

Legal Compass

International social security and tax law

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Authors

COVID-19 – Cross-border commuters

In response to the COVID 19 pandemic, Switzerland has reached agreements with its neighboring countries on social security law and tax law for cross-border commuters. Despite the opening of borders and the continuous relaxation of sanitary measures by the Federal Council, the special regulations remain in force in different ways.



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1. Social security

1.1. Insurance coverage

Employees who are resident outside of Switzerland are only allowed to perform up to 25% of their work from their country of residence on a regular basis before all their employment activities trigger social security contributions there. This is governed by an agreement between Switzerland and the EU (Art. 13 Regulation (EC) No 883/2004). It has been agreed that the regulation applies to Switzerland, the EU and its members as well as the EFTA. Special consideration needs to be given to particular cases, for example, when someone has multiple employers. In such situations employers need to closely analyse, consult and check additional provisions.



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1.2. Special rules

Such provisions do not apply to cross-border commuters who worked in Switzerland before the instruction to work from home was issued, according to the Federal Social Insurance Office (FSIO), as it does not consider this temporary arrangement as employment in several countries. In other words, cross-border commuters who are requested to work from home will remain subject to social security in Switzerland. They do not need a secondment certificate (A1). There are also no changes in terms of social security liability for cross-border commuters who regularly worked in several countries and were therefore subject to fluctuations prior to the outbreak of COVID-19.



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1.3. Flexible application

The insurance coverage should not change due to COVID-19 restrictions. A person is considered to be employed in Switzerland even if he/she cannot physically carry out his/her activity here. This applies in particular to frontier workers in the home office. This flexible interpretation also corresponds to the EU recommendations concerning the application of European coordination law. The AHV compensation funds, whose decisions apply to all branches of social insurance, are responsible for determining the applicable legal provisions.

In view of the different sanitary situations in the individual states, there is no Europe-wide time limit for the flexible application of the subordination rules. With regard to Germany, France and Austria, the flexible application of the subordination rules was agreed until 31 December 2020. In the case of Italy, this was limited until 31 October 2020. In relations with the other countries, the flexible application also remains in place until the end of the year in the absence of other agreement.

1.4. Conclusion

Cross-border commuters from neighboring states instructed to work from home due to the coronavirus outbreak will remain subject to social insurance cover in Switzerland until the end of 2020 (Italy until 31 October 2020).

2. Tax law

2.1. Employees

2.1.1. Initial position

Foreign employees become taxable at the place of work based on the work carried out in Switzerland. In principle, tax liability is limited to the days worked in Switzerland. Due to the COVID-19 pandemic, employees increasingly worked and still work from home office. For such foreign-based employees, questions arise regarding the taxation of their income from employment due to the lack of physical presence in Switzerland.

In tax law, a distinction is made between cross-border commuters and "*international weekly residents*". Cross-border commuters are employees who work in Switzerland and return regularly, usually daily, to their foreign residence. "International weekly residents" are employees who stay in Switzerland solely for the purpose of working but continue to live abroad and cannot be expected to return daily to their place of residence abroad.

Switzerland has concluded double taxation agreements with a large number of countries including the neighbouring ones (Germany, France, Italy, Austria and the Principality of Liechtenstein), which regulate the taxation (under normal circumstances). Due to the COVID-19 pandemic and the resulting lack of employee presence in Switzerland, Switzerland has concluded mutual understanding agreements with Germany, France and Italy.

2.1.2. Germany

The income of cross-border commuters from gainful employment in Switzerland can be taxed in Germany. As a compensation, Switzerland can levy a limited withholding tax of up to 4.5%, which is credited in Germany.

In this constellation, nothing changes in principle for employees who work remotely from Germany, since their income is in any case completely taxed in Germany and a possible deduction does not change the total amount of their tax burden. However, they may lose their cross-border commuter status. As a consequence if the cross-border commuters no longer work physically in the country, Switzerland is in principle not entitled to levy withholding tax.

Switzerland, as the country of employment, levies a withholding tax on the income of international weekly residents. Germany exempts the income from work performed in Switzerland from taxation (subject to progression). If the work is carried out in Germany due to a home office order, the income from employment would only be taxed in Germany according to the Double Tax Treaty between the Swiss Confederation and the Federal Republic of Germany dated August 11, 1971. This may imply a considerable difference in the total tax burden for employees. Furthermore, Switzerland loses the right to tax the income at source in this case as well.

Pursuant to the Agreement of Consultation of 11 June 2020, Switzerland and Germany consented that the current exceptional situation should not affect the existing taxation rules. Remote work is considered as work in the country of employment (Switzerland) and the proceeds remain subject to Swiss taxation if the work activity was not carried out in Switzerland exclusively due to the COVID-19 measures. Furthermore, the cross-border commuter status is unlikely to be lost. This agreement can be terminated by either party - which has not previously been the case.

2.1.3. France

If a person's place of employment is in the cantons of Berne, Solothurn, Basel-Stadt, Basel-Landschaft, Vaud, Valais, Neuchâtel or Jura, there is no withholding tax for French cross-border commuters. Their income is taxed in France, whereas

France pays a compensation in the amount of 4.5% of the gross income to the Swiss tax authorities.

If the place of employment is in another canton, e.g. Zurich or Aargau (Geneva has specific regulations which are basically the same as those of Zurich), withholding tax is levied in Switzerland. In France, the income from gainful employment in Switzerland is taken into account for the assessment of the French tax. Employees are entitled to a tax credit, which in fact has the equivalent effect of an exemption of Swiss gainful income from French tax.

