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Belgium: Intracorporate Transferees Directive

Overview

In 2014, the European Council adopted the proposal for a directive on the conditions of entry and residence of third-country nationals, within the framework of an intracorporate transfer. Twenty-five participating EU member states had 30 months to transpose this directive (by 29 November 2016). As with other EU policies on legal migration of third-country nationals, the UK, Denmark, and Ireland opted out of this directive.

The ICT Directive complements past harmonization initiatives, such as the EU Blue Card and single-permit directives. Its objective is to “make it easier and quicker for multinational companies to temporarily assign highly skilled employees to subsidiaries situated in the EU. Moreover, the directive will facilitate mobility of intracorporate transferees between member states during their assignments."

Intracorporate transferees within this directive's scope are non-EU nationals assigned from a multinational company's entity to another entity of the same group in a different country. The ICT directive foresees, among others, transparent and harmonized conditions for admission, residence and work, intra-EU mobility, and certain guarantees to uphold labor and social security standards for highly skilled profiles (i.e., trainees, managers, and specialists).

As with other EU directives, this one is binding as to the result to be achieved, and leaves the form and methods used to member states' discretion when implementing the rules in national legislation. So far, of the 25 participating countries, 13 have implemented the ICT directive rules.

In a number of countries (such as Austria, Finland, Germany, Luxembourg, Poland, Slovakia, and Sweden), the implementation of the ICT directive is expected soon – or, at least, sometime in 2017. In several other countries (such as Belgium, Croatia, Cyprus, Portugal, and Slovenia), it is unknown when the ICT directive will be implemented. Once the rules of this directive are implemented in member state national legislation, intracorporate transferees are (subject to certain conditions) exempt from Schengen visa obligations, and are able to enter, stay, and work in other member states without the need to apply for another work permit, for a period of up to 90 days. In view of long-term mobility (more than 90 days), the conditions are stricter. The directive also foresees benefits for intracorporate transferees' family members. These family members will be able to apply for their visa/residence permit at the same time as the assignee and can therefore accompany the assignee from the start of the assignment. They can also be provided with a right to work in the host member state for the duration of the transfer.

Deloitte's view

Clearly, the ICT directive's implementation meets the demand of many international companies by allowing their non-EU nationals to work in different EU countries while having to go through the immigration formalities in only one EU country.

While using the ICT permit, however, companies need to be careful. When working in different EU member states, the EU coordination rules on social security (as laid down in Regulation 883/2004) will become applicable, and may in some situations activate the social security scheme in the EU country where the individual resides. Furthermore, it is important such a setup does not constitute a forbidden chain-secondment, which may be in contradiction with local labor law. In all instances, it will be important to make sure that the link of subordination remains with the assigning employer outside of the EU and that attention is paid to the contractual setup of these ICT assignments.

Deloitte Belgium's immigration and social security services team will provide updates and is readily available to provide more detailed information.

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South Africa:
Revised process for rectifications, transfers & valid visa in an expired passport

Overview

In the past, the Department of Home Affairs (the "department") has accepted visa transfers and rectifications as requested by applicants. But the department recently refined its procedures and implemented the following new business processes specifically for rectifications and transfers.

Rectifications

The department will only accept rectification applications in the following instances:

- **Incorrect Names:** The name on the visa is incorrectly spelled or not captured as indicated by the applicant on his or her application form.
- **Incorrect Visa Category:** The visa category issued by the department is not the same as the one applied for by the applicant. The visa will only be corrected if the Visa Facilitation Services Centre "VFS Centre" can confirm and prove that the visa category requested by the applicant, per the checklist that the VFS Centre has on file, is correct, and the visa category issued by the department is incorrect.
- **Incorrect Reference Number:** The number does not correspond with the reference number allocated to the applicant on his or her original visa application.
- **Dates:** The issue date and expiry date do not correspond; for instance, if the validity period of the visa is issued for a period longer than the period prescribed for the visa category.
- **Visa Conditions:** The conditions of the visa, such as employer name or position, are incorrect.
- **Visa Conditions – Secondary Activities:** The conditions of the visa were supposed to cover more than one activity, for example, "to continue employment with Bank ABC, while studying at University ABC."

Transfers

The department will only accept transfer applications from applicants who wish to transfer a valid temporary residence visa for the following reasons:

- For a new passport to replace a lost or stolen passport.
- For a new passport to replace a damaged passport.
- For a full passport, if the original passport did not contain sufficient pages – The VFS Centre must verify this claim at the time of application submission, and the applicant must provide his or her old passport as proof.

