

## Cross-border UK/EU social security rules

### (Lecture P1236 – 11.04 minutes)

These notes will provide a general overview about how mobile workers are liable to National Insurance/social security contributions and in particular, how this has been affected by Brexit.

While these notes will concentrate on liability for the mobile worker, it should be assumed in these notes that where an employed worker has a liability to UK Class 1 primary NICs, the UK employer will face a secondary charge.

#### *NIC and the Mobile Workforce – General Principles*

Workers move around. Well, they used to before the pandemic and will hopefully do so again once our bodies are replete with vaccine.

Most countries have some sort of social security system. Ours is called National Insurance. Most social security systems link the payment of contributions to the provision of state-provided welfare benefits. But in essence we are dealing with tax.

For mobile workers, the key question is where social security contributions should be paid. Does the worker pay in the “host” country in which the work is carried out, or does the worker continue to pay into their “home” system despite them living and working in another state? Or could the worker be liable for contributions in either both states or (very exceptionally and improbably) neither?

#### *The default position*

The default position is that workers generally pay social security/NI contributions in the country where the work is carried out and/or where the duties are performed.

Therefore, if a UK employee is sent by his employer to work in (say) France, unless there are rules which say otherwise, the assumption is that he will be subject to the social security rules of France rather than paying NICs in the UK. Paying contributions in France could therefore (in principle) give the individual some entitlement to certain welfare benefits from the French Government (for example, pension on retirement). Whether this is actually the case depends on the rules of the country in question. Some countries are more generous than others. Some indeed are “contribution only” and give nothing in return. Caveat emptor.

However, where an employee is only working in a country for a temporary period, the two countries could mutually agree that social security contributions be paid only in the “home” country with no contributions being paid in the country in which the work is carried out. So, a UK worker who is sent on a short secondment to France could instead continue to pay UK NICs on his earnings for work performed in France and would not pay any French social security contributions.

Note here that the income tax rules which apply to the assignment are irrelevant. There is no “Statutory Residence Test” for NIC and no assumption that just because earnings are taxable (or not) in the UK that they should similarly be liable to NICs (or not) in the UK. It is not unknown for a worker to be subject to overseas income tax on his non-UK earnings but for those same earnings to be subject to NICs in the UK only.

Payroll operators beware. This is a difficult area and specialist advice is usually recommended.

### *The “World” for NIC purposes*

To help determine social security liabilities for mobile workers, the “world” for NIC purposes has traditionally been split into three areas (“NIC-zones” for simplicity). These are:

- Zone 1: The European Economic Area (EEA) being the EU member states plus Norway, Iceland and Liechtenstein. Switzerland joined Zone 1 for NIC in 2012;
- Zone 2: Non-EEA countries with which the UK has a “reciprocal agreement on social security” (which is basically a double tax treaty for NIC). These include the USA, Canada, Japan, the Channel Islands and the Isle of Man. See gov.uk for a complete list.
- Zone 3: The rest of the world (being non-EEA countries with whom the UK has no bilateral social security agreement). There are too many here to list but include major trading partners such as China, Australia and India. [While the UK’s double tax agreements cover most of the world, the same cannot be said for NIC.]

I will deal with these zones in reverse order.

#### *Zone 3: Non-reciprocal countries*

Where a worker is sent by his home employer to work in a non-reciprocal country, the default position is that liability to UK NICs will cease and the non-UK earnings will be subject to the social security regime of the host country. A UK employee sent on secondment to India for example will be subject to Indian social security contributions instead of UK NICs. In such cases there is an option for the worker to then pay voluntary NICs in the UK to preserve entitlement to UK benefits which is always worth considering as contributions are generally quite cheap.

However, there are situations where UK NICs will continue for the first 52 weeks of the overseas assignment. This will be the cases if the employer has a place of business in the UK and the assignment is such that the worker remains ordinarily resident in the UK. A worker who spends (say) 3 months on secondment to the firm’s office in Mumbai would then remain liable to UK NICs in that period and would not pay into the Indian system.

If the overseas posting extends beyond 52 weeks, contributions will then be made to the foreign social security system from week 53.