The taxation of international weekly residents follows the above-mentioned basic rules (Zurich etc.) and are applicable in all cantons.

If the work is performed in France due to a home office order (except for cross-border commuters in the cantons of Berne, Solothurn, Basel-Stadt, Basel-Landschaft, Vaud, Valais, Neuchâtel or Jura), the earned income would only be taxed in France under the Agreement of the Swiss Federal Council and the Gouvernement of France, dated April 11, 1983. This might mean a considerable difference in the total tax burden for employees. They may also lose their status as cross-border commuters. In principle, Switzerland has no right to levy withholding tax if the employees are not physically present.

In the Agreement of Consultation of 14 May 2020, Switzerland and France agreed that the days which cross-border commuters had to and must spend in France due to the COVID-19 pandemic do not change their cross-border commuter status and that in principle COVID-19-related working days in the home office are considered as working days in the country of employment (Switzerland). This agreement is valid until 31 December 2020, subject to renewal or a new agreement.

2.1.4. Italy

For cross-border commuters, Swiss withholding tax is levied on Swiss earned income. In Italy, income earned in Switzerland is exempt from taxation. However, the cantons of Grisons, Ticino and Valais transfer 40% of the withholding tax levied each year to the Italian treasury for the benefit of Italian border municipalities.

Switzerland levies withholding tax on the remuneration of international weekly residents. The Swiss earnings from gainful activity are taken into account in the assessment of the Italian tax, with the withholding tax paid in Switzerland being credited.

Due to the home office setting, the tax burden for cross-border commuters changes drastically, as their income becomes taxable in Italy. This may imply a considerable difference for the employees. They can also lose their status as cross-border commuters. For international weekly residents nothing changes with regard to their total tax burden. In both cases, Switzerland can in principle not levy any withholding tax, since the employees do not physically work in the country.

The Agreement of Consultation between Italy and Switzerland of 20 June 2020 stipulates that the COVID-19 related home office activity does not affect the cross-border commuter status and that the work performed remotely shall be considered as work performed in the country of employment (Switzerland). The agreement shall remain effective until termination thereof plus the cancellation of health policy measures restricting or advising against the freedom of movement by both countries. It is currently not possible to predict how long the agreement will remain effective.

2.1.5. Austria

Both cross-border commuters and international weekly residents are subject to withholding tax on Swiss employment income. Austria taxes Swiss earnings, whereas Swiss withholding tax is credited to the employee. As fiscal equalization, Switzerland pays the Austrian Federal Ministry of Finance an annual compensation for cross-border commuters resident in Austria in the amount of 12.5% of Swiss tax revenues from paid employment.

For cross-border commuters and for international weekly residents, teleworking does not change anything with regard to the total tax burden, because the income is subject to taxation in Austria in any case. However, the status of a cross-border commuter may be lost. Furthermore, Switzerland can in principle no longer levy withholding tax. Switzerland has not concluded an Agreement of Consultation with Austria.

2.1.6. Excursus: Revision of the withholding tax in Switzerland as of 1 January 2021

This Legal Compass is based on the legal and regulatory framework currently in effect in Switzerland.

Independently of an extension of the exceptional situation conditioned by COVID-19 pandemic beyond the end of the year, the Federal Law on the Revision of Withholding Taxation in Switzerland and the corresponding ordinances must be observed as of 1 January 2021. This revision will not be dealt with in the present context.

2.1.7. Conclusion

The COVID-19 pandemic and the associated restrictions have led to a rise in telework. This has an impact on the employees' status of cross-border commuters and may imply an alteration in their tax burden. It also has an impact on the levying of withholding tax and the tax equalization mechanisms. To counter this, Switzerland has concluded consultation agreements with Germany, France and Italy. As a consequence, employees who have to telework due to COVID-19 do not lose their status as cross-border commuters and the work performed remotely shall be considered as work in the country of employment (i.e. in Switzerland). There is no general harmonization regarding the termination of these agreements. A frequent case-by-case analysis is therefore recommended.

2.2. Employer

2.2.1. Withholding tax accounting

For companies which have foreign-based employees, the accounting of the withholding tax currently remains unchanged. Future developments should be monitored, especially for the year 2021.

2.2.2. Permanent establishments

In its recommendations on the effects of the COVID-19 pandemic, the EU has also expressed its views on the establishment of permanent establishments within the meaning of Article 5 of the OECD Model Tax Convention. In doing so, it has stated that if during the COVID-19 pandemic an employee of a company based in Switzerland, who is resident abroad, carries out his or her work in a home office on the basis of recommendations issued by the respective governments, this is due to force majeure. In view of the exceptional nature of the COVID-19 crisis, this does not constitute a permanent establishment for the Swiss company under the law of treaty - unless working from a home office becomes the rule. In particular because there is a lack of a sufficient degree of permanency or continuity as well as of a sufficient power of disposal of the company over the home office. In addition, under normal circumstances an employer provides employees with an office that cannot be used only because of the current exceptional situation (see OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis of 3 April 2020, margin note 9).

2.2.3. Conclusion

The COVID-19 pandemic and the associated restrictions have led to a rise of telework. This does currently not have any consequences for Swiss companies regarding withholding tax settlements.

Additionally, the risk of establishing a foreign permanent establishment of Swiss companies has been limited by the EU in the annotation on the consequences of the COVID-19 effects. However, should the home office situation continue without compelling reason, further assessment may be required on a case-by-case basis in the future.

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