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CROSS-BORDER REMOTE WORK FAQs

SWITZERLAND

1. Assume that a foreign national employee of a foreign company wishes to work remotely for a period of time in your country performing services exclusively for the foreign company and not interacting with the local market in your country.

IS WORK AUTHORIZATION REQUIRED? IF SO, PLEASE PROVIDE A BRIEF DESCRIPTION OF THE TYPE OF VISA, PROCEDURE, PROCESSING TIME, ETC.

According to Swiss Law it is not entirely clear whether remote work for a foreign company without interacting with the local Swiss market qualifies as gainful occupation in Switzerland which is subject to resident and work permits. Residents and work permits are granted by Cantonal authorities which handle the cases of remote work differently. We therefore advise to approach the competent Cantonal migration offices with regards to each specific case.

IS THERE RISK OF “PERMANENT ESTABLISHMENT” CONSEQUENCES FOR THE FOREIGN COMPANY BY VIRTUE OF THE REMOTE WORKER’S ACTIVITIES?

IF SO, WHAT ARE THE MAIN FACTORS DETERMINING THE EXPOSURE.

If the remote work does not have a permanent character, the risk is rather low but needs to be assessed based on the specific circumstances of each case. For Swiss tax law purposes, the term ‘permanent establishment’ means a fixed place of business through which the business activity of an enterprise is wholly or partly carried on. In particular, PEs are branches, factories, workshops, sales agencies, permanent representations, mines and other places of extraction of natural resources, as well as building or construction sites that are maintained for at least 12 months. This definition is generally in line with the criteria according to the current Article 5 paragraph 2 of the OECD Model Tax Convention on Income and Capital.

AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES WOULD THE REMOTE WORKER BECOME SUBJECT TO LOCAL SOCIAL SECURITY AND OTHER PAYROLL REQUIREMENTS? CAN SUCH REQUIREMENTS BE FULFILLED BY A FOREIGN COMPANY, AND IF SO BY WHAT MECHANISMS?

The answer to the question depends on whether Switzerland has entered into a treaty on social security with the state where the employee usually performs his work duties. Many treaties (in particular The Agreement on the Free Movement of Persons between the European Community (EC) and Switzerland) provide that the employees may remain insured for the duration of the relocation in the state where they usually perform the work for a certain period of time.

If a remote worker becomes subject to local social security in Switzerland, the following applies: If the employer is domiciled outside the EU/EFTA, the social security contributions are settled via the employee or a payroll provider. If the employer is domiciled in the EU/EFTA, the employer can choose to pay the social security contributions itself, via his employee or a payroll provider.

AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES DOES THE REMOTE WORKER BECOME SUBJECT TO LOCAL EMPLOYMENT LAW REQUIREMENTS SUCH AS IS WAGE-HOUR, LOCAL HOLIDAYS, ANNUAL LEAVE, MATERNITY LEAVE, DISABILITY LEAVE, PROTECTION AGAINST UNFAIR DISMISSAL, ETC.

Regarding the applicable law in an international employment context, the Swiss Federal Act on Private International Law provides that employment contracts are governed by the law of the state in which the employee habitually performs her/his work. If the employee habitually performs her/his work in several states, the employment contract is governed by the law of the state of the establishment or, in the absence of an establishment, of the domicile or habitual residence of the employer. The parties may submit the employment contract to the law of the state in which the employee has her/his habitual residence or in which the employer has its establishment, domicile or habitual residence.

Thus, from a Swiss conflict of law rules perspective, the applicable private employment law to the employment contract of the remote worker does not change to Swiss Law unless there is no choice of law clause and the remote workplace in Switzerland becomes the place where the employee habitually performs her/his work.

An exception has to be made with regard to public law. Even if the employment law contract is subject to foreign private employment law, the Swiss Labor Law Act, which forms part of public law, applies to employees working on Swiss territory for a foreign company “as far as this is possible under the circumstances” (art 1 para 3 Swiss Labour Law Act). The Act contains provisions on health protection as well as provisions on working hours and rest periods.

Furthermore, Switzerland has a special public law that applies to workers posted to Switzerland. The Federal Act on Posted Workers sets out minimum working and wage conditions that must be granted to posted workers. The Act only applies to employees whom an employer domiciled abroad sends to Switzerland to perform work for a certain period of time (a) on the employer’s account and under the employer’s direction within the framework of a contractual relationship between the employer and a third party or (b) in a branch or a company that is part of the employer’s group of companies.

We are of the opinion that if the remote worker does not interfere with the Swiss market and does not perform her/his work in a branch of the employer in Switzerland, the Federal Act on Posted Workers does not apply.

Last but not least, in case an employee has jurisdiction for an employment law dispute in Switzerland, Swiss Courts will despite the applicability of a foreign private employment law also consider mandatory provisions of Swiss law which, by reason of their special purpose, are applicable regardless of the private law governing the employment contract.

ARE THERE SPECIAL REQUIREMENTS GOVERNING REMOTE WORK IN YOUR COUNTRY WHICH WOULD COVER THE REMOTE FOREIGN WORKER?

Provisions of the Swiss Labour Law Act on health and safety requirements for the remote workplace need to be recognized as far as possible in the given circumstances. Furthermore, if private Swiss Employment Law applies (see question on applicable law) the employee needs to be reimbursed for costs occurred in connection with remote work if the remote work is not voluntary and the employer does not offer the employee working space at its premises.

WHAT IS THE EMPLOYEE'S EXPOSURE TO LOCAL INCOME TAX, AND UNDER WHAT CIRCUMSTANCES IS THE FOREIGN EMPLOYER REQUIRED TO ARRANGE FOR WITHHOLDING OF INCOME TAX?