You may have thought (and indeed hoped) that “ordinary residence” died with IR20, but the term still lives and breathes in NIC-land where it applies to workers who normally live in the UK, have a settled and regular mode of life in the UK but are temporarily absent from the UK. Keeping a home in the UK while working abroad is a typical indicator of ordinary residence.

Where a worker is coming to the UK from a non-reciprocal country, the earnings will normally be liable to UK NICs (although again there is a 52-week NIC-free period if the worker does not become ordinarily resident in the UK and his employment is mainly outside the UK for a non-UK employer). Short term secondments to the UK would therefore fit the bill. UK NICs will then kick in if that worker stays beyond 52 weeks.

#### *Zone 2: Reciprocal countries*

Where a worker is sent by his home employer to work in a “reciprocal” country, liability is determined by reference to the specific bilateral agreement between those countries. These agreements are also called Double Contributions Conventions or Totalisation Agreements.

For example, assume ABC plc (a UK company) sends Andrew, an employee, to work in its New York office. The UK/USA social security agreement allows Andrew to remain in the UK system (and not pay US social security contributions) where the posting is for five years or less. Note that the income tax position here is irrelevant, so Andrew will probably pay income taxes in the US but NICs in the UK. The payroll operator in the UK would therefore still have a job to do here.

The UK employer will apply to HMRC for a certificate of continuing liability. This will prevent the overseas authorities making demands for payment of social security contributions in the country of posting.

Note here that the reciprocal rules will only apply where the employee is posted by his home country employer to work in a reciprocal country. If an employee simply leaves his job in the UK to work for a different employer in the USA, overseas contributions will apply from day one with no UK NIC liability.

The Zone 2 and Zone 3 rules are (unsurprisingly) unchanged post Brexit.

#### *Zone 1: Workers moving between the UK and the EU/EEA*

Until 31 December 2020, the UK was covered by UK/EU Social Security Regulations (these having continued until the end of the transitional period after the EU Withdrawal Agreement).

Under the EU principles of free movement of persons, the EU Regulations had always ensured that a worker of an EU/EEA member state should only be subject to the social security legislation of a single member state/EEA country at any given time.

The pre-Brexit social security regulations provided that:

Where a “detached worker” spent a short period of time working outside their home EU country and the home country employment contract remained in place, the employee remained in the home country social security scheme. A short assignment was one which was not expected to exceed 24 months. If these conditions were met, the employer applied to the relevant authorities for a coverage certificate (an “A1 certificate” in the UK) to confirm that it was the home social security contributions legislation that applied in respect of the employee whilst he was working abroad.

For longer postings of up to five years, it was possible to remain in the home country scheme if the relevant authorities agreed.

In the absence of an A1 certificate (or once one had expired), social security contributions were paid in the country in which the work was carried out.

#### *The impact of Brexit*

All this was thrown up in the air by Brexit.

In the absence of a Brexit deal, liability to social security contributions would depend on whether the UK had negotiated reciprocal agreements with the 27 individual EU member states. If so, the Zone 2 rules would apply to workers moving between those countries.

In the absence of any reciprocal agreements, the Zone 3 rules would apply, and liability would be determined by the worker’s ordinary residence status and the place in which the work was carried out. Double liability to social security contributions could not then be ruled out.

To guard against a possible “no deal” scenario, in 2019 the UK and Ireland entered into a bilateral social security agreement under which employed and self-employed workers would continue to pay NICs/social security contributions in their home country where they are assigned / posted to the host state for up to 2 years. This mirrored the arrangements already in existence.

### *The post-Brexit deal*

After what seemed like an eternity of wrangling between the ever-present Monsieur Barnier in the blue corner and the phalanx of different UK sacrificial lambs in the red-white-and-blue corner, the UK and the 27 EU Member States finally shook hands on a Brexit deal on Christmas Eve 2020. The “UK-EU Trade and Co-operation Agreement” was born and became effective from 1 January 2021.

At the time of writing, the Bill implementing the Agreement has been passed in the House of Commons and it is expected to be passed by the House of Lords. The European Parliament will formally vote on the Brexit Deal sometime in January 2021. However, ambassadors from all remaining EU member states have unanimously approved it in advance, so barring something catastrophic, we’re finally there.