Note: The new visa will be issued with the same expiry date and conditions as the original visa. The only details that will change on the new visa are the VFS reference number, the passport number, and the visa issue date. Also, a transfer application may not be submitted less than 60 days before expiry of the original visa.

Important notes

- If the original visa was not issued by the VFS Centre in South Africa, the transfer application must include written confirmation of the original visa's validity from a regional or home office of the department.
- No transfer applications can be made for an expired passport to a new passport, regardless of the expiry date of the original visa.

Valid visa in an expired passport

The Immigration Act states that a foreigner's passport must be valid for at least 30 days after his or her intended date of departure from South Africa. Therefore, a visa should not be issued for a validity period that exceeds the expiry date of the related passport.

If a visa is issued for a period that exceeds the expiry date of the related passport, the visa shall immediately and automatically lapse on the same date the passport expires. If discovered, the visa will be withdrawn, as it was issued in error. A visa issued for a period that exceeds the expiry date of a passport will not be transferred to a new passport.

No illegal foreigner will be allowed to remain in South Africa on the grounds that he or she was issued an erroneous visa.

Deloitte's view

The rectification and transfer requirements are logical and should not present a problem to our clients; however, the cancellation of visas due to government errors is problematic and should be dealt with proactively. We are currently engaging with the South African immigration authorities to establish a process to rectify visas issued for periods that exceed the expiry date of the related passports.

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South Korea:
Clarifications provided on the application of the flat income tax rate for foreign employees

Overview

In December 2016, the South Korean National Assembly approved income tax law revisions that included changes to the flat income tax rate scheme for foreign employees. The changes to the scheme limit the period in which a foreign employee can qualify for the flat tax rate. We now have additional information on how the limitation will be applied.

Clarifications on the application of the flat income tax rate for foreign employees

Under the Tax Incentives Limitation Law, foreigners are allowed to elect a flat income tax rate as an alternative to regular, progressive income tax rates when calculating individual income tax liability on earned income. If a flat tax rate is elected, it is applied to all gross income earned in South Korea, with no deductions, income exclusions, or tax credits allowed. The flat rate is offered in lieu of the regular, progressive individual income tax rates, which range from 6% to 40% (6.6% to 44% including a local income tax surcharge).

Effective January 1, 2017

Change to the flat income tax rate: In connection with numerous tax law revisions designed to achieve fair and equal taxation, the Ministry of Strategy and Finance (MOSF) has approved increasing the flat income tax rate to 20.9% (including a local income tax surcharge of 1.9%) from 18.7% to decrease the taxation disparity between South Korean nationals and foreign taxpayers.

Limited period for application of flat income tax rate election:

1. Application of the flat income tax rate election is limited to a maximum of five years from the start date of South Korean employment for foreign employees arriving in South Korea for the first time on any day between January 1, 2014 and December 31, 2018.
    a. Example: If a foreign employee started work in South Korea on March 1, 2016, that employee is eligible to elect the flat income tax rate through the end of tax year 2020.
2. For cases in which a foreign employee began working in South Korea prior to January 1, 2014, the flat income tax rate election will be allowed until the end of 2018, even if five years have elapsed from the date of the employee's commencement of work in South Korea.

3. Foreign employees starting work in South Korea after January 1, 2019, are not eligible for the flat income tax rate, unless they work for "qualified regional headquarters" of foreign companies.

Deloitte's view

- Companies should carefully plan around their foreign employees' eligibility period to qualify for the flat income tax rate as it can have a great impact on the overall tax costs for the deployment.
- Companies should also be careful to withhold relevant income tax using the increased flat income tax rate.

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United States:
Tax Reform: Human Resources and Global Mobility

Setting the tax reform stage

Tax reform is a top priority for President Trump and Republican leaders in Congress. Both groups have expressed a strong desire for significant changes to the current tax code and Republican control of both the Executive and Legislative branches of government may make reform a real possibility. In addition, there is a greater sense of urgency among congressional taxwriters given recent developments in the global tax landscape.

Both the Trump administration and House Republicans have put forth proposals for tax reform; although these proposals have important differences and lack a number of technical details, there appears to be quite a bit of agreement around key policy objectives. Specifically, both proposals include reducing corporate and individual tax rates, encouraging the on-shoring of jobs to the US, and repealing and replacing the Affordable Care Act (ACA).

