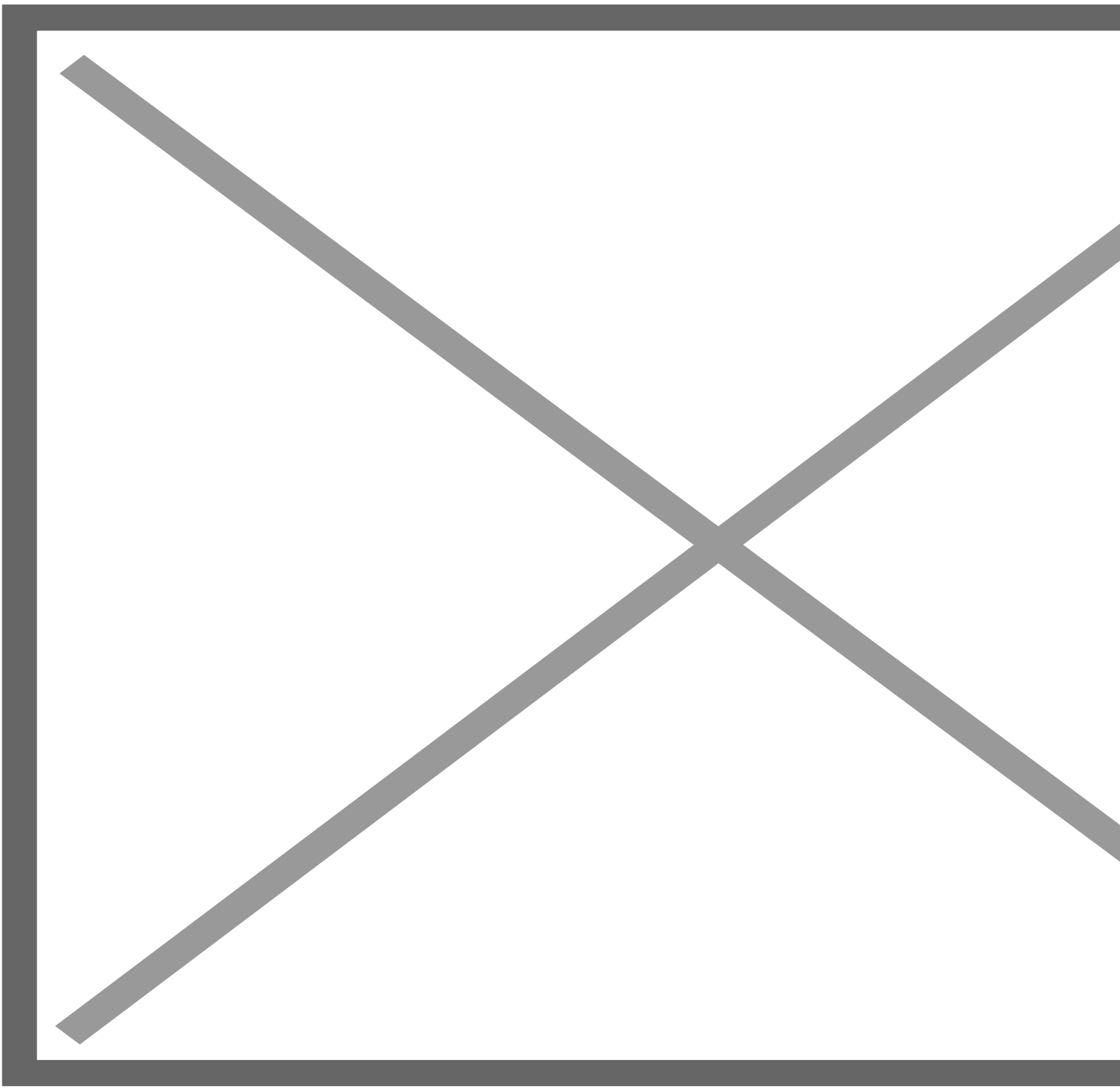
European delights

Employment Tax | International Tax



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Robert Salter highlights the challenges that can arise for employers with employees working across other European countries

Key Points

What is the issue?

