Analysis

Social security after Brexit: internationally mobile employees

Speed read

Following the end of the 'transition period' on 31 December 2020, the social security implications for internationally mobile employees between the UK and the EU will become more complicated. The Withdrawal Agreement provides that existing arrangements for employees internationally mobile at 31 December are capable of continuing unchanged 'for as long as they continue without interruption'. However, the position is different for employees who become internationally mobile from 1 January 2021. The UK has agreed a reciprocal agreement with Ireland which broadly provides for the same outcomes as under the current EU regulations. But for employees internationally mobile between the UK and other EU member states, EEA members and Switzerland, the position is not yet finalised and will depend on the outcome of any final deal reached between the UK and the EU.

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Up to, and including, 31 December 2020, the social security coverage of internationally mobile employees working between the UK and EU is covered by the EU social security regulations (Regulation (EC) No. 883/2004 and 987/2009), ensuring that individuals are only liable to pay contributions in a single member state, and which provide clear (if complex) rules for determining in which state that is, under a multitude of different circumstances.

The most common examples under the current regulations include:

- the default position is that individuals are subject to social security in the country in which they work; however
- individuals being seconded to another EU member state for up to five years generally remain within their home country social security (and are therefore exempt from paying into the host country system); and
- individuals who regularly work in multiple member states are generally within the system of the country in which they live, so long as they work at least 25% of their time in that state.

The EU regulations also cover the ability to aggregate benefits accrued under multiple systems, ensuring that individuals do not 'miss out' on benefits due to working in multiple member states during their employment. Healthcare provision is also covered with EHIC and S1 documents providing vital access to national health services in EU countries in which an employee either does not live or is not liable to pay social security.

The Withdrawal Agreement includes provisions dealing with the social security position for certain internationally mobile employees (see article 30). These mean that during the transition period the current regulations should continue to apply in most cases (article 31), although the position from 1 January 2021 is less clear and will depend on any final deal that may, or may not, be concluded.

Employees internationally mobile at 31 December 2020

The Withdrawal Agreement confirms that the EU regulations should continue to apply to employees who are internationally mobile as at 31 December 2020, but crucially only 'for as long as they continue without interruption' to be in that situation (article 30, para 2). This is not further defined, and it is, therefore, unclear as to the extent of change that would cause an 'interruption' (for example would a multi-state worker who changes their work pattern result in an interruption?).

This should mean that any existing arrangements are capable of continuing unchanged, at least until the current expiry date of any social security certificate, i.e. portable document A1 (an 'A1'), and potentially of being extended up to the maximum period for which an A1 can be issued (for example, a two year secondment from the UK to France could be extended by a further three years with the individual still remaining subject to UK social security and exempt from French).

This also means that any new international mobility arrangements that start before 1 January 2021 should be considered under the existing regulations, and an A1 should be applied for on the basis of the current rules. Any A1 applied for should therefore continue to be valid, and extendable (to the maximum permitted under the current regulations) after 31 December 2020 'for as long as [the arrangement] continue[s] without interruption'.

With the large variance in employer social security contribution rates, and even the potential of double liabilities (see below), employers may wish to consider their plans for international mobility during the start of 2021 and whether it is sensible to bring forwards these arrangements so they start before 1 January 2021 in order to be covered under the withdrawal agreement.

The withdrawal agreement has been supplemented by the European Union (Withdrawal Agreement) Act 2020, which (at s 13) incorporates these details into domestic legislation.

HMRC has confirmed that it will continue to process A1 applications for any new international mobility arrangements that begin before 1 January 2021 (see HMRC's *Employer Bulletin*, issue 86, October 2020).

Employees internationally mobile from 1 January 2021

The UK and Ireland

The UK has agreed a reciprocal agreement for social security purposes with Ireland (Convention on Social Security between the Government of the [UK] and the Government of Ireland, 1 February 2019). This means that international mobility arrangements between the UK and Ireland from 1 January 2021 will be subject to the terms of this reciprocal agreement which, broadly, provides for the same outcomes as under the current EU regulations.

The UK and other EU member states, EEA members, and Switzerland

For other countries the position is still not finalised and will depend on the outcome of negotiations and the details of any final deal reached between the UK and the EU.

Deal

Although s 3 of the European Union (Withdrawal) Act 2018 incorporated the current EU regulations into domestic legislation, the UK government published details in February 2020 which confirms that it is seeking to 'establish practical, reciprocal provisions on social security coordination' and that 'any agreement should be similar in kind to agreements the UK already has with countries outside the EU' (*The future relationship with the EU: the UK's approach to negotiations*, Part 2, para 18). This could result in a number of changes given the features typically seen within such reciprocal agreements:

- assignments of limited duration (often up to a maximum of five years) can often mean individuals remain covered by their home country social security; but
- single country reciprocal agreements, for obvious reasons, do not usually contain provisions for individuals who regularly work in multiple countries: they are persevered for individuals working between the two countries for which the agreement is reached.

No deal

There have been a number of statutory instruments (SI 2019/721, SI 2019/722, SI 2019/723, and SI 2019/726) made which deal with the possibility of a no deal situation, and which would come into force from 1 January 2021. These are designed to, in effect, replicate the current EU regulations, with certain amendments:

- as a default rule, employees will be subject to UK social security if either they (a) work in the UK; or (b) they are resident in the UK and not subject to social security in an EU member state;
- for secondments from the UK to an EU member state lasting up to two years employees will remain subject to UK social security, and for secondments from an EU member state to the UK lasting up to two years employees will be exempt from UK social security; and
- for employees regularly working in the UK and at least one EU member state, the current basis for determining the country of coverage will continue to apply.

Although these statutory instruments allow the UK to, in effect, continue to apply the EU regulations any coherent operation will be dependent on reciprocal action from the EU or member states.

Without a deal and in the absence of further reciprocal agreements it is easy to see situations in which double liabilities for social security could arise:

- the incorporation of the EU regulations into domestic legislation mean that, for example, an individual temporarily seconded to an EU country for a period of two years would remain subject to UK social security, but without reciprocal agreement from the EU they may also become subject to social security in the EU country in which they are working from day one;
- if the UK amends the domestic legislation to determine those countries in the EU with which the UK has not reached reciprocal agreements should be treated similarly to non-EU non-agreement countries there may be a 52 week ongoing liability to UK social security where an individual is temporarily seconded, and a liability in that country from day one.

Enforcement

There will also be questions about enforcement for non-resident employers. Current EU regulations provide that an employer resident in one member state is automatically deemed to have a presence, social for social security purposes, in any other member state that is necessary to ensure that both employee and employer contributions are paid in that state (Regulation (EC) No. 987/2009, article 21(a)). The UK has a long-standing principle of territorial limitation, stemming from *Clark v Oceanic Contractors Inc* (1982) 56 TC 183, that means payroll obligations are limited to entities with a tax presence in the UK.

As we await final details of any deal reach with the EU, if there is one, HMRC have confirmed that employers can continue to make applications for A1s for new assignments from 1 January 2021, but that that they will not be able to process them. Given current turnaround times for A1 applications it is very likely that there will be delays and uncertainty as to the correct position. ■