



GES NewsFlash

European Union – International Social Security: European Commission Publishes Further Guidance on Multistate Workers

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Summary

The European Commission (EC) has published the second part of its *Practical Guide on Regulation 883/2004* (“**Practical Guide**”) which contains the EC’s view on the parts of the European Union’s (EU) Social Security legislation which apply to multistate workers and international commuters. The EC’s long-awaited interpretation of the less specific multistate worker legislation, which has been in place since May 2010, provides some useful clarification on key issues. The main points are as follows:

Introduction of five percent threshold for multistate workers

This 5% threshold relates to employees who normally carry out activities on the territory of more than one member state. The Practical Guide now clarifies that activities, which do not account for **five percent** of the employee’s **regular working time or overall remuneration**, should be considered as *marginal activities* (i.e., falling outside of the scope of article 13 of the regulation on simultaneous employment). In these situations, the individual would be regarded as working in one member state only, and would be subject to the legislation of that member state, or treated under the posted worker rules, if applicable.

Determination of registered office or place of business

In circumstances where an individual is a multistate worker, but does not spend at least 25 percent of his or her time working in the state in which he or she is habitually a resident, he or she is subject to the legislation of the member state in which his or her legal employer has its registered office.

The Practical Guide has now set out a number of conditions that must be satisfied in order that an entity can be treated as the registered office or place of business for

the purposes of assessing whether the social security liability sits. These include:

- the length of time that the undertaking has been established in the member state
- The number of administrative staff working in the registered office
- Whether the functions of its central administration are carried out in the location of the registered office
- Whether that entity dictates company policy and operational matters

Deloitte's View

The EC's guidance on this issue is clearly designed to limit the effectiveness of so-called 'brass plate' operations being set up to employ multistate workers in a low Social Security cost environment, without having any real business function associated with that entity. Based on the EC's comments, such companies are likely to be more strictly scrutinized when referred to in certificate applications.

The EC's solution in such cases, however, is not clear-cut. If the relevant institution determines that the registered office/legal employer is not the 'real' employing entity, the EC's guidance is that the individual should be subject to the legislation of the member state of the entity with which the individual has the closest connection. This is, of course, highly subjective and, in our view, open to legal challenge.

Transport and other highly-mobile workers

One of the most noticeable impacts of Regulation 883/2004 was the removal of special provisions relating to transport workers and airline staff. The removal of these special rules was part of a drive for simplification, and guidance has been due since May 2010 on the EC's view of how these workers should be treated. Although now covered under the regular multistate worker rules, the Practical Guide includes some commentary on the difficult situations often encountered with this type of worker. Acknowledging that assessing where a transport worker actually carries out the significant parts of his or her role can be difficult, the Practical Guide allows flexibility in the definition of 'a substantial part of his or her activity', suggesting that a method other than working hours can be used. The numbers of loadings or unloadings, or take-offs or departures in the case of aircrew, and the proportion of those activities in the home member state are cited as potentially suitable replacements in the assessment of whether or not home country duties are substantial.

Deloitte's View

The subjectivity of the tests applicable to international transport workers and aircrew leaves employers in those industries in no better position than before the publication of the guide. Although flexibility is welcome, unless a series of

possible criteria is put to the relevant authority, the employer concerned will have no clear idea whether its view of the most important facets of the individual's role is acceptable for the purposes of determining the location of the contribution liability.

Validity of certificates for multistate workers

The EC has acknowledged that where an individual's working arrangements are subject to frequent change, it is impractical for the individual to submit his or her case for reassessment when each work-pattern change occurs. In these cases, the Practical Guide establishes that providing the information given by the employer and employee in making the application was full and complete, and the decision as to which state the individual and his or her employer should be contributing should not be reviewed for at least 12 months.

In general, the employee's work pattern over the previous 12 months will be an indicator of his or her duties for the purposes of certification, but in all events, the expected work pattern over the coming 12 months must be taken into account in coming to the decision on which state is competent.

Deloitte's View

We welcome the statement that in cases where an individual's working arrangements frequently change, reevaluation does not have to take place for 12 months. In practice, most employers would choose not to reexamine a case while an issued certificate remained valid, but the Practical Guide gives useful support to this de facto approach.

People to contact

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