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Obligation to register for secondments of EU employees for a period of less than 90 days - Calculation of the 8 days

In a previous article from 2018, the undersigned recalled that while most Swiss employers who employ EU nationals, most EU employers who send employees to Switzerland and most self-employed service providers from the EU who come to work in Switzerland, are aware that a residence permit is not required if the duration of stay does not exceed 90 days per calendar year, the registration procedure is less well known. Knowing whether the registration requirement applies can be a real headache, as can the calculation of the 8 days.

The purpose of this article is to recall some basic rules and especially to give some indications on how to calculate the 8 days.

As a reminder, any gainful activity carried out in Switzerland by a foreign national or a company based abroad requires a permit. The Agreement on the Free Movement of Persons (FMPA) has greatly relaxed this rule for EU nationals, whether they are employed in Switzerland or self-employed service providers, as well as for companies based in the EU.

For these, a residence permit is no longer required if the activity carried out in Switzerland or the stay does not exceed 90 days per calendar year.

If a residence permit is not required for an activity of less than 90 days, an announcement must be made. This announcement is made online via the website of the State Secretariat for Migration (SEM). The registration must be made at least 8 days before the start of the activity. Registration is mandatory as soon as the activity exceeds 8 days. In other words, for an activity of less than 8 days per calendar year, registration is not mandatory.

However, there are some areas where the announcement must be made from day one. These include, but are not limited to, construction, civil engineering and finishing, hotels and catering, industrial cleaning or security and surveillance.

But how are these 8 days calculated?

According to the OLCP-10/2022 guidelines, *“the total period of eight days permissible without notification applies to both the worker and the company (cf. Art. 6 para. 1 Odét). Consequently, a worker is subject to the obligation to register as soon as he has reached the total of eight days. The same applies to the company.*

For more information on the calculation of the 8 days, it is advisable to visit the website of the Swiss State Secretariat for Migration (SEM), which gives examples that speak for themselves (https://www.sem.admin.ch/sem/fr/home/themen/fza_schweiz-eu-efta/meldeverfahren.html):

1. *"An IT company seconded an employee to Switzerland for eight days. For both the company and the employee, this is the first cross-border service provision in the calendar year. No notification is required (at eight days without notification). From now on, all employees of the company who are to be posted to Switzerland in the same calendar year must be notified by the employer at least eight days before the start of the planned employment activity".*

In other words, for the first eight days of work, no notification is required. On the other hand, for any new secondment of employees from the same company in the same calendar year, a notification will have to be made, regardless of the duration of the activity.

2. *"A horticulturist seconded an employee to Switzerland for eight days. For both the company and the employee, this is the first cross-border service provision of the calendar year. Nevertheless, the activity must be reported at the latest eight days before the start of the work, because in this sensitive economic sector there is an obligation to report from the first day of work in Switzerland".*

In this area, registration is compulsory from the first day. The horticulturist must therefore make the announcement and does not have to worry about the calculation of the 8 days.

3. *"A music school seconded an employee to Switzerland for five days. This employee has already worked for eight days without notice in Switzerland for another employer. For the music school, this is the first posting to Switzerland. Since the employee has already used her eight days of unregistered work, the employer (the music school) must still register for this secondment".*

In other words, if an EU employer has hired an employee in the course of the calendar year and intends to post him/her to Switzerland, he/she must first check whether the employee has already been posted by his/her previous employer in the same calendar year to Switzerland. If this is the case, these days must be taken into account in the calculation of the 8 days. So, for example, if the employee has already been seconded for 5 days by his previous employer and his current employer intends to second him for another 5 days, the duration will be 10 days and therefore more than 8 days. The current employer must make an announcement.

4. *"Since the obligation to register exists from the first day of work in the construction sector, a posting to Switzerland must be registered eight days before work begins".*

A construction company sends three employees to Switzerland for the same five-day work period. For this posting, five days are deducted from the posting company's balance. If the company sends each of the three employees successively for five days of work for different periods in Switzerland (the employees do not therefore work at the same time in Switzerland), 15 days are deducted from the company's balance.

In other words, for the calculation of the company's balance of days, the calculation is different if the employees are sent for the same period (the number of employees does not matter) or if they are sent for different periods.

5. *"A company announces that one of its employees will be present at two different work sites at the same time (e.g. in the morning) on calendar day X. This is not permissible. On the other hand, it is permissible for an employee to be assigned several tasks on different sites on the same day, as long as the tasks follow one another (e.g. he works on site X in the morning and then on site Y in the afternoon). The (approximate) arrival and departure times from the site should be indicated in the comments field of the relevant advertisement. In this case, only one working day will be counted".*

Examples are also given in Annex 4 to the OLCP guidelines and it is also advisable to consult this document.

Annex 5 to the OLCP guidelines lists activities that are not subject to the reporting obligation (e.g. seminars, courses etc.) and activities that are subject to reporting (e.g. meetings with clients, preliminary work for the conclusion of a contract etc.).

According to the OLCP-10/2022 guidelines, *"a separate announcement must in principle be made for each mandate and for each place of activity.*

However, a single announcement is sufficient, if:

- *More than one stay is required to carry out a mandate for the same principal at the same location; the dates of the various engagements must be indicated;*
- *The work is carried out without interruption in the same place.*

A single announcement is exceptionally sufficient if:

- *Several stays are necessary to carry out maintenance and service mandates for the same client in different locations. The advertisement will indicate the days of engagement for each mandate and the first location of activity.*

Thus, in summary, the 8 days are calculated per calendar year, on the one hand for each employee (it must be checked whether the employee concerned has already been seconded to Switzerland in the same year by his/her previous employer), and on the other hand for the company.

Thus, from the company's point of view, all postings to Switzerland in the same calendar year for all clients are taken into account for the calculation of the 8 days and for the company's balance. The company must also ensure that the employees it intends to second have not already been seconded in the same calendar year to another employer.

Still from the company's point of view, we strongly advise to get information beforehand and of course before starting the activity in Switzerland.

Source :

<https://www.wg-avocats.ch/en/actualites/labour-law/obligation-to-register-for-secondments-of-eu-employees-for-a-period-of-less-than-90-days-calculation-of-the-8-days/>