

Social Security and Brexit: Where are we now?

Incentives and Remuneration Group



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If you are a UK employer, with employees working in the EU, EEA or Switzerland, the country in which social security contributions are paid on their salary and benefits is currently set by EU Social Security Coordination rules.

The purpose of the EU rules is to ensure that employees and employers are only subject to the social security regime of a single member state at any one time, so there can be no double charges on the same income.

The starting point is that contributions should be paid where the work is done, regardless of where in the EU (EEA or Switzerland) the employer is based. However, there are special rules for individuals who work outside their home country for temporary periods and for individuals who work in more than one country at the same time.

Broadly this means that:

- If you employ workers to work for you in an EU, EEA country or Switzerland, you (and they) must pay social security contributions in the country where the work is done.
- If you employ workers to work for you in more than one EU, EEA country or Switzerland at the same time, you (and they) must pay social security contributions in the country in which they live, provided they carry out a "*substantial amount of activity there*". There are special rules to decide this.
- If you second or post UK workers temporarily to work for you in an EU, EEA country or Switzerland, you (and they) continue to pay UK social security contributions provided certain conditions relating to the assignment are met (**the Posted Worker rules**). In these circumstances, neither you nor they pay social security contributions in the country where the work is performed.

THE POSTED WORKER RULES

Broadly, the Posted Worker rules apply if an employee of yours moves abroad to work for a short period of time and:

- the assignment is expected to last for no longer than two years;
- the employee is not sent to replace another posted worker; and
- there continues to be a direct relationship between you and the employee during the course of the assignment (for example, they remain engaged by you and you retain the obligation to pay them and the power to dismiss them).

In order to take advantage of the Posted Worker rules, UK employers must request an A1 Form from HM Revenue & Customs (ideally **prior to the posting**). Once this has been obtained, the UK employer and employee can use this form as evidence that local social security contributions do not need to be paid (a form A1 is often also referred to as a "**Certificate of Coverage**").

At the end of the two-year period, it might be possible to obtain permission for the individual to remain within the UK social security system for longer. This needs the agreement of the authorities in **both** countries and it will be necessary to show that the individual (i) has specialist knowledge or skills; (ii) has specific objectives in the host country which their services are needed for; or (iii) it is in their interest to remain within the home member state social security regime.

WHAT IS CHANGING?

The UK left the EU on 31 January 2020 pursuant to the terms of the UK-EU Withdrawal Agreement¹. We are currently in a transition period, which is expected to come to an end on 31 December 2020 (**Transition Period**).

During the Transition Period, the EU Social Security Coordination rules (including the Posted Worker rules described above) have continued to apply.

In addition, existing social security arrangements (including those entered into during the Transition Period) are expressed to be protected². It is our understanding, therefore, that UK employers and employees who are currently working under a Posted Worker arrangement (or enter into one prior to 1 January 2021), may continue to rely on the EU rules (and any existing Certificate of Coverage (A1 Form) issued by HMRC) even if the arrangement extends beyond the Transition Period.

However, the necessary UK regulations to formalise this have yet to take effect and as each Member State is responsible for applying the terms of the Withdrawal Agreement on a local level, specific legal advice in both the UK and the host country concerned is still recommended to confirm the position.

Subject to the above, from 1 January 2021, if the Transition Period ends without any further agreement between the UK and the EU, the EU Social Security Coordination rules will **no longer** apply to **new** cross-border arrangements between UK employers and employees.

Instead, the rules in the UK and the country in which the employee works or has been seconded to will determine the social security position **on a country by country basis**.



¹Which became UK law by virtue of the European Union (Withdrawal Agreement) Act 2020

² See the explanatory notes to s.13 of the European Union (Withdrawal Agreement) Act 2020

³ This depends on whether an agreement is reached between the UK and the host country/EU to treat the home employer as having a place of business in the host country (and therefore a liability to pay host country social security contributions).

WHAT WILL THE NEW UK RULES BE?

Prior to 31 January 2020, the UK Government had drafted contingency legislation under which the UK would continue to apply the existing rules unilaterally in respect of EU countries in the event of a no-deal Brexit.

