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## Remote working from abroad: what employers need to know

It is currently planned that most of the special provisions introduced in the area of social security law between Switzerland and its neighbouring countries in order to simplify working from home during the pandemic for cross-border situations will be abolished as of 31 December 2022. Sooner or later, the regular provisions that significantly restrict working from home for employees abroad - especially for cross-border commuters - will return. This is a good time to remember what must generally be considered when employees work abroad. We show what employers need to know.

## Flexible forms of work versus inflexible legal systems



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The COVID-19 pandemic has shown that many employees can fully or partly work from home. Now that the pandemic-related remote working has receded into the background, many employers continue to allow their employees to perform (all or part of) their work from home. This is because employees appreciate the possibility of remote working as it offers, for example, more flexibility in their private life and a better work-life balance. Employers often also increase their attractiveness for (potential) employees by offering remote working. Some employers go even further than the “classic” working from home and allow remote working for a certain period of time from any (holiday) destination. However, without prior in-depth clarification, employers can be confronted with undesirable consequences when granting requests for remote working from abroad: there are social security, tax and labour law stumbling blocks. Our Employment News shows what to look out for when it comes to remote working so there is no rude awakening for either employers or employees.

### What applies to employees having a cross-border commuter status?

#### Social security law

Until a few days ago, it was assumed that the flexible subordination rules which were introduced due to the COVID-19 pandemic would only apply until 30 June 2022. Due to these special regulations, basically no social security implications have arisen if employees holding cross-border commuter permits spend the majority of their working hours working from home in their country of residence. Employees with cross-border commuter permits remain subject to the social security scheme at their original place of work in Switzerland. Without these special provisions, the Regulation (EC) No 883/2004 and the associated Implementing Regulation (EC) No 987/2009, which Switzerland adopted as part of the Agreement on the Free Movement of Persons with the EU/EFTA, apply. Among other things, the purpose of these regulations is to coordinate the various social security schemes to ensure that

even in the event of multiple employment in different countries within the EU/EFTA area and Switzerland, only one social security scheme applies, and social security contributions must be paid just once.

The regulations also specify what applies in the event that employees work in two or more countries. As a general rule, the decisive factor is where employees carry out a substantial part of their work. And at this place the social security subordination takes place. Here, the so-called **25% rule** comes into play. In simple terms, this means that if employees work 25% or more in their country of residence, this may serve as an indication that a substantial part of their work is carried out there. This in turn can lead to employees being subject to social security contributions in their country of residence. For employees holding cross-border commuter permits, this has the practical effect that if, for example, they work from home in Germany for two days whilst having a full-time job, they are (usually) subject to the German social security scheme and the (Swiss) employer must pay the corre-

sponding social security contributions in Germany for such employees and is generally – and depending on local law – liable for them.

Now the Federal Office for Social Security has announced that the flexible subordination rules will be extended again until **31 December 2022**. Increased working from home on the part of employees having a cross-border commuter status will therefore not lead to a change in their social security scheme until 31 December 2022, even if the 25% threshold is exceeded.

The regular subordination rules, which are still inactive until 31 December 2022, no longer meet today's needs for flexible and location-independent working. The need for action on the European level has been generally recognised. It is planned that, in the long term, the subordination rules will be adapted in such a way that the possibility of working from home abroad (in border areas) and within the EU/EFTA as well as Switzerland will be extended without affecting the social security status. It is conceivable, for example, that the threshold of 25% will be increased.

### **Tax law**

In contrast to social security law, the agreed special provisions in the area of taxation will cease to apply for most of Switzerland's neighbouring countries on 30 June 2022; hence, the regular provisions will reapply from 1 July 2022. In concrete terms, this means that the payment of withholding taxes for employees with a cross-border commuter permit depends on whether a national or cantonal double taxation or tax agreement exists with the respective state that contains provisions for employees holding a cross-border commuter permit. These provisions should be complied with, also with regard to the cross-border commuter status.

### **What are the typical risks when employees work abroad?**

Special regulations must be observed not only for employees having a cross-border commuter status. Typically, there are risks and a need for prior clarification in the following areas:

#### **Work permit**

Most countries require a work permit for foreign nationals who work in the respective country. These requirements are based on local law (i.e. where the work is actually carried out) or on any intergovernmental agreements. While the Agreement on the Free Movement of Persons has reduced the obstacles for EU/EFTA nationals to work in other EU/EFTA states, the granting of a work permit in other countries or for other nationals is dependent on various entry requirements. Depending on the relevant law, a work permit is required from the first day of work. Working without a work permit may result in criminal or administrative sanctions in the respective country. Sanctions range from heavy fines to possible entry bans and are often directed at the employer and the employee. In the meantime, however, various countries have recognised the need for action and the gap in the market and offer "remote work visas", i.e. work permits created specifically for remote working from abroad. These include, for example, some Caribbean states (such as Barbados and the Cayman Islands), Mauritius, the United Arab Emirates and now also Brazil. In any case, we recommend that any permit requirements in each country be clarified in advance.

