



EU Social Security Regulations: Significant Changes – Could They Affect Your Clients?



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Introduction

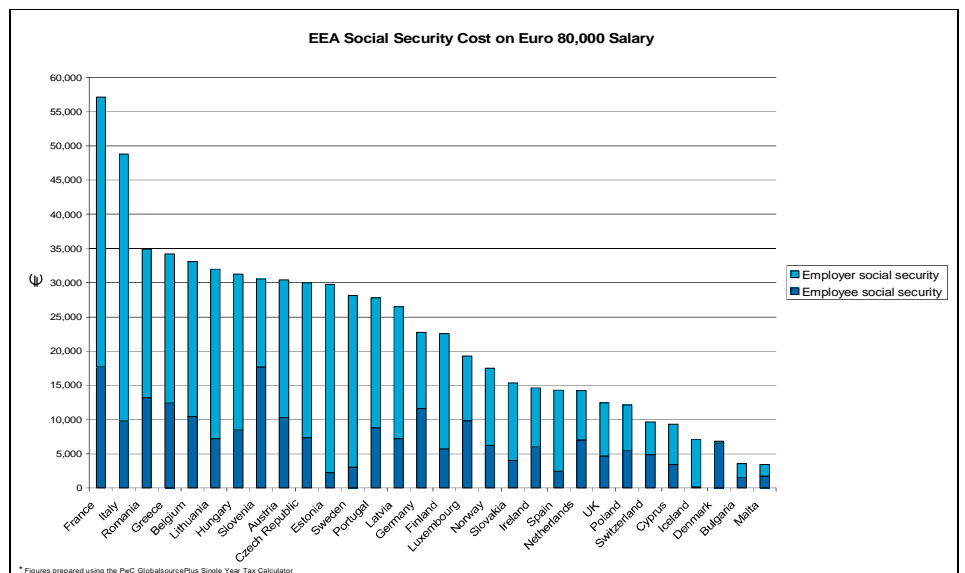
Since the inception of the EU, there has been an appreciation that one of the issues that could potentially block the cross-border movement of labour was the diverse systems of social security operated by the various EU Member States. In order to overcome this potential issue, in 1971 the then EEC introduced Regulation 1408/71. Among other things, this Regulation provided a framework to be used to overcome social security issues that arose in respect of intra-Community labour movement.

Social Security Costs

Throughout the EU, total social security costs (both employer and employee) represent a significant element of labour costs and Government revenues. In Ireland the total amount of social security (PRSI and health levy) collected by the Revenue Commissioners in 2009 was €9,207m,¹ far outweighing the corporation

tax take for 2009 of €3,889m. Irish social security costs are still, however, at the lower end of the EU average, as can be seen from the graph below.

Given the relatively low cost of Irish social security, organisations with internationally mobile employees are well advised to be familiar with the EU provisions dealing with social



1. Taken from the Revenue Commissioners' 2009 Annual Report.

security and how these provisions can be used to minimise unnecessary social security costs and maximise employee social security benefits.

Basic Principles of the EU Social Security Provisions under Regulation 1408/71

Since the introduction of Regulation 1408/71, the basic principle of EU social security law for employees has always been that an individual pays social security in the country in which he or she undertakes employment activities. Such individuals are also subject to the social security legislation of only one State at any one time. This meant that a person who was employed in Belfast and lived in Dundalk would normally pay UK social security (NIC) and would not be subject to Irish social security (PRS).

Regulation 1408/71 originally applied only to EEC countries. However, through reciprocal arrangements, the provisions were extended to cover the EEA countries and Switzerland, as well as the expanded EU.

Regulation 859/2003 extended Regulation 1408/71 to cover third-country (non-EU) nationals, who had previously been excluded from these provisions solely based on nationality, to all EU countries, with the exception of Denmark, which opted out.