Employers cannot simply assume that they only need to consider Social Security obligations for their European employees in the ‘home location’ of the company.

What does it mean for me?

Advisors and employers need to ensure that they genuinely understand the working patterns of all of their international employees (and Directors) and ensure that the Social Security obligations that may arise in other European states are pro-actively addressed.

What can I take away?

The increasingly international development of business and the ease of working remotely have created greater risks for businesses than ever before with international workers. The European regulations around Social Security and the high costs of Social Security in particular European countries mean that these developments can represent a serious risk to employers.

Though Social Security is often not regarded as a tax by the public, it is a major source of revenue for governments throughout Europe. As such, it certainly fits the description of a ‘hidden tax’. Moreover, Social Security often brings hidden challenges for employers with regard to their employees and this is particularly true when one looks at the issue from a pan-EU perspective.

Challenges can arise in respect of regular employee secondments where companies transfer an individual to another EU location for a set period of time (say two or three years), but issues can also occur in other scenarios including:

- International home-based workers who work in a jurisdiction that is different from that of their legal employer;
- Home-based cross-border workers (i.e. who are employed in one country but live/work in another jurisdiction);
- Multi-State workers;
- Business travellers who spend short periods of time working in other EU locations; and
- The Non-Resident Directors of companies (e.g. individuals from the EU who are directors of a UK company).

Specific issues can arise for all of the above groups. Companies need to ensure that they understand where their employees are working and what Social Security obligations can result from the arrangements. Companies cannot ‘ignore’ the risks that can arise with these employee groupings and assume that because they are accounting for Social Security withholdings in the home location (e.g. NICs for people on a UK employment

contract), that there are no overseas issues or risks.

In addition, one needs to note that when we refer to the 'European Union' in the context of Social Security, we are actually not just referring to the formal members of the Union, but also to the countries of the European Economic Agreement Area (Norway, Liechtenstein & Iceland) and also Switzerland.

Direct assignments

In many respects, the Social Security requirements for regular assignments are well-established and the EU, for example, has had some standardized regulations in place covering assignees since at least 1971. The classic approach for such assignments, is that the employer obtains an 'A1 Certificate' (or occasionally still an E101 Certificate), from their home Social Security Authority and continues to account for employee and employer Social Security in their home location only. The existence of the A1 Certificate ensures in the first instance that there shouldn't be an obligation to Social Security contributions in the other jurisdiction as a core principle of the EU regulations in that Social Security liabilities only arise in one location for any individual.

However, the real world is often more complicated than the above example. Companies actually need to consider a wide range of other issues when handling such intra-EU secondments including:

- Should individuals just stay in their home Social Security System? Or should companies consider alternatives? For example, certain EU countries have employer Social Security rates which are considerably higher than others. French, Italian and Belgium employer social charges are all considerably higher than UK NICs (employer social charges in these locations can typically be equivalent to 35–45% of an individual's overall compensation). As such, an employer who transfers someone from France to the UK and employs them on a UK local contract would be potentially saving a significant cost for each individual employee. Clearly such arrangements are not purely an issue of cost and companies would need to consider other factors including:
    - Would the individual accept the transfer to the UK on a UK contract as compared to a secondment? You will find that some individuals are very 'attached' to their home Social Security and are unwilling to give this up.
    - Does changing the legal employment contract have a long-term impact on the individual's employment rights and potentially their long-term pension entitlement, for example?
    - If there is a negative impact to the employee per the above, what options exist to ensure these risks are minimised? For example, would it be appropriate to provide the employee with some of the 'win' associated with the Social Security savings that occur?
    - Or can you provide the individual with voluntary State Social Security coverage in the home jurisdiction (e.g. in addition to UK NICs, if we have a Frenchman working in the UK under a UK contract). Whilst not all EU Social Security regimes provide the option of voluntary Social Security contributions, some schemes do (e.g. the French scheme) and these voluntary contributions can actually represent very good value from a cost-benefit perspective.