The potential impact of tax reform on US companies is a high priority issue and the impact of tax reform to Human Resources and global mobility programs should not be overlooked.

Top considerations and planning for Human Resources and Global Mobility

Refreshing global mobility strategy: Changes to individual income tax rates could have a direct impact on the cost of global mobility programs for companies that apply a tax equalization policy. Lower US tax rates with no change in foreign tax rates will result in a rebalancing between hypothetical and actual taxes, thereby impacting overall tax reimbursement costs. Whether this change is an overall increase or decrease to a company's costs will depend on the mix of assignments into high-tax or low-tax countries. A holistic review of policies can help to ensure that the structure and costs of global mobility are in-line with the company's business needs.

Analyze impact of reduced tax rates on rewards programs: As corporate tax rates are reduced, deductions become less valuable and companies may realize additional benefit by accelerating deductions to a higher tax year. Employee benefit and rewards plans may present several opportunities to accelerate business deductions; for example, accelerating the accrual of bonus payments, pre-funding of qualified retirement plans and Voluntary Employees Beneficiary Association Plans (VEBAs), and reviewing equity plan arrangements coupled together with new accounting guidance (ASU 2016-09) present opportunities to take deductions in a higher-tax year. Companies should analyze the potential impact of reduced tax rates on their rewards programs and review opportunities to enhance corporate tax deductions.

Addressing timing around individual income inclusion relating to employee benefit and equity programs: In anticipation of potentially lower individual income tax rates, employees may be motivated to defer income to future tax years through delayed exercise of stock options or greater participation in deferred compensation programs. While the lower tax rates may present a tax planning opportunity for individuals, the increased deferral of income may also delay the corporate tax deductions related to that income, which could impact a company's ability to accelerate compensation deductions into a higher-tax year.

Monitoring changes to the Affordable Care Act: Repeal and replacement of the ACA is widely expected; however, the exact mechanics of any 'repeal and replace' have yet to be determined and it is anticipated that many aspects of the law will remain in place. Additionally, ACA is still the law of the land and employers should continue to assess whether internal processes are adequate to determine the potential risk liability for each month of 2017 reporting.

Next steps

Tax reform is a rapidly-evolving area. Deloitte Tax LLP's Global Employer Services group will continue to publish updates as the legislative process progresses and new developments emerge. In the meantime, companies can begin to conduct impact analyses to assess the potential cost of these changes to their global mobility and rewards programs and analyze potential cash tax savings that could be realized through acceleration of corporate tax deductions related to employee benefit plans.

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United States: ACA repeal and replace: The proposed American Health Care Act & its potential impact on employers

On March 6, 2017, House Republican leaders made public the American Health Care Act ("AHCA"). Leaders have expressed a desire to move the legislation through the House in the next few weeks, leaving time for the Senate to complete action on the bill prior to Congress's two-week recess set to begin April 10. Committee mark-ups have begun, and below is a summary of the primary provisions of the AHCA as it stands now, obstacles that may lead to changes prior to adoption and what the main provisions mean to employers.

AHCA Summary of Key Provisions

- **Individual and Employer Mandates "Repealed":** The bill would immediately (and retroactively) reduce the individual and employer mandate penalties to zero. The rules would remain on the books, but there would be no consequence for violating them.
- **Advanced Premium Tax Credits Replaced with Refundable Tax Credits:** Beginning in 2020, ACA's premium assistance credits for low-income households would be replaced with age-adjusted refundable tax credits to assist those who don't receive coverage through their employer or a government program (e.g., Medicare, Medicaid). These credits would be phased-out for households with income over $150,000 (indexed for inflation).
- **Some Employer Reporting Still Required:** To support the Refundable Credits, the bill would establish a new employer reporting requirement. This credit would not be available to anyone who is eligible for employer-sponsored coverage that meets certain minimum requirements. In order to enforce this eligibility requirement, employers would be required to report offers of coverage on employees' Forms W-2. The bill does not eliminate the current reporting done on Form 1095-C but it is intended that this would be duplicative and the Secretary of the Treasury could stop enforcing the reporting as it would not be needed for taxable purposes.
- **The "Cadillac Tax" Will Be Delayed (Again), But Not Repealed:** The bill would further delay the effective date of the ACA's Cadillac Tax, so that it would not begin to apply until 2025. This delay enabled the drafters to avoid (for now, at least) the need to come up with a replacement revenue source – such as capping the taxable income exclusion for employer-provided coverage.
- **The ACA's Group Health Plan Mandates Survive:** The bill would not repeal or alter many of the ACA's group health plan mandates, including the ban on preexisting condition exclusions and the requirement for employers to allow employees' children to remain eligible until age 26.
- **Enhanced HSAs:** The bill would make several changes to enhance health savings accounts (HSAs).
- **No Annual Limit on Salary Reduction Contributions to Health FSAs:** The bill would repeal the $2,500 annual inflation-adjusted limit on salary reduction contributions to health flexible spending arrangements