Exceptions to the General Rule under Regulation 1408/71

It was appreciated from the outset that the general rule set out in Regulation 1408/71 could

not be applied to all circumstances. As such, a number of exceptions from the general rule were provided for in Article 14 of Regulation 1408/71.

These exceptions covered:

- › multi-State workers – i.e. persons who undertook employment activities in more than one Member State at one time,
- › self-employed persons trading in more than one State,
- › mariners,
- › persons engaged in international transport, and
- › persons employed by diplomatic missions, consular staff and certain staff of the European Commission.

The most widely used of the above exceptions are the posted and multi-State worker provisions, further details of which are set out below.

Posted workers

“Posted worker” is the term used to describe employees who are sent abroad to work on behalf of their employer. The most common occurrences would be international assignments within a group of companies or individuals sent

to a foreign location to fulfil a specific position or function, e.g. a commissioning engineer sent to a customer location in France to commission a new assembly line.

Under Article 14a, such individuals were obliged to remain in their home-country social security system if they went abroad for a period of less than 12 months. Article 17 also made provision to allow the home- and host-country authorities to agree to allow individuals to remain in their home-country social

security system for a period of up to five years. However, in practice, some countries will agree only to a shorter period.

Multi-State workers

As international organisations seek to use their resources more effectively, there has been an increase in the numbers of individuals working in a number of different countries. There are two typical groups of individuals who fall within

this category. The first is individuals with split roles who may spend, say, one day per week based in Ireland and the other four days based in Germany. The second typical group would include a full-time employee in, say, Ireland who acts as a director for, say, a UK company, in respect of which he or she receives director’s fees for attending meetings in the UK.

Under Article 14(2)b, individuals pursuing employment activities in more than one EU Member State will be subject to the social security legislation of only the EU Member State where they are considered habitually resident, provided that they also pursue some level of employment activity in that country.

In circumstances where individuals do not undertake employment activities in their country of residence, they are subject to the social security legislation of the country where their employer’s registered office or place of business is located. However, if an individual works for a number of companies with places of business or registered offices in a number of locations, the country where the individual is subject to social security can revert back to his or her country of residence.

It is important to note that, for the purposes of the EU Social Security Regulations, residence is not based on the tax definition of residence; rather, it is based on the more complex concept of habitual residence. As such, there may be situations whereby a person is deemed to be tax-resident in one country and resident for social security purposes in another.

New EU Social Security Regulation 883/2004

After 38 years of dedicated service, Regulation 1408/71 has been replaced by Regulation 883/2004 with effect from 1 May 2010. The new Regulation is supported by the implementing Regulation 987/2009, together with Administrative Decision A2. The aim of these is to allow for a consistent approach in applying the EU social security rules across the EU. This will mean significant changes to the way that a number of countries administer the Regulation, including Ireland.

The main purpose of the new Regulation is to modernise, simplify and clarify existing rules. One of the main intentions is that the whole

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process will be undertaken electronically. This would include online applications, electronic communication between the various countries and the issue of all forms in an electronic format. This is very much welcomed and should help to speed up parts of the process considerably.

To whom will the changes apply?

The new Regulation will cover EU countries only. The old Regulation will continue to apply to the EEA countries of Norway, Iceland and Liechtenstein, as well as Switzerland, for the foreseeable future, as the new Regulation has yet to be formally adopted by these countries.

The provisions of Regulation 883/2004 do not apply to third-country nationals (i.e. non-EEA nationals). The EU Employment, Social Policy, Health and Consumer Affairs Council has recently agreed a new draft Regulation to replace Regulation 859/2003 (extending the Regulation to third-country nationals). Accordingly, until such time as the draft Regulation is finalised and enters into force, Regulation 1408/71 will continue to apply to such individuals.

It is worth noting that, in addition to Denmark, the UK has opted out of the new Regulation dealing with third-country nationals. As such, there appears to be some uncertainty regarding how third-country nationals moving to the UK will be treated once the new Regulation comes into force, given that the UK had up to now been party to Regulation 859/2003.