Some key exceptions

Companies and advisors also need to note, that the principle of someone remaining in their home-country Social Security system whilst temporarily living overseas doesn't apply in all situations. Typical exceptions are:

- 'Back-to-back' assignments – i.e. is the company actually sending someone to replace an existing secondee? Typically A1 Certificates should not be issued by the home jurisdiction for back-to-back secondments; rather the replacement employees should fall within the host country's Social Security

regime. Whilst some exceptions exist (e.g. with people on a graduate training scheme, encompassing transfers around various EU jurisdictions), this is an area that companies and their advisors need to be aware of and manage carefully. Construction companies cannot, for example, simply send bricklayers or electricians from Germany or Poland to a building site in the UK and have these new assignees directly replace their predecessors.
- Advisers also need to understand whether the transfer is genuinely an assignment initiated by the Company rather than someone simply choosing to work in another EU jurisdiction for personal reasons?

Individuals who decide to work / live in another EU country for personal reasons (e.g. as a 'trailing spouse' of another internationally-assigned employee or to live closer to their elderly parents, who need increasing support), are not innately assignees for the purposes of the EU Regulations. As such, they would usually be subject to Social Security in their 'host location' per the EU regulations.

In these situations, the home country employer should therefore be registering with a payroll bureau in the overseas jurisdiction and accounting for overseas Social Security contributions (employee and employer).

Home-based workers

Home-based workers are individuals who are employed in a particular country but not working from a regular office or factory. If they are working in the same country as their employment contract – wonderful – companies have no further issues (at least from the perspective of the EU Social Security regulations) to consider.

However, what is the situation, if the individuals are working in another country on a long-term basis? For example, because the HR team actively encouraged all individuals to consider 'home working' as part of a process of 'hoteling' to reduce the demands on desks in the office.

In this situation, social charges are actually due in the jurisdiction of their actual home rather than the legal employment. Even if their activities in that location do not constitute a 'permanent establishment' or similar for corporate tax purposes, the company would need to register in that location for Social Security withholdings.

Companies actively encouraging home-based working (e.g. to reduce the pressure on office space), may therefore want to consider introducing restrictions on the precise home-working arrangements. For example, a clause in the contracts of employment stating that employees cannot work outside the employment contract jurisdiction without the specific agreement of the employer may be sensible.

Multi-State Workers, Short-Term Business Visitors and Non-Resident Directors

The Social Security requirements for Multi-State Workers and Business Travellers often cause problems for companies.

Firstly, it is important to understand what Multi-State Workers (MSWs) and Business Travellers actually are. In practice, a MSW could be someone who lives in one EU state (e.g. Ireland), and perhaps works from home one to two days per week, whilst working in a different state (e.g. the UK) for the rest of the week. A Business Traveller may be only based in the UK (or another EU Jurisdiction), but actually has a job with pan-European (or at least pan-Regional responsibilities) and therefore spends a number of days each month working in other EU states (or the EEA / CH countries).

This group of employees can raise numerous issues including:

a. Do companies have any understanding of their MSWs and business travellers and where they are working?
b. What is the precise working pattern for the individuals involved? For example, how much time do they spend working in their home location compared to the overseas location?
c. Does the company need to apply for an A1 Certificate for MSW?
d. At what stage is it appropriate for a company to consider applying for A1 Certificates for their Business Travellers?

Companies that don't have an accurate understanding of these employee groups, need to ensure that they develop a system of tracking people. This could be via the use of technology (e.g. mobile phone apps), using data provided by the travel providers, requiring individuals to present their travel calendars on a regular basis or the company expense reporting system. Without such systems, companies are exposing themselves to unnecessary risks – and these risks could be significant – both from an absolute cost perspective, but also in terms of time, professional fees and negative publicity.

