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Telework of border workers is back in the news

The teleworking of frontier workers is once again in the news. The following headlines have appeared in the press: “Telework by frontier workers could play a dirty trick on employers” or “Frontier telework: agreement or deadlock” (www.24heures.ch). In addition, a “[cross-border telework guide](#)” has just been published by the FER and the French-speaking economic organisations.

More and more employees of Swiss companies in the tertiary sector practice “home-office” or telework, i.e. work from home a few days per week or per month. The Covid-19 pandemic has only reinforced and increased this practice. Telework was even mandatory until last week according to the COVID-19 Ordinance in special situations “where the nature of the activity makes it possible and feasible without disproportionate effort” (<https://www.fedlex.admin.ch/eli/cc/2021/379/fr>). Since 3 February 2022, telework is again “only” recommended.

Many Swiss companies employing cross-border workers are now aware that there are problems of social insurance and of being subject to French social insurance (but the same problem exists for other neighbouring countries). The 25% “rule” now seems to be known by most Swiss employers.

As a reminder and to summarise, if the activity carried out from one’s place of residence in France exceeds 25% of one’s working time or remuneration, the employee will be subject to French social insurance and not to Swiss social insurance. Thus, if a Swiss employer wants to avoid being subject to French social security, he must limit the telework of his employees domiciled in France to less than 25% of their working time or remuneration.

An exception to this 25% “rule” (or rather a relaxation) has been put in place in the context of the Covid-19 pandemic. Indeed, in this particular and exceptional context, an amicable agreement was reached between Switzerland and France (as is also the case with other neighbouring countries) for a flexible application of the rules of liability to social insurance. With France, this flexible application is foreseen at least until 31 March 2022.

This flexible application means that an employee is considered to be working in Switzerland even if he or she cannot physically carry out his or her activity on Swiss territory due to the pandemic and “this concerns in particular cross-border teleworkers” (<https://www.bsv.admin.ch/bsv/fr/home/assurances-sociales/int/donnees-de-base-et-conventions/int-corona.html>).

What few Swiss companies employing cross-border workers are aware of is that the teleworking of these employees at home in France can have important tax implications. The 25% “rule” does not apply in tax matters and, to complicate matters further, different rules apply depending on the canton in which the Swiss employer is based.

As it is the case for social insurance, an amicable agreement was concluded between Switzerland and France in the context of the Covid-19 pandemic in May 2020. This agreement has been extended several times. It is currently in force until 31 March 2022. It can then be extended by tacit agreement until 30 June 2022, unless either State denounces it at least one week before 31 March 2022.

According to this agreement and in summary, until 31 March 2022 (or even until 30 June 2022), teleworking of cross-border employees due to the pandemic has no impact on the practice of employers with regard to taxation of their cross-border employees.

In other words, if taxation at source (or withholding tax) is practised (and this is the case in particular in the canton of Geneva), during the pandemic period and until the end of the amicable agreement, the entire activity is considered to be carried out in Switzerland and is therefore taxed at source. In other words, all days teleworked in France are taxed at source in the canton of Geneva.

When the agreement is no longer in force, which is likely to happen at the end of March, two situations may arise in Switzerland depending on the location of the Swiss employer.

Some cantons (such as the canton of Vaud or the canton of Neuchâtel) have concluded an international agreement with France. Other cantons (such as the canton of Geneva) have not concluded such an agreement.

The canton of Vaud is one of the eight Swiss cantons that have concluded a Franco-Swiss border tax agreement. According to this agreement, a cross-border employee who works in Switzerland is taxed in full in France, i.e. at his place of residence.

There is therefore no withholding tax if the cross-border employee has presented his Swiss employer in the canton of Vaud with the 2041-AS certificate, i.e. a certificate of residence. Thus, in this situation, the fact that the employee teleworks at home in France, whether during the pandemic or not, has no tax implications from the French point of view. However, it should be borne in mind that, in the canton of Vaud in particular, an employee may lose cross-border status for tax purposes if he or she works more than one day a week at home in France (i.e. more than 20%).

The canton of Geneva (and also the canton of Fribourg) is not party to this Franco-Swiss agreement with France.

In this canton, the system of taxation at source applies. Thus, the Swiss employer deducts a withholding tax for all his cross-border employees.

As mentioned above, during the pandemic period and until the end of the amicable agreement between Switzerland and France, even in case of teleworking at home in France during this period, the entire activity is considered as being performed in Switzerland and is therefore taxed at source.

With the end of the amicable agreement this will no longer be the case.

In case of telework in France continuing beyond 31 March 2022 (or even 30 June 2022 if the amicable agreement is renewed), taxation will have to be done, under French law, according to the place of work.

In other words, the cross-border employee will be taxed at source for his activity carried out in Geneva for his Swiss employer but he will be taxed in France for his activity for the same employer in teleworking at his home in France

This taxation in France will take place from the first day of work in France and it will take place regardless of the number of days of teleworking. In other words, the taxation is done in France even for one day of telework and the 25% "rule" concerning social insurance does not apply.

The Swiss employer will therefore be obliged to keep a record of the days during which the cross-border employee works in Switzerland and the days during which he teleworks at home in France. It will then have to reduce the taxable base at source by the part that concerns telework.

Even more restrictive, French law would require the Swiss employer who has teleworking employees in France to appoint a tax representative in France. Not only is this very restrictive but, as Swiss law stands, it is incompatible with it and even constitutes the criminal offence punishable in Switzerland of "acts performed without right for a foreign state" (Article 271 CP).

Discussions are currently underway between Switzerland and France but nothing has been decided yet.

Without wishing to be alarmist, great caution is called for with regard to teleworking of cross-border employees for the “post-Covid” period, and perhaps already from 31 March 2022. Swiss employers with cross-border employees would be well advised to seek information and advice before deciding, for example, to make teleworking permanent for all employees, even for just one day a week.

Source : <https://www.wg-avocats.ch/en/news/labour-law/telework-border-workers/>