#### **(Social security) insurances**

Working in a country that differs from the usual country of employment is either governed by inter- or multinational agreements (cf. above for EU/EFTA countries) or it is left to local law whether countries levy social security contribu-

tions for activities on their territory, regardless of whether this wage is already subject to social security contributions in another country. Many countries also recognise the employer's liability for such social security contributions, sometimes up to and including subsidiary personal liability of the corporate bodies of the employer. It is therefore possible that the employer pays social security contributions twice since these are not only payable in Switzerland, but also abroad (possibly even retroactively and with interest). Accordingly, it is advisable to clarify social security law in detail prior to performing any work abroad in order to avoid a possible change in the applicable social security law (which could then lead to unnoticed gaps in insurance, which in the event of a claim would at times have to be covered by the employer), or any double payments.

Furthermore, at least in respect of long-term stays abroad for work purposes, there is a risk that any insurance policies (in particular accident insurance or daily sickness benefits insurance) will not provide any insurance benefits or only reduced insurance benefits in the event of a claim, as general insurance conditions contain corresponding exclusions. Depending on the form of the employment agreement, the employer may be held liable. It is therefore advisable to check the insurance conditions accordingly and to adjust any insurance commitments prior to any work abroad.

#### **Aspects of tax law**

From the employer's perspective, the risk of a permanent establishment abroad under tax law must also be kept in mind in the event of remote work abroad. For example, if employees regularly work from home abroad, there is a risk that their home offices may be considered to constitute a permanent establishment on the part of the employer,

which entails the relevant tax consequences for the employer in the respective country. Depending on the country, this risk can be kept in check through specific regulations on which activities employees may pursue abroad.

From the employee's point of view, working abroad may also result in a (limited) income tax liability at the place of work. Depending on the country, this may even lead to double taxation of income. Depending on why employees are working abroad, it is advisable in this respect, against the background of the employer's duty of care, to at least inform employees in the form of written documentation of any tax consequences of working abroad.

#### **Application of foreign (mandatory) labour law**

In many jurisdictions, labour law is governed by mandatory local law, i.e. deviating agreements between the contracting parties in the employment agreement do not take effect. Accordingly, it is possible that foreign law has more employee-friendly regulations that may not be altered and that employees working locally are entitled to the corresponding claims. For example, many countries have a mandatory remote working allowance if employees work from their place of residence. In addition, remote working from abroad may establish a new place of jurisdiction, which, in the worst case, could mean that the employer might be sued in a court abroad and be subject to the less favourable mandatory labour law of the respective country.

#### **Is the employer thus required to check where its employees are working from in order to counter these risks?**

In view of the high risks that employers are exposed to when employees work abroad, preventive precautions and certain verification measures are indicated. For example, employers may stipulate that working from home is only permitted within Switzerland and provide spe-

cial rules for employees holding cross-border commuter permits, respectively, taking into account the current social security and tax situation. It is also recommended that the days on which employees work from home are documented. This can be implemented in such a way that the place of work is recorded as part of the working time recording and the documentation is subsequently confirmed by the supervisor's signature, at the end of the month. Moreover, technical verification measures can be used (e.g. by means of IP location determination) to randomly check whether employees comply with the requirements. However, such random IP location determination is not limitless, because before such measures are introduced, the employees must be informed (in the form of written documentation) and, if necessary, consulted as well. Furthermore, the exact location should not be determined, just the region where the employees work. If such a region is abroad, appropriate measures may be taken to prevent any risks from materialising.

#### **Conclusion and recommended action**

If an employer offers its employees the opportunity to work from home, a remote work policy or a detailed regulation of working from home in the employment agreement is recommended in any case. For remote working in Switzerland, these regulations should include not only general requirements (e.g. that remote working is voluntary and that no compensation is paid for remote working expenses, or regulations on data security, working hours or health protection measures) but also special basic provisions with regard to employees holding cross-border commuter permits. In order to minimise the risks listed above, we recommend a specification in the remote work policy that remote working is only permitted in Switzerland. In special or complex cases (e.g. various self-employed/employed part-time jobs), it must be checked on a case-by-case

basis which social security scheme applies.

If employers wish to allow their employees to work from abroad for a certain period of time, it is strongly recommended to check the effects of this work in advance, taking into account the local law at the place of the intended work to ensure that the granting of flexible working does not lead to undesirable consequences. Furthermore, it should be evaluated whether remote working from abroad cannot be realised in a different way, e.g. in the context of a secondment, which is subject to other legal requirements.

We have a wide network of lawyers all over the world and are happy to help you with such clarifications, queries about our Employment News as well as with creating a remote work policy.

Employment News reports on current issues and recent developments in Swiss labor 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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