Global InSight
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In this issue:

EU Posted Workers Directive – Equal pay for equal work

What is the change?

As of July 30, 2020, the principle of "equal pay for equal work" between posted and local workers, as mandated by the revision of the Posted Workers Directive in 2018 (European Union (EU) Directive 957/2018), is due to become law across the EU.
URL: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32018L0957

This revision implies that the remuneration of posted workers should be at the same level as that of their local peers. The (revised) Posted Workers Directive does not define the concept of "remuneration" as such, except by specifying that remuneration includes all "*the constituent elements of remuneration rendered mandatory by national law (…) or* *by collective agreements (…) which have been declared universally applicable.*" Each country is to determine the different elements of remuneration on its own territory, to go live on 30 July, 2020.

What does the change mean?

Status of transposition: Regarding the adoption of the directive into member state law, in most countries the draft legislation has been published (*e.g.*, in France, Belgium, Spain, Portugal, Poland, and Sweden), while no details are available yet in others (*e.g.*, in Germany, Denmark, Ireland, Slovenia, and Spain).

Having analysed the new concept of "remuneration" across the EU, a significant number of countries are stipulating that additional salary components will include overtime pay; allowances for night work, or dangerous or difficult work; and work on Sundays and public holidays, etc. In some countries where salary requirements had already been implemented in a very broad sense, no substantial changes are expected (*e.g.*, Austria, Belgium, The Netherlands, Portugal, Sweden, and Ireland).

Main challenges: The most challenging aspect for employers will be identifying precisely what elements of remuneration must be paid exactly to comply with local labour law and collective bargaining agreements. In most countries, a distinction is made per sector, in addition to which there are further differences according to function, seniority, etc. Local authorities are expected to provide very transparent information about this, but, even if they do, the huge complexity of each country's collective bargaining agreement and labour law landscape will create a significant problem for employers.

Adding to that complexity is the fact that, in most countries, the local remuneration requirements must also, in principle, be considered for short-term business travellers. This will put a huge burden on employers with highly mobile populations – to keep track of all moves within the EU and implement salary uplifts or allowance adjustments, perhaps for only a few days.

Lastly, for assignments more than 12 months (extendable to 18 months), all mandatory labour law of the host country will need to be respected, with the exception of local termination and occupational pension rules. This will necessitate an even broader scan of local requirements and for home HR functions to be more aware of compliance issues than ever before.

Considering the above, we strongly recommend that employers have the July 2020 changes high on their agendas. Of course, we will closely monitor the progress in all countries and keep you informed of new developments.

Deloitte's view

Now, of course, business travel is hugely reduced as a result of the ongoing measures aimed at limiting the spread of Covid-19. Whilst movement may be on hold currently due to these restrictions, our expectation is that this pause will be temporary, and employers should use this time to define and implement processes for when business activities resume. We have outlined below a few activities to consider in relation to the Posted Workers Directive more broadly:

- Carry out a review to understand in which EU/EEA countries you have a presence of inbound business travellers/expats.
- In advance of the new rules coming into force on 30 July 2020, look to implement processes to ensure compliance with the existing legislation on posted workers (*e.g.*, pretravel notifications, appointment of liaison persons, and social documents).
- Review the applicable collective bargaining agreements (CBAs) for your business/industry in the relevant European countries.
- Take time to assess the elements of the CBAs that will influence an employee's remuneration package.
- Review payroll processes and consider what enhancements need to be put in place to enable salary uplifts for posted workers.
- Understand the capabilities and breadth of information stored within your HR systems.
- Monitor for the latest developments regarding the revision of the Posted Workers Directive and its implications in every EU country – but particularly those in which you have a larger population.

If you have any questions concerning the items in this alert, please contact your usual tax consultant at our Deloitte offices in Belgium. For general inquiries, please contact bedeloittetax@deloitte.com.

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IRC Section 139 payments related to COVID-19 relocations

What is the change?

Employers of all sizes are dealing with unprecedented changes as the Novel Coronavirus ("COVID-19") has spread around the globe and countries seek measures to contain the virus.

The impact has been profound and wide-ranging, including with respect to the global workforce.

On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in response to the ongoing COVID-19 pandemic (Emergency Declaration). On March 18, 2020, the Internal Revenue Service (IRS) issued Notice 2020-17 that provides taxpayers limited relief for tax payments due by April 15, 2020. On March 20, 2020, the IRS issued Notice 2020-18, which automatically postpones the due date for filing Federal income tax returns and making Federal income tax payments from April 15, 2020 to July 15, 2020. Notice 2020-18 supersedes Notice 2020-17.

