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New framework agreement on maintaining subordination under social security law in the case of cross-border home office work of less than 50%

Switzerland has signed a new framework agreement on the retention of social security status for cross-border home office work by employed persons. The framework agreement will enter into force on 1 July 2023. In the following, you will find out what it is all about.

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Initial situation

Since 1 April 2012 the regulation (EC) No. 883/2004 on the coordination of social security systems ("basic regulation") has applied to cross-border employment between Switzerland and the EU and the EFTA states (Iceland, Liechtenstein, Norway).[1] According to this basic regulation, an employed person who works partly from his/her home in his/her foreign country of residence and partly in the country of the employer's registered office is subject to the social security system of the country of residence if he/she performs a substantial part of his/her gainful employment there. An activity of at least 25% of the total working time is considered to be substantial in an overall view. If there is no substantial gainful employment in the country of residence, the employee is in principle subject to the social security system of the country in which the employer has its registered office.

Since the beginning of the COVID-19 pandemic, the home office behaviour of employees has changed considerably and employees and employers have been forced to expand (cross-border) work from home activities due to partially binding orders of the authorities. In accordance with this need, the EU and EFTA states agreed on a temporary flexible application respectively suspension of the above-mentioned rules, according to which the pre-existing subordination under social security law did not change because of the new work from home activity at the foreign place of residence. This agreement on the flexible application of the subordination rules expires on 30 June 2023.

New framework agreement from 1 July 2023

Against the background of increased work from home activity since the COVID-19 pandemic and the expiry of the flexible application of the general subordination rules, Switzerland and certain EU/EFTA states have decided to conclude a framework agreement[2] , initially limited to five years, to facilitate work from home activity in a cross-border context. This framework agreement provides that persons who habitually work in the country of the employer's registered office may now work up to a maximum of 49.9% (instead of only 24.9% as previously) of their total working time from their home in a foreign country of residence and still remain socially insured in the country of the employer's registered office.

Conditions for the applicability of the framework agreement

For the framework agreement to apply, the following conditions must be met:

- The employee is subject to the general rules of the basic regulation, but in addition to his/her habitual work in the employer's country of residence, he/she works 25% or more (but no more than 49.9%) in his/her home office in the foreign country of residence, which would lead to a change in social security subordination under the basic regulation.

  According to the framework agreement, home office activity is defined as any activity that could be carried out from any location, including in particular the employer's registered office, and that basically relies on a digital connection (IT link) to stay in contact with the employer's work environment to perform the task.

- Both the employee's place of residence and the employer's registered office must be located in signatory states of the framework agreement. Currently, especially Germany, Austria, Liechtenstein and Switzerland have already signed the framework agreement.[3] Numerous further states have expressed their inten-

1 For the general conflict of laws rules under the basic Regulation, see EmploymentNews No. 24 of February 2015.

2 Framework Agreement on the application of Article 16 (1) of Regulation (EC) No 883/2004 in cases of habitual cross-border telework.

3 In addition the Czech Republic, the Netherlands, Slovakia, Belgium, Luxembourg, Finland and Norway have also already signed the framework agreement.

tion to sign the framework agreement too.[4] However, France and Italy have not yet declared whether they will sign the framework agreement. A current list of signatory states is available on the website of Belgium as depositary state.[5]

- The employee pursues a solely employed activity. Self-employed persons are not covered by the framework agreement. If a worker is employed by several employers, all employers must be based in the same signatory state.
- For the framework agreement to be applicable, two negative conditions must also be met:
  - On the one hand, the employee may not habitually pursue another activity in a state other than the state of residence and the state of the employer.
  - On the other hand, the employee may not habitually pursue another activity in the country of residence in addition to the cross-border telework.

The framework agreement itself as well as its explanatory memorandum do not include a definition of what is to be understood by "*habitually pursue another activity*" and whether this also includes, in particular, visits to clients. According to information from the Federal Social Insurance Office, an internationally valid definition for such habitual activity has not yet been established and there is currently no corresponding practice. It is conceivable, however, that the general marginality rule of the basic regulation will be used for this purpose and that subordination to the framework agreement will remain possible, provided that the other activity amounts to less than 5% of the total working time. However, it is also possible that the regularity and frequency of the further activity are considered decisive and that merely occasional activities do not preclude the applicability of the framework agreement. Although the framework agreement is primarily aimed at facilitating work from home, in our opinion, occasional visits to customers or business trips in the country of residence or in other EU/EFTA states in the context of a posting should not qualify as habitually pursued activity by definition. Ultimately, however, the practice of the authorities will have to show what is to be understood by a habitually pursued activity according to the framework agreement.