Once companies understand about these employee groups, they are then in a position to analyse exactly what steps they need to do and also to develop some rules about when, for example, A1 Certificates should be applied for. For example, should an A1 be obtained for only very limited business travellers (e.g. individuals who spend say 1 day per month overseas on average for a limited period of time)? What if individuals are expected to spend say 2-3 days per month in a particular jurisdiction over a period of 5-6 months?

When considering whether to apply for A1 Certificates in respect of Business Travellers, companies need to note that:

a. The regulations do not provide any formal, specific 'deminimus' – so from a legal perspective, overseas authorities could argue that you should obtain an A1 Certificate for even one day of overseas business travel to that jurisdiction;
b. Can you obtain A1 Certificates retrospectively? Whilst HMRC would usually issue Certificates on a retrospective basis, this may not be possible in all cases (e.g. if an employee has left your company). Moreover, overseas authorities may not accept A1 Certificates that are issued late or issue them retrospectively.

When considering the position for Multi-State workers (MSWs) – e.g. the individual who works between say the UK and Republic of Ireland on a permanent basis – companies need to understand what their working pattern is and potentially be in a position to monitor this on an ongoing basis. For example, if someone has a formal UK contract of Employment and spends some of their time in the UK, but lives in Ireland and has their permanent home in Ireland, they (and their employer), could be liable to Irish or UK Social Security contributions depending upon the precise working pattern.

For example, if the individual works at least 25% of their working time in their home location (e.g. Ireland), the Company should be accounting for Irish Social Security, even if they don't have any formal presence in Ireland. However, if the individual spends at least four days per week (assuming a five day per week, full-time contract), working in the UK, UK NIC is due rather than the Irish equivalent. When considering which Social Security Contributions for MSWs are due, it is common to purely consider the individual's working pattern arrangement – i.e. if 25% or more of the duties are undertaken in the home jurisdiction, Social Security charges are due in the home location. However, the position can be more complicated than this – e.g. if someone has two separate employment arrangements with different entities in different locations (i.e. one in the UK (4 days per week) and one in Ireland for 1 day per week), the Social Charges may be due in Ireland depending upon the 'value' associated with the Irish work compared to the UK work.

If the value of the Irish employment represented at least 25% of the employee's cumulative package, both the UK employer and the separate Irish employer should arguably be paying Irish PRSI rather than NICs. However, if the Irish work was actually 'self-employment' per Irish law rather than employment, the position changes again and suddenly UK NICs are due by the UK employer rather than PRSI.

Similar issues arise with Non-Resident Directors (NRDs) – e.g. directors of a UK company, who happen to live overseas and may also be Non-Executive Directors (NEDs) of other companies in other, additional EU jurisdictions. Whilst the UK regards directors as employees, in other states (e.g. France, Switzerland), they may actually be legally regarded as self-employed. As such, when dealing with NRDs (e.g. the retired executive with a portfolio of NED roles), you don't just need to consider their overall working pattern and where they live, but also potentially whether those other NED roles are employment or self-employment per the relevant country's domestic legislation.

BREXIT and the next steps

Companies may wish to 'delay' any decisions re their Intra-EU mobile and international workforce given that this area is governed by EU-wide legislation and the UK is leaving the EU from March 2019. However, BREXIT or no BREXIT, the issues caused by internationally-mobile workers will not go away.

The initial agreement between the UK and the EU from December 2017 committed the UK to retaining the EU Regulations with regard to Social Security (at least as an interim measure) and as these regulations apply to one Non-EU/EEA Member at the present time (Switzerland), it is quite possible that Britain will remain subject to the EU Social Security Regulations regardless of exactly what 'BREXIT' arrangements are eventually agreed.

As such, companies need to understand the issues they face and what this means from a cost, operational and risk perspective. They need to establish a robust framework for tracking these employees and need to ensure that the individuals involved understand the issues that arise and that there is a system of clear, meaningful communication between the company and the individuals who are impacted by the arrangement. And they need to ensure that their budgets are updated, to address any additional employer Social Security costs that are due.