Continuity of some basic principles

The basic principles laid down by Regulation 883/2004 are in general the same as the ones applicable previously. The Regulation repeats that a person should be subject to the social security legislation of only one State at a time. The basic rule remains the same, that is, an employee is subject to the social security system of the country in which he or she is employed, except in the cases of secondment and simultaneous multi-State employment.

The main modifications introduced by the new Regulation relate to the maximum posting period and the introduction of the notion of “substantial activity”, together with a number of other technical and administrative changes, which are summarised below.

Initial posting period extended

In order to simplify and modernise the regime, Regulation 883/2004 extends the period for which a posted worker must be retained in their home-country social security system when posted abroad from 12 to 24 months.

Under Article 12.1, individuals posted by their employer to another EU Member State for a period not exceeding 24 months will continue to remain insured in their home-country social security system, provided that they are not replacing another worker. As mentioned above, under the old Regulation the maximum initial posting period was 12 months, with renewal upon request (E102) where certain conditions are met.

For example, an Irish national insured under the Irish social security scheme and who is posted to Luxembourg from 15 May 2010 for two years must now remain in the Irish system, whereas under the old Regulation this was optional and subject to the agreement of both countries once the posting exceeded 12 months.

Additionally, as was already the case under the old Regulation, Article 16 of the new Regulation provides that posted workers may still be insured under their home-country social security system for up to five years, subject to the mutual agreement of their host and home Member States.

Multi-State workers

The rules relating to employees who work in two or more Member States have been amended significantly.

As mentioned above, under Regulation 1408/71 employees working in two or more Member States are subject to the social security system of the State in which they were considered habitually resident, provided that they perform regular employment duties there. However, there was no clear definition of what constituted “regular employment duties”. In some countries an average of one workday per quarter was sufficient to fulfil this requirement.

Under Article 13.1 of Regulation 883/2004 a person who normally pursues an activity as an employed person in two or more Member States shall be subject to the social security system of the Member State of residence only if he or she

pursues a substantial part of the employment activity in that Member State.

Article 14.5 of the implementing Regulation 987/2009 defines the notion of substantial activity as an activity representing at least 25% of the working time or remuneration of the employee; otherwise, it will default back to the country where the employer’s registered office or place of business is located in the first instance.

Subject to any relief available under the transitional rules referred to below, this definition could change the social security situation for a number of mobile employees who are working in several countries and who are currently subject to the social security scheme of their country of residence. The new provisions clearly aim to tackle some of the abuses that currently exist. There was a tendency toward social security shopping by having employees officially “reside” in certain countries, although they actually performed the greater part of their activity in another State but claimed to perform only a small part (mostly working from home) in the country of residence.

Example

An Irish multi-State worker:

- » *is habitually resident in Ireland,*
- » *has a total remuneration package of €80,000,*
- » *divides his working time between Ireland (20%) and France (80%) and*
- » *is employed by a company whose registered office and place of business is located in France.*

Under the existing Regulations:

- » *he is currently insured in Ireland,*
- » *employee social security €6,003,*
- » *employer social security €8,600.*

Under the new Regulations:

- » *he is liable to French social security,*
- » *employee social security €17,671,*
- » *employer social security €39,460.*

Percentage increase under the new Regulations:

- » *employee social security 294%,*
- » *employer social security 459%.*

The position becomes more complex where there is more than one employer in different EU Member States or where the employer is registered outside the EU. In such circumstances it may be possible to revert back to the social security system in the country of residence.

Determination of applicable law for multi-State workers

Article 16.2 of the implementing Regulation 987/2009 also provides that the country of residence will determine the Member State legislation to which the multi-State worker will be subject. Once a determination is made by the authorities in the country of residence, they must inform the authorities in the relevant countries, who will have a two-month period in which to challenge this determination. Once the two months have elapsed, the determination becomes final.

