International
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Newsletter

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INTERNATIONAL MOBILITY AT THE TIME OF BREXIT

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In the context of the UK's withdrawal from the EU (Brexit), effective 1st January 2021, different agreements have been reached. Ongoing negotiations remain, especially with Switzerland.

After long negotiations, **the UK and the EU finally concluded a trade and cooperation agreement in December 2020**. In the context of the Brexit, the relationship between Switzerland and the UK was also indirectly impacted, as Switzerland applied certain EU regulations in its relations with the UK (Regulations 2004/883 and 2009/987) , which are no longer applicable. Until a new agreement came into force, the previous bilateral agreements between Switzerland and the UK remained in force.

A new social security agreement has been reached between Switzerland and the UK, earlier in September 2021.The new social security agreement has been applied provisionally from 1st November 2021, and will enter into force definitively once the parliaments of both countries have approved it.

What are the consequences of these different agreements on the international mobility of employees in the UK's relations with the EU and Switzerland respectively? Are there any significant differences? What flexibility does Switzerland offer in this context?

Not only the rules related to social security are being redefined, other areas are also being impacted and have their rules changed as well.

Since 1st January 2021, the EU Regulations applicable in the areas of labour law (N°96/71/EC, 2014/67/UE, 2018/957/EU) and immigration (Directive 2004/38/CE) have also ceased to apply in relations between the EU Member States and the UK.

At the same time, the Free Movement of Persons (AFMP) agreement concluded between Switzerland and the EU ceased to apply.

As a result, rules applicable to labour law, social security and immigration in the contexte of international mobility have had to be redefined.

LABOUR LAW IMPLICATIONS

In accordance with the principles of international law, and EU regulations, the parties to an international employment contract may freely choose the law applicable to their employment relationship, provided that this choice does not deprive the worker of the protection afforded by the mandatory provisions of the law which would have been applicable in the absence of choice. However, irrespective of the choice of the parties as to the law applicable to the employment contract, **the parties must respect the mandatory provisions of public policy applicable in the employee host country.**

Within the EU, Directives 96/71/EC and 2018/957/EU set out a list of mandatory standards that must be applied in the case of posting to a Member State, regardless of the law chosen by the parties.

These provisions of the European directives **have been incorporated into the domestic law** of the Member States, to a greater or lesser extent depending on the country, so that **today these mandatory standards shall apply to any employee posted to that EU member State** in compliance with domestic law.

As a result, employees posted within the EU from the UK or Switzerland (non-EU countries not directly bound by the EU directives themselves) shall benefit from these minimum standards applicable under the law of the Member State to which the employees are posted.

Depending on the respective national provisions in force in the EU Member States, prior posting declarations, specific formalities and minimum rights may remain applicable, for example in the case of a posting to France, regardless of the nationality of the employee or the country from which he is posted.

Please note that Directive 2018/957/EU has introduced within EU a differentiation of the applicable standards according to the duration of the posting.
From the 31st July 2020:

- these **minimum mandatory standards are applicable only during the first 12 months of the posting.**
- **From the 13th month of posting**, however, it is not only these minimum mandatory rules that apply, but **all the regulations in terms of labour law of the host Member State**, with the exception of the rules governing the conclusion and termination of employment contract and supplementary occupational pension schemes.

In view of the rule of autonomy and free choice of the law applicable to the contract, one may wonder about the application of this dichotomy beyond 12 months to employees posted from non-EU member states.

SOCIAL SECURITY IMPLICATIONS

As a result of the UK's withdrawal from the EU (Brexit), the Agreement on the Free Movement of Persons between Switzerland and the EU, as well as **EU Regulations** (No. 883/2004 and No. 987/2009) on the coordination of social security systems, **do no longer apply** to relations between Switzerland, EU member states and the UK **since 1st January 2021**.

However, it should already be noted that the rules hitherto applicable to posting of workers continue to apply for postings that began before 1st January 2021.
Thus, posting certificates issued before 31st December 2020 remain valid for the duration indicated on the document.

With regard to mobility **starting from 1st January 2021, a distinction must be made between the rules for postings between the EU/UK and between Switzerland/UK**.

• Rules in case of mobility between EU Member States & the UK

The EU-UK Trade and Cooperation Agreement includes a Protocol on social security coordination which apply to persons and their family who are, or have been, subject to the legislation of the UK and/or one or more of the EU states. These rules are applicable irrespective of the employee's nationality, even non-UK or non-EU nationals.

Under this agreement, it has been agreed to **keep the basic principles** that individuals will be subject to the **social security system of a single country, where the work is carried out, with two exceptions** for "**posted workers**" and "**multi-state workers**"

✓ Posted workers

According to the provisions of the Trade and Cooperation Agreement, every **EU member state remain free to opt in or out** of the exception for posted workers.
At this stage, all EU member states have indicated that they will initially agree to opt in and apply posting rules.
But situation must remain under review as every single EU member state can opt out of these rules at any time with just 1 month's notice.

According to the rules stated in this new agreement, **employees seconded between the EU and the UK, as from 1st January 2021, can remain in their home country's social security system only for a maximum duration of 24 months**.
To do so, a certificate of coverage must be applied for in the home country before the start of the secondement.

