or memorandums of understanding, as well as the separate cantonal special agreements with the border states. A more in-depth discussion of the tax approach will be addressed in the next blog post. It should already be mentioned that a new mutual agreement has entered into force with France on 1 January 2023. A new cross-border commuter agreement and an amendment protocol also entered into force with Italy on 17 July 2023. In relation to Germany, the new consultation agreement of 6 April 2023 concerning "senior employees" must be taken into account.