The new Agreement contains a protocol on social security co-ordination between the UK and the EU.

These new social security co-ordination arrangements deal with workers moving between the UK and the EU from 1 January 2021. In simple terms, the Agreement tells us which State should collect social security contributions in cases where a “detached worker” is temporarily seconded/assigned/posted from the UK to work in an EU Member State or vice versa. The rules also apply to the self-employed and to “multi-state workers” who whizz about working in several EU states at the same time.

The rules apply broadly as they did before Brexit in that an employee who is sent on a temporary posting to another EU state will continue to be subject to the social security legislation of their home country. “Temporary” means that the duration of the posting does not exceed 24 months and the detached worker is not replacing another detached worker.

Under pre-Brexit rules, the 24-month period could be extended (for up to 5 years). This is no longer possible from January 2021. Once the 24-month period has expired, contributions will be payable under the system of the country where the work is carried out.

What is unclear at the moment, is that if a worker is sent on a 24-month secondment to an EU state (after which he returns to the UK), can that worker remain in the UK system if he accepts another posting to either the same or a different EU state?

### *Opting out*

Each EU member state (except Ireland which is now bound by the reciprocal convention) has the ability to “opt-out” of the detached worker rules.

Each EU country must individually agree to apply the detached worker rules by 1 February 2021 in order for these rules to apply (and for the previous regime to be retained). A failure to do so is effectively an opt-out (in which case the Zone 2 or Zone 3 rules for inward and outwards assignments will apply).

There is therefore no guarantee that the new detached worker rules will apply for all postings and we will need to wait for the individual EU member states to formally confirm their respective agreement or non-agreement. As I write this (staring at Google), Austria, Belgium, Hungary, Portugal

and Sweden have already opted in and it is reasonable to assume that most (if not) all of the others will follow.

#### *Switzerland, Norway, Iceland and Liechtenstein*

The new detached worker rules do not cover Norway, Iceland, Liechtenstein and Switzerland.

- Switzerland: Employees will remain within their home country legislation for temporary postings of up to 2 years;
- Norway: Employees will remain within their home country legislation for temporary postings of up to 3 years;
- Iceland: Employees can remain within their home country legislation for temporary postings of up to 1 year but only if they are non-UK and non-EEA nationals. This can be extended by agreement for a further 12 months. Otherwise, contributions will be paid in the country in which the work is carried out (subject to the 52-week rule);
- Liechtenstein: There are no special rules (thus making Liechtenstein a Zone 3 country for NIC). Contributions will be paid in the country in which the work is carried out, subject to the 52-week rule.

#### *Employer responsibilities*

Employees will require a certificate of coverage (or similar document) in order to carry on paying social security contributions only in their home country. Whether this will be the old A1 or a new form remains to be seen.

A failure to obtain the required documentation will mean that contributions should be charged in the country in which the work is carried out.

One telling little snippet from the new protocols is that:

“An employer who is not established in a state whose legislation for social security applies must comply with the legislation in that state as if the employer was established there”.

So, UK companies who send their staff to an EU State need to know the social security rules for that state even if they have no tax presence in that country. Ignorance would appear to be no excuse.

#### *Working abroad pre-January 2021*

Some workers will be working in the EU/EEA on a posting which straddles 1 January 2021.

Assignments that began before 31 December 2020 are covered by the transitional arrangement in the EU Withdrawal Agreement.

Workers who had been posted between the UK and the EU/EEA (including Norway, Switzerland, Iceland and Liechtenstein) before 1 January 2021 are protected by the Withdrawal Agreement which states that individuals “shall be covered for as long as they continue without interruption to be in one of the situations .... involving both a Member State and the United Kingdom”.

This means that a posted worker with a valid A1 certificate who remains on their posting will continue to be covered by that A1 certificate, so NICs / social security contributions will remain payable in their home country (and not the host country).

The existing A1 will also cover pre-January 2021 postings to and from any EU State that decides to opt out of the new detached worker rules.

*Contributed by Steve Sanders*