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Legal aspects of social insurance between the European Union and Switzerland



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The agreement between the European Community and its member states, of the one part, and Switzerland, of the other, concerning the free movement of persons entered into force on 1 July 2002. Among other things, it coordinates the various national social security systems. In practice, it has become evident that for independent, German entrepreneurs engaged in gainful activity in Switzerland, problems can arise.

Introduction

The basis for the free movement of persons in the area of social security are the principles of independence from nationality and the submission to the law of a single state (the "concentration principle"). The objective of these rules – which are new for Switzerland – is the simplification of social insurance schemes for gainful activities across borders. This NewsLetter presents the principles governing the submission of income derived from gainful activity to the social security system of a treaty state.

Location of the gainful activity

The rule based on the location of the gainful activity is applied when a person is engaged in gainful activity in only one country. In this situation, neither nationality, nor residence, nor the country in which the enterprise or employer has its legal domicile is of consequence. This principle applies for both employees and self-employed persons. E.g., a person who resides in France but who is engaged in gainful activity only in Switzerland is subject to the Swiss social security system.

If a person in Switzerland is subject to the obligation to make payments to the Swiss social security system, but the employer is not (e.g., because the employer does not have a domicile or a permanent establishment in Switzerland), the employee must register with the relevant cantonal compensation office.

Country of residence

A person is subject to the social security system of the country of residence if he or she works simultaneously in the country of residence and one or more other treaty member states, regardless of whether the per-

son is employed or self-employed. E.g., if a person resides in Italy and works in both Italy and Switzerland, he or she is subject to the social security system in Italy.

The laws of the country of residence also are controlling if a person has more than one employer and the employers are domiciled in various treaty member states. It does not matter whether the person pursues gainful activity in the country of residence. E.g., a person who resides in Italy and works for an employer in France and an employer in Switzerland is subject to the social security system in Italy.

Place of employment

If a person works for a single employer in more than one treaty member state and none of those states is his or her country of residence, then he or she is subject to the social security system of the country in which the employer has its headquarters. E.g., a person who resides in Italy and works in Switzerland and France for an employer which has its headquarters in France is subject to the social security system in France.

A self-employed person who works in one or more treaty member countries but not in the country of residence is subject to the rules of the social security system in the country where the person conducts the primary business activities. E.g., a person who resides in Italy and who pursues his or her occupation in France primarily and in Switzerland will be subject to the French social security system.

Special situation in the case of simultaneous employment and self-employment

The previously described principle applies to persons who are either employed or self-employed. In the

case of simultaneous self-employment and employment in one or more treaty member states, the person is subject to the principle that the social security rules of the country in which he or she is employed are to be applied. E.g., a person who resides in and is self-employed in Germany, but is also an employee of a company in Switzerland, is subject to the social security system in Switzerland.

The exception to this principle is in Annex VII to Council Regulation (EEC) No 1408/71 governing the implementation of the agreement and in which certain treaty member states have reserved the right to apply their own social security rules on a proportional basis. Under these exceptions, a person who is simultaneously employed and self-employed in more than one treaty member state is subject to the social security system of each country in proportion to the work performed in that country. Most treaty member states assert the exception.

A proportional application of the social security system will always apply when a person engages in a self-employed occupation in Switzerland. E.g., a person who resides in Switzerland and pursues a self-employed occupation there and who also is an employee of a company in France will be subject, on a proportional basis, to the social security system in both countries.

Conclusion

In situations between Switzerland and the member states of the European Union, the "concentration principle" applies. This means that persons engaged in gainful activity are only required to make social security payments in one treaty member state, even if they work in various treaty member states or reside in a different treaty member state. Whether a person engaged in gainful activity is required to make social security payments in Switzerland depends on the circumstances. Depending on the situation, it will be necessary to determine whether employment or self-employment exists, whether such person is engaged in gainful activity in other treaty member states (whether self-employed or as an employee) and where the domicile of the employer or the relevant person is located. If a person is required to make social security payments in Switzerland, then he or she must register with the relevant cantonal compensation office, if this has not already been done by the employer.

As an exception, a proportional obligation to make social security payments in relevant treaty member states exists if one of the treaty states has asserted the exception in Annex VII to Council Regulation (EEC) No 1408/71 implementing the agreement. For treaty member states which have not asserted this exception (e.g., Germany) the person is subject to the social security system of the country in which he or she pursues a dependent gainful activity.

E.g., in Germany this means that a self-employed entrepreneur who is simultaneously employed in Switzerland (e.g., as a member of a board of directors) must subject his or her entire income to the obligation to make social security payments in Switzerland. Because income from self-employment activities does not result in an obligation to make social security system payments in Germany, this leads to a burden on such a person's income in Germany. It should be noted that some cantons in Switzerland have a somewhat relaxed approach to this rule and require social security payments only in respect of the income from employment in Switzerland or partially refund the social security payments based on self-employment activities in Germany.

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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