Procedure

If the requirements are met and the employee wants to work for a maximum of 49.9% from his home in a signatory state, the Swiss employer must - with the consent of the employee - submit an application for the issuance of an A1 certificate via the ALPS platform (*Applicable Legislation Portal Switzerland*) in order to apply the regulation in accordance with the framework agreement (*opt-in*). The application must be submitted within a maximum of three months of the desired date of subordination. However, during the first year since the framework agreement came into force, an additional grace period applies: the A1 certificate can be issued retroactively as of 1 July 2023 for applications submitted by 30 June 2024. If the application is approved, an A1 certificate will be issued with a validity for a maximum of three years, but with the possibility of renewal.

If the conditions according to the framework agreement are not met, the application is treated as an ordinary application for an exceptional authorization according to Art. 16 of the basic regulation. Depending on the individual case, the states involved can therefore agree to exceptionally maintain social security subordination even if not all conditions according to the framework agreement are met, whereby the conditions for such an exception are very restrictive.

If no such application is submitted, the basic regulation and thus the limit of 24.9% of (foreign) work from home activity remains applicable.

Consequences of non-subordination

If the application for subordination under the framework agreement is rejected, the employee is in principle subject to the general rules under the basic regulation (25% limit; see above). This general rule under the basic regulation will also apply from the expiry of the flexible application of the basic regulation on 30 June 2023, to all those countries that have not yet signed the framework agreement by then, which, according to the current status, will include France and Italy.

If a new state signs the framework agreement after 1 July 2023, the provisions of the framework agreement shall only apply from the first day of the month following the signing.

Conclusion and prospects

The framework agreement is an important step towards the liberalization of the social security subordination for work from home in the European cross-border context.

As things stand, however, only Germany, Switzerland, Liechtenstein, Finland, the Czech Republic, Austria, the Netherlands, Slovakia, Belgium, Luxembourg and Norway have signed the framework agreement. France and Italy in particular – along with various other states in the EU/EFTA – have not yet declared their intention to sign the framework agreement. Accordingly, it is likely that there will be legal fragmentation in the future in the area of social security regulations for cross-border work from home activities.

4 Estonia, Hungary, Ireland, Lithuania and Malta.
5 Cf. https://socialsecurity.belgium.be/en/internationall-active/cross-border-telework-eu

In this regard, the following should be noted in summary:

- From 1 July 2023, the rules of the basic regulation, which were suspended during the COVID-19 pandemic, will (for the time being) again apply for employees of EU/EFTA states that have not (yet) signed the framework agreement. In general, Swiss employers do not have to take any precautions if the work from home activity in the EU/EFTA area is less than 25% and the employee has an A1-certificate.

- The situation is different if Swiss employers allow their employees to work from home in the EU/EFTA area for 25% or more:

  - It is necessary to verify in advance whether the respective country of residence of the employee has signed the framework agreement. Only if this is the case and all further requirements are met, a foreign home office activity of up to 49.9% can be granted without a change in the social security subordination.

  - Employers who had previously allowed their employees to work from a non-signatory state of the framework agreement at 25% or more, must act immediately and reduce the work from home activity to a maximum of 24.9% in order not to risk a change in social security subordination.

  - If the framework agreement is applicable, it is mandatory to apply for the issuance of an A1 certificate via the ALPS platform (*opt-in*). If no application is submitted, the 25% rule of the basic regulation remains applicable.

- The new framework agreement only has effects in the area of international social security law – in terms of tax law, the implications of a foreign home office activity must be examined separately for each country.

- For employers, (foreign) home office work – in addition to the social security thematic described above – involves various other stumbling blocks (employment contract law, tax law, insurance law, data protection, etc.). Employers are therefore strongly advised to comprehensively regulate work from home in internal guidelines or staff regulations

We will be happy to provide you with further information and support you in drawing up internal home office regulations.

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