(FSAs). It also would repeal the rule prohibiting health FSAs and health reimbursement arrangements (HRAs) from reimbursing the cost of over-the-counter drugs obtained without a prescription.
- **High-income individuals:** The bill would repeal the 0.9% additional Medicare tax on high-income individuals, as well as the 3.8% surtax applicable to high-income individuals' net investment income. It also would again permit employers to deduct retiree medical expenses allocable to the Medicare Part D subsidy. These changes would apply to taxable years beginning after December 31, 2017.
- **Medicaid Expansion cutback:** The proposal would freeze new enrollment under the ACA's Medicaid expansion (which 31 states accepted, including in a number with Republican governors) after 2019. For non-expansion beneficiaries, beginning in 2020 the government would institute a Medicaid policy known as "per capita caps" – where the federal share of Medicaid spending in a particular state would not be open-ended, but rather limited to a set dollar amount based on that state's Medicaid population.
- **Life Sciences and Healthcare Industry Taxes Repealed:** For taxable years beginning after December 31, 2017, the bill would repeal the medical device excise tax, the annual fees on health insurance providers and manufacturers and importers of branded prescription drugs, and the tax on indoor tanning services. As of the same date, the bill would also repeal the limitation on deductible compensation paid to officers, directors, and employees of certain health insurers.

Anticipated AHCA Obstacles

As of the date of this article, a cost estimate from the Congressional Budget Office (CBO), which will be critical in the determination of whether the plan can be advanced under the budget reconciliation process and avoid a near-certain Democratic filibuster, is still required. The forthcoming analysis from CBO will likely also include projections of how many individuals may gain or lose health coverage under the plan – statistics that could significantly impact the politics of moving the plan through Congress. Based on statements made by Republican leaders, CBO's analysis may be released early next week.

Even setting aside the importance of the CBO information, political hurdles will impact what AHCA ultimately looks like. Congressional Republican leaders can afford to lose few Republican votes; however, various blocs of House and Senate conservatives have expressed concern with some of the AHCA's features, including its refundable tax credits, deferred repeal of the ACA's tax increases, and planned roll-back of the Medicaid expansion.

Developing Issues of Particular Interest to Employers

While changes can be expected from the bill as introduced, the current draft legislation includes provisions for continued employer reporting offers of coverage, including when the offer started and ended, potentially integrating this into their W-2 process, as noted above. The new rules would be effective for months beginning after December 31, 2019.

While some fashion of employer reporting on offers of coverage are likely to remain, it is still early in the process and there is no assurance the employer mandate will not apply for 2017. Thus, employers are advised that all requirements from the ACA remain in effect unless and until modifications envisioned in the AHCA become law.

Additional information, including the text of the proposed bill, is available on the House Ways and Means Committee's website.
URL: https://waysandmeans.house.gov/

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Global Reward Updates:
Belgium: Expanded scope of the Belgian stock exchange tax

In its 2017 budget, the Belgian parliament extended the scope of the Belgian stock exchange tax to cover transactions executed by Belgian residents through non-Belgian financial intermediaries. The 2017 budget has been adopted and all steps in the legislative process have been concluded, so that this change has been in force since January 1, 2017.

Background

Previously the scope of the stock exchange tax covered transactions in stocks such as purchases and sales of shares and stock options received from employee share plans, executed through Belgian financial intermediaries. The Belgian residence of financial intermediaries was a key element for determining whether a transaction was in scope of the Belgian stock exchange tax. The applicable rates on stocks was 0.27% capped at €800 per transaction. The Belgian financial intermediaries were legally responsible for tax collection and remittance to the Belgian tax authorities. Since the tax liability was satisfied at source, individuals on whose behalf the tax was levied had no reporting/settling obligations with respect to the tax.