Unity of applicable legislation

Under the new Regulation, the principle that there should be no exceptions that would allow an individual to be insured in more than one Member State at the one time has been strengthened. The new Regulation provides that a person who is simultaneously employed in one Member State and self-employed in another Member State will no longer be insured in more than one State at the same time. The Annex 7 rules, which provided that an individual might be subject to social security in two countries, have been removed.

Abrogation of specific rules for international transport employees

The specific rules for personnel involved in international transportation, such as airline crew, which applied under Regulation 1408/71 are repealed. Under the new Regulation, employees of transport companies and their employers will be subject to the same rules applying to all other employees (Article 13.1 of 883/2004 and Article 14.5 of the implementing Regulation 987/2009).

This change is bound to have a significant impact on individuals who are employed by airlines based outside their home country, who, in many cases, previously found themselves subject to the social security law of a country in which they may have spent only a minimal amount of time working and to which they have no real long-term connections.

Given that international transportation workers are now subject to the general multi-State worker rules, issues have arisen regarding how one would measure the amount of time that such individuals spend working in each country in order to apply the substantial presence test outlined above. The authors understand that this issue is currently being addressed by the Administrative Commission, which is tasked with dealing with such matters.

Cross-border enforcement

Under the new provisions it will be possible for contribution debts to be pursued in other EU Member States. This will apply, however, only to debts accruing after 1 May 2010.

Electronic exchange of information

An important feature of the new legislation is that a system is being developed and will be in place whereby Member States will exchange the necessary information electronically. This will speed up communication, improve customer service and help to prevent social security fraud.

In time, this new electronic process will in effect replace the existing, paper-based E101 system. Member States have a 24-month transitional period to implement the new electronic system (including an online application system). As an interim measure, the paper-based E101 will be replaced by paper-based A1 certificates.

Minimum contribution period

A requirement that must be met before an A1 certificate can be issued is that the employee must be contributing to a social security system before being posted. Under the old rules, the contribution period required before an E101 certificate would be issued differed in each Member State. In Ireland an individual would normally be expected to be contributing to the Irish PRSI system for up to three months before an E101 would be issued.

Under the new Regulations (Decision A2) this period is to be standardised across the EU at four weeks. In exceptional circumstances, shorter periods may be considered on a case-by-case basis.

Back-to-back assignments

Previously, the Irish authorities took the view that the five-year limit on retention within the Irish social security system applied to the “aggregate” period for which a person could

be retained in the Irish social security system without returning to work in Ireland. Under the new Regulation (Decision A2) each assignment to a separate country will be viewed as a new assignment.

For example, under the new rules, an Irish person spending four years on assignment to Germany followed by a three-year assignment to Italy could remain within the Irish system for the full duration of both assignments, subject to the agreement of all parties.

This change gives rise to potential large savings and simplification of the employee’s social security position.

Assignment breaks

As mentioned above, there are time limits regarding how long individuals can work in another country and remain in their home-country social security system. Under the old legislation there was no clear-cut answer to what constituted a break in an assignment, which led to very diverse approaches to this issue. The new Regulation (Decision A2) provides a consistent approach by clarifying that a temporary interruption of the assignment of less than two months will not be considered as a break in the assignment. Therefore an interruption of greater than two months will be considered a break in the assignment.

Transitional measures

The new Regulation came into force on 1 May 2010; however, it provides for grandfathering provisions. Article 87 allows for the old Regulation to continue to apply for a period of 10 years for individuals who are currently availing of them, as long as the factual elements of the existing situation have not changed and unless the individual explicitly requests that the new Regulation is applied.

Therefore, as regards persons who currently hold an E101, the new Regulation will apply only in the following cases:

- › where the employee requests to be subject to the new Regulation – in that case, the employee’s choice could result in higher social security costs for the employer, or
- › where the employee’s situation changes.

Because of the existence of this transitional period, employers will have to be prepared to manage two different systems.