This legislation (and any guidance relating to its application) has since been paused, to allow for any additional agreement to be reached during the Transition Period. If no further agreement is reached during the Transition Period and subject to any bilateral agreements that are made between the UK and individual EU countries, the legislation will take effect from 1 January 2021.

From that date, you and your employees' liability to social security contributions in the UK and the place they work (if that is in the EU, EEA or Switzerland) (the "host country") will be as follows:

WHERE COULD EMPLOYER AND EMPLOYEE SOCIAL SECURITY CONTRIBUTIONS BE PAYABLE FROM 1 JANUARY 2021?

	Employer contributions	Employee contributions
Employee working long-term in the host country	Possibly in the host country ³	In the host country
Employee working in the UK and also a host country at the same time	Possibly in each country in which they work ⁴	Possibly in each country in which they work ⁵
Employee working short-term in the host country under a Certificate of Coverage (A1 Form) issued by HMRC	UK and Possibly also in the host country ⁶	UK and Possibly also in the host country ⁷

As noted in the table above, if, after the Transition Period, you send employees to work in the EU, EEA or Switzerland, under a new Certificate of Coverage (A1 Form) issued by HMRC, this could potentially lead to an

⁴ Unless the UK and host country/EU agree to adopt reciprocal rules that determine which country has sole charging rights.

⁵ Unless the UK and host country/EU agree to adopt reciprocal rules that determine which country has sole charging rights.

⁶ Unless the UK and host country/EU agree to adopt reciprocal rules for posted workers.

⁷ Unless the UK and host country/EU agree to adopt reciprocal rules for posted workers.

unwelcome double charge if there is no corresponding exemption in the host country. Before applying for such a certificate, therefore, specific legal advice in the host country concerned should be sought to confirm the local position.

DOES THE UK HAVE ANY EXISTING BILATERAL AGREEMENTS WITH COUNTRIES IN THE EU, EEA OR SWITZERLAND?

In 2019, a new agreement was signed with **Ireland** to ensure that the position of UK nationals working in Ireland (and vice versa) will not change. Employers and employees will not need to do anything different in respect of that country following the end of the Transition Period.

The UK has entered into agreements with **Switzerland and the EEA-EFTA states (Iceland, Lichtenstein and Norway)** to preserve some existing social security rights.

The UK also has a number of legacy agreements with EU countries (such as Germany, France and Spain) that pre-date the current EU rules. However, it is not clear whether these older agreements will be binding and, given the time that has passed since they were originally signed, they are unlikely to be fit for purpose and we anticipate new ones will need to be negotiated.

HOW CAN BUSINESSES PREPARE THEMSELVES?

With only a matter of weeks to go, UK employers should be prepared for a no-deal scenario and need to understand how this may affect their internationally mobile employees, as well as their obligation to deduct and pay local social security contributions.

Employers should:

- assess their internationally mobile workforce to identify intra-EU assignments;
- ask the local social security authorities whether the existing rules (and existing Certificates of Coverage) will continue to apply to current assignments between the UK and that country;

- consider how to structure new assignments taking place following the end of the Transition Period, e.g. should you (i) send them as posted workers (with the risk of double charges to social security) or (ii) employ them in the host country (with the result that they (and you) will be liable to pay social security contributions in the host country at rates that could be higher than in the UK); and
- get in touch with the employees who are likely to be affected by any of these changes. You might need to consider who will bear the costs of any increased social security charges and how this might affect any tax equalisation agreements that you currently have in place.

WHAT ABOUT OTHER PAYROLL TAXES?

There are no EU-wide rules that set out which country can tax an employee's income during an overseas posting. Therefore, Brexit should not impact on the obligation to collect and pay local payroll taxes on an employee's salary and benefits. Each country's national law, as well as tax treaties between the UK and EU countries (on a country by country basis) will continue to determine these.

WHAT ABOUT ACCESS TO HEALTHCARE?

Employees on short term business trips are currently covered by the European health insurance card (EHIC), which provides access to local healthcare services. Posted Workers on slightly longer temporary assignments (of up to two years) can apply for what is known as an S1 Form, which provides continuing access to local healthcare services.

Following the end of the Transition Period, access to these local healthcare schemes may cease or be reduced, so employers may need to purchase additional travel and private medical insurance for their employees working abroad.

FOR FURTHER INFORMATION, PLEASE CONTACT



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