Employees are exposed to full tax liability in Switzerland if, among other things, they stay for at least 30 days and engage in gainful employment in Switzerland. This is subject to any double taxation agreement that Switzerland may have concluded with the individual's country of residence. Residence in accordance with the double taxation treaty can reduce unlimited tax liability in Switzerland on the basis of tax residence, so that the person only has limited or no tax liability in Switzerland.

In principle, employees who work in Switzerland but do not have a permanent residence permit are subject to withholding tax for income generated in Switzerland unless any double taxation agreement provides for different rules.

WOULD THE REMOTE WORKER BE ENTITLED TO BRING A CLAIM FOR WORKPLACE INJURY IN YOUR COUNTRY?

The answer to the question on whether courts in Switzerland have jurisdiction regarding a workplace injury depends on the fact in which state the employer as defendant is domiciled.

An employer domiciled in the territory of a state bound by the Lugano Convention may be sued: In the courts of the state in which the employer is domiciled; or in another state bound by the Lugano Convention in the courts for the place where the employee habitually carries out her/his work or last habitually carried out his work; or b) if the employee does not habitually carry out or did not habitually carry out her/his work in the same state, in the courts for the place where the establishment which engaged the employee is or was situated.

Thus, a remote worker employed by a company having its seat in a state bound by the Lugano Convention may only be entitled to bring a claim for workplace injury in Switzerland if the employee habitually carries or has carried out her/his work in Switzerland.

If the employer has its seat in state not bound by the Lugano Convention, Swiss courts decide on their jurisdiction in international disputes based on the Federal Act on Privat International Law. The applicable provision provides: The Swiss courts at the defendant's domicile or at the place where the employee habitually performs her/his work have jurisdiction to hear actions relating to an employment contract. An action initiated by an employee may also be brought before the courts at her/his domicile or habitual residence in Switzerland.

A habitual residence in Switzerland is given if a person lives for a longer time period in Switzerland, even if the time period is limited from the outset. When the criteria of a "longer stay" is fulfilled, needs to be assessed given the specific circumstances of each case.

Thus, if a remote worker is employed by an employer not domiciled in a state to the Lugano Convention and if this remote worker habitually performs her/his work in Switzerland or if the remote worker establishes a habitual residence in Switzerland, the remote worker can bring a claim for workplace injury against the employer in Switzerland (although the risk for a workplace injury will be very small in case of remote work).

Regardless of the country in which the employer is domiciled, the employee may sue the employer for compliance with the terms and conditions of work and wages in the context of a posting within the meaning of the Swiss Federal Act on Posted Workers.

WOULD THE REMOTE WORKER BE COVERED UNDER THE LOCAL NATIONAL HEALTHCARE SYSTEM OR INSURANCE?

See answer on social security.

IS A FOREIGN EMPLOYER SUBJECT TO DATA PRIVACY AND SECURITY REQUIREMENTS REGARDING PROTECTION OF EMPLOYEE PERSONAL INFORMATION FOR A FOREIGN EMPLOYEE WORKING REMOTELY IN YOUR COUNTRY?

The Swiss Data Protection Act only applies to the processing of data of natural and legal persons on the

territory of Switzerland and in particular with regards to the export of data from Switzerland to a foreign country. Consequently, if the data of the employee is not processed in Switzerland, the Swiss Data Protection Act does not apply.

If the posting lasts longer than 90 days, a work and/or residence permit for Switzerland is required.

In case of posting by employers from third countries, a work and/or residence permit is required in most sectors from the 8th day onwards.

HAS THERE BEEN ANY LITIGATION OR SPECIFIC LAW OR REGULATION REGARDING THE FOREIGN REMOTE WORKER IN YOUR COUNTRY?

No, there is no specific law on foreign remote work and we are not aware of any case law.

2. Would any of the above answers change if the remote worker (a) is a citizen of your country, or (b) engages in activity interacting with the local market.

a) Yes, in particular a Swiss citizen does not need a resident and work permit in order to live and work in Switzerland.

b) Yes, if the remote worker engages with the local market in a sense that he/she works for an employer domiciled abroad and is sent to Switzerland to perform work for a certain period of time (a) on the employer's account and under its direction within the framework of a contractual relationship between the employer and a third party, the Swiss Federal Act on Posted Workers, that contains work and wage requirements, applies.

Furthermore, with regards to the posting of workers the following rules on work permits and registration process apply:

Postings by EU/EFTA employers of EU/EFTA employees for up to 90 days per calendar year are only subject to reporting obligations and in most industries a reporting duty only exists if the posting last for more than 8 days per calendar year. In certain industries (such as construction), the obligation to report already exists from the first day on. The same regulation applies to third-country nationals who are resident in an EU/EFTA member state and have been admitted to the regular labor market of an EU/EFTA member state on a permanent basis, i.e. for at least 12 months, prior to the posting.



André Lerch
Partner, **Humbert Heinzen Lerch**
lerch@hhl-law.ch
+41 43 399 89 99



Sara Ledergerber
Associate, **Humbert Heinzen Lerch**
ledergerber@hhl-law.ch
+41 43 399 89 99

Humbert Heinzen Lerch
Meisenweg 9, P.O.Box
8038, Zurich, Switzerland
+41 43 399 89 99
www.hhl-law.ch

CONTACT US

For more information about L&E Global, or an initial consultation, please contact one of our member firms or our corporate office. We look forward to speaking with you.

L&E Global
Avenue Louise 221
B-1050, Brussels
Belgium
+32 2 64 32 633
www.leglobal.org

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