Summary of key technical and administrative changes

- › New Regulation effective as of 1 May 2010
- › Mandatory period of retention in home-country social security system for posted workers increased from postings of up to 12 months to up to 24 months
- › New Regulation applies only to EU Member States and EU nationals
- › Old Regulation applies to posting to/ from EEA countries and Switzerland, together with all third-country nationals
- › Under new Regulation, multi-State workers will need to spend at least 25% working time/time related to 25% remuneration in their State of residence to remain covered there in the first instance
- › Transitional measures are in place for up to 10 years
- › New documentation
- › Electronic exchange of information between authorities

Effects of These Changes and Issues Arising from Move to New Regulation

The intention behind the changes is to simplify the Regulations; however, it remains to be seen whether this objective will be met.

At first glance, these changes may appear to have little significant impact for employers. They do, however, potentially have some wide-ranging implications that need to be considered.

Application process

A new and far more detailed application form must now be completed when applying for an A1 certificate. This would suggest that the mutual agreement Article, which allows individuals to be retained in their home-country social security system with the consent of the host-country

authorities, will be policed in a stricter way in the future. In some cases this may involve employers being requested to make business cases to retain individuals in their home-country social security system for periods of more than two years.

Dual system in operation

As mentioned previously, the old Regulation will continue to apply to the EEA countries of Norway, Iceland and Liechtenstein, as well as Switzerland, until such time as the new Regulation is formally adopted in these countries. The current E101 arrangements will also continue to apply to third-country nationals (non-EEA nationals) working across borders. Accordingly, for the moment a parallel system will exist. This will create significant practical problems for employers as they will be operating two systems.

- › E101s issuing to non-EEA nationals and
- › A1s issuing to EEA nationals

Transitional provisions

Employers of current assignees are in theory shielded from the full force of the new legislation by the grandfathering provisions detailed in Article 87.

Moreover, the Regulation states that “the legislation shall continue to apply as long as the relevant situation **remains unchanged**” [emphasis added]. However, it does not give clarity to what the term “remains unchanged” means in practice. For example, could the extension of a fixed-term contact be considered a change in circumstances?

Changes to how the EU Regulation interacts with domestic legislation

It is expected that a number of EU Member States will review the way in which the Regulation interacts with their domestic legislation, which may see some changes to practice. For example, the UK has stated that, from 1 May 2010, it is no longer willing to allow EU employers who do not have a place of business in the UK an exemption from employer national insurance contributions. This exemption will, however, continue to be available to non-EU employers in limited circumstances. Similar provisions will also apply to crews of UK-registered ships.

Individuals Coming into Ireland

When individuals come to work in Ireland and remain within their home-country social security system, they are, as you would expect, exempt from Irish PRSI (both employee and employer) on production of a form E101/A1. Although not totally beyond doubt, the Irish authorities' view has always been that the health levy is not a social security charge and, as such, there was no automatic entitlement to an exemption from the health levy. Regulation 1408/71 and Regulation 883/2004, however, provide that individuals holding certain E101s/A1s are entitled to receive all non-cash benefits-in-kind available under the Irish social security and health systems. This includes an entitlement to a full medical card on a non-means-tested basis.

The above entitlement should not be confused with medical assistance provided on foot of a European Health Insurance Card (EHIC). An EHIC provides certain medical assistance (mainly A&E-related treatments) to visitors to Ireland from countries covered by these Regulations. This is not a full medical card and, as such, no exemption from the health levy or the income levy is available based on an EHIC.

Therefore, a significant number of E101/A1 holders who come to Ireland will, by default be exempt from the health and income levies via their entitlement to a medical card.

Conclusion

The new Regulations will provide both challenges and opportunities. The employees who will probably be most affected are long-term expatriates and commuters. Long-term commuters might find it harder to remain in their home-country social security system from 2010, making this area even more complex. Employers with cross-border worker populations should consider how the changes to social security contribution positions will impact international assignment structures and how international assignments and cross-border work arrangements can be designed to benefit from reduced social security liabilities.