New Extended Scope of the Stock Exchange Tax

The new regime, applicable as of January 1, 2017, expands the scope of the tax to cover transactions executed by Belgian residents (individuals and entities) outside of Belgium. The tax now includes transactions carried out by foreign intermediaries, provided the instruction is directly or indirectly given by an individual with a habitual residence in Belgium, or by a legal entity on behalf of its registered office or permanent establishment in Belgium. As an example, a transaction executed through a US broker by a Belgian tax resident is now subject to the Belgian stock exchange tax.

The tax rate remain the same (.27%), however the maximum contribution amount has been doubled to €1,600.

This means that as from 2017, individuals themselves may need to fulfil the stock exchange tax obligations (i.e. paying the tax and filing the return). If the foreign intermediary does not withhold this tax from the impacted transaction via an appointed Belgian representative, the individual will be required to file a return (separate from their individual tax return) to pay the transaction tax.

Impact on Expatriates Benefiting from Belgian Special Tax Status

Even though expatriates benefiting from the Belgian special tax status would be qualified as habitual residents, they are considered to be non-resident taxpayers in Belgium. Therefore it is unclear whether expatriates benefiting from special tax status fall within the new scope of the stock exchange tax. The Belgian legislation does not provide a specific definition for “habitual residence”, though it is generally accepted as the residence where the individual has settled principally. Habitual residence also depends on the factual situation in which the personal and professional circumstances indicating a durable link with the location, or the intention to create a durable link, are important.

Considering that the expatriate special tax status only applies to those who are temporarily present in Belgium and maintain the center of their interests abroad, there are arguments for expatriates to fall outside the scope of the stock exchange tax.

Clarifications from the tax authorities can be expected over the new few months.

Deloitte’s view

The new scope of the stock exchange tax is a significant additional burden on foreign intermediaries if they decide to take on the reporting and withholding obligations for the tax via an appointed Belgian intermediary. Mechanisms will need to be put in place in order to calculate, collect and remit the taxes due to the authorities. If foreign intermediaries do not take on the new reporting and withholding obligations then Belgian individuals will be responsible for filling a return and settling taxes due. Clients may wish to consider a formal communication to Belgian employees to make them aware of the extended scope of the tax. It will be important to monitor whether expatriates benefiting from the special tax status are deemed to fall within the new scope the stock exchange tax. Additional guidance is expected from the Belgian authorities, and Deloitte will stay close to the issue and provide further guidance when any updates are made available from the tax authorities.

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Global Reward Updates:
France: Constitutional challenge to employer social contribution paid at grant for free share awards (RSUs)

Key Points to Know

In February 2017, two French judicial bodies referred a question to the French Constitutional Council to determine whether it is constitutional to apply an employer's social contribution at grant even where employees do not acquire shares at vesting, such as where an employee terminates prior to vesting.

If the French Constitutional Council finds that the application of contributions in such situations is unconstitutional, it may be possible to claim a refund on employer social contributions paid at grant for qualifying awards when the employee never acquired the shares at vesting.

Background

In 2008, the French social security financing act introduced an employer contribution on qualified free share awards, payable upon grant of the award. This tax was payable at grant and was non-refundable, even in the event that employees never vested in such shares.

Constitutional question

On February 8 and 9, 2017, the Conseil d'Etat (the French Council of State) and the Cour de cassation (the French supreme court of appeal) each referred a question prioritaire de constitutionnalité (QPC – priority question of constitutionality) to the Conseil constitutionnel (the French Constitutional Council) to confirm the constitutionality of the application of employer's contribution at grant on qualifying free share award regime (RSUs) granted before the Macron law (i.e. before August 8, 2015), even if shares are not acquired by employees at vesting (e.g., in the case of termination of an employee prior to vesting or in the case of vesting subject to performance conditions).

The question referred to the Constitutional council is based on one argument: how terms and provisions regarding the contribution payment date could be compatible with the constitutional principle of equality before the law and with respect to fair taxation since related income may remain virtual income when award vesting is subject to performance and /or presence tests.

The questions referred insist on the absence of restitution of the employer contribution paid at grant in the absence of awards vesting.

A decision from the Constitutional council is expected in the next three months.

Deloitte's view

The Constitutional council can modulate its decision and limit its application, which means that a limited window may be available to claim a refund in the event of a favorable decision. While waiting for a definitive decision, it is recommended that employers evaluate their French qualifying free share award plans to determine whether they have any awards that may be eligible for a refund and, if so, the possible amounts involved and to consider whether to file a claim without awaiting the decision.

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