Unlike prior EU regulations, the new agreement does not provide for the possibility of any derogation and therefore no extension of the 24-month limit. **Particular attention should be paid to the fact that any new secondment between the UK and an EU Member State as from 1st January 2021 can no longer be granted for a period exceeding two years, whereas the duration of the secondment was previously possible for up to 5 or 6 years depending on the country.**

✓ Multi-state workers

Rules equivalent to those applicable up to now have been provided for multi-state workers. Thus, multi-state workers will be covered by the legislation of the State of residence if they carry out a substantial part of their activity in that State. If this is not the case, then generally the social security liability will fall under the legislation of the country in which the employer is situated.

In line with the provisions of EU regulations, an activity should be considered substantial if it accounts for 25% of the worker's working time or pay.

It should be noted that, unlike the rules applicable to secondment, **the rules governing multi-activity are applicable to all EU Member States and the UK, without the possibility of opting out.** Please note that this specific agreement only apply in relations between the EU & the UK.

• Rules applicable in case of mobility between UK & Switzerland

EEA Countries (Norway, Iceland, Liechtenstein, and Switzerland) outside the EU are not part to the new EU agreement with the UK.
To date, Switzerland and the UK have negotiated an agreement on citizens' rights that protects acquired social security rights.

In accordance with the provisions of this agreement, Regulations **(EC) No 883/2004** and **(EC) No 987/2009** shall continue to apply to the following persons:

- Swiss nationals residing and working in the UK,
- British nationals residing and working in Switzerland,
- Swiss nationals residing in Switzerland & working in UK,
- British nationals residing in the UK and working in Switzerland,

on the 31st December 2020.

For people moving as from the 1st January 2021, it has been agreed that until new agreement comes into force, previous social security bilateral agreement shall apply temporarily.

Switzerland and the UK have negotiated a new social security agreement to ensure the long-term coordination of the two States' social insurance systems. **As part of these negotiations, a new social security agreement has just been agreed.**

As from 1st November 2021, relations between Switzerland and the UK are to be governed by this new agreement.

The new social security agreement has been applied provisionally from 1st November 2021, and will enter into force definitively once the parliaments of both countries have approved it.

Under this agreement, it has been agreed to **keep the basic principles** that individuals will be subject to the **social security system of a single country, where the work is carried out, with two exceptions** for "**posted workers**" & "**multi-state workers**"

✓ Posted workers

This new agreement allows in particular for social security postings, whatever the nationality of the employee, **for an initial period of 24 months**. However, unlike the secondment provided for under the UK-EU agreement, **this period is renewable, up to a maximum of 6 years**, subject to the agreement of the competent institutions.

The new agreement between Switzerland and the UK remains very flexible in terms of the duration of the secondment, which is maintained for up to 6 years, a period that is much longer than that provided for in the framework of relations between the UK and the EU, all nationalities combined.

✓ Multi-state workers

The agreement introduces rules in terms of pluri-activity (in the UK and Switzerland only), which was not foreseen by the prior 1968 bilateral agreement.

This new agreement has thus preserved the flexibility of the previous agreements in terms of secondment from Switzerland up to 6 years regardless of the nationality provided that conditions are met**, while offering new possibility of multi-activity, even if limited to Switzerland and the UK**.

IN SUMMARY

Social Security Implications of the New Agreements	
Moves between UK and EU	**Moves between Switzerland and UK**
Less flexibility in terms of posting - maximum 24 months	**Flexibility is kept in terms of posting still possible for up to 6 years, regardless of nationality**
Possible opting out for EU member states. Lack of legal certainty	No opting out possible for states bound by the agreement
Flexibility for multi-activity remains unchanged	Less flexibility for multi-activity for **British nationals**

IMMIGRATION IMPLICATIONS

As from 1st January 2021, British nationals are now considered as third country nationals and therefore subject to ordinary immigration law. Employees on international mobility between the UK and the EU from 1st January 2021 will therefore need to obtain the necessary visas and work permits in accordance with the forms and conditions required respectively in the countries concerned.

As regard Switzerland, following the end of the transition period on 31st December 2020, the Agreement on the Free Movement of Persons (AFMP) is no longer applicable between Switzerland and the UK.

To safeguard the rights of Swiss citizens who are resident in the UK (and vice versa), the two governments have concluded the Swiss-UK Citizens' Rights Agreement (CRA) which has been provisionally applied since 1st January 2021. The Swiss-UK CRA secures the rights acquired by Swiss citizens who were living in the UK (and vice versa) prior to the end of the transition period.

From 1st January 2021:

- **Swiss citizens who wish to take up employment in the UK must comply with the rules of the UK's new immigration system**. According to this, economically active persons who intend to work in the UK will have to fulfil the requirements under the UK's new Points-Based System.

- **British nationals who wish to immigrate to Switzerland will have to comply with the provisions of the Federal Law on Foreigners and Integration (LEI) and will therefore be subject to quotas**. In this context, Switzerland decided to grant 3,500 residence permits for British nationals.

In December 2020, the Federal Council approved a new agreement, on the mobility of service providers between Switzerland and the UK, initially limited to two years. This agreement provides that the notification procedure can continue to be used for temporary stays of up to 90 days per calendar year with no prior assessment of the labour market.

Thus, following the Brexit, all the rules have been redefined in the areas of labour law, social security and immigration, with flexibility maintained as before in the agreements concluded with Switzerland.

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