While it is critical that employers monitor the changing legislative and regulatory environment, it is likewise important for employers to reassess existing tax rules and potential opportunities in this environment that may be worthwhile to explore. With that need in mind, a summary of Internal Revenue Code Section (IRC) Section 139 qualified disaster relief payments is provided below.

IRC Section 139 – Qualified Disaster Relief Payments

Under Section 139, qualified disaster relief payments may be made by employers and other parties to an individual on a tax-free basis in the event of a qualified disaster.1 To qualify under Section 139, a two-prong test must be met. First, a "qualified disaster" must have occurred, and second, the payments must be considered "qualified disaster relief payments." Based on the Emergency Declaration and indications by the IRS in Notice 2020-18 that a Federally declared disaster has occurred, it appears that the first prong of section 139 (*i.e.*, that a qualified disaster has occurred) has been satisfied in accordance with Section 139(c)(2). The IRS has not commented or issued any guidance specific to the COVID-19 pandemic as to what sort of tax-free payments and reimbursements may meet the second prong of section 139 and, therefore, be considered qualified disaster relief payments related to the COVID-19 pandemic. Employers should review existing IRS guidance and should continue to monitor IRS guidance on this matter.

Section 139 qualified disaster relief payments are meant to include any amount to reimburse or pay reasonable and necessary personal, family, living or funeral expenses incurred as a result of a qualified disaster. IRS guidance makes clear that qualified disaster relief payments do not include amounts paid for by insurance or other reimbursements, or, notably, income replacement payments, such as lost wages.2 As noted above, IRC Section 139 treats qualified disaster relief payments as tax-free amounts that would ordinarily be included in an employee's gross income. However, the amounts may continue to qualify as an ordinary and necessary business expense of the employer, and thus, remain deductible under the standards of Section 162.

Please read the previous *Section 139: Qualified Disaster Relief Payments* issued on March 23, 2020 for more detailed information regarding Section 139.

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[1] IRC Section 139(b)
[2] IRS Publication 3833

What does the change mean?

How may IRC Section 139 apply to payments related to COVID-19 relocations?: Deloitte issued an alert, "Compensation Considerations Related to Coronavirus Relocations" on March 13, 2020. The commentary below addresses the same scenarios included in the prior alert but from the perspective of treating payments as Section 139 qualified disaster payments or not.
URL: https://www2.deloitte.com/us/en/pages/tax/articles/employer-tax-considerations-for-COVID-19-relocations.html?id=us:2sm:3na:gis:awa:tax:050120&sfid=7011O000001xmL5QAI

Due to the fact that Section 139 applies to amounts paid to, or for the benefit of an individual, in connection with a qualified disaster, it is important to highlight the potential differences between payments made to individuals located in the US as opposed to payments made to individuals located abroad. As noted above, based on the Emergency Declaration and indications by the IRS in Notice 2020-18 that a Federally declared disaster has occurred with respect to COVID-19, it appears that the condition for a qualified disaster under Section 139(c)(2) has occurred. Under Section 165(i)(5)(A), the term "Federally declared disaster" means any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.
URL: https://www.law.cornell.edu/topn/disaster_relief_act_of_1974

Notably, the IRS has not issued a notice or other guidance declaring a qualified disaster under a different condition, such as Section 139(c)(3), that would cover areas outside of the US. Under Section 139(c)(3), the term "qualified disaster" includes a disaster resulting from an event that is determined by the Secretary to be of a catastrophic nature. A recent example of such a declaration can be found in Notice 2014-65, which addressed the Ebola Virus Disease outbreak occurring in the West African countries of Guinea, Liberia, and Sierra Leone as a qualified disaster.

As of the date of this communication, it appears that Section 139 applies with respect to qualified disaster relief payments related to the Federally declared disaster in the US, however, payments made to, or for the benefit of an employee, for expenses related to the pandemic but not covered by the Federally declared disaster may not qualify for Section 139 relief. An employer should examine each situation involving employees in order to specifically assess expenses incurred by the employee and the potential for tax-free payments under Section 139. Employers should monitor IRS guidance with respect to any additional disaster declarations that may impact areas outside the US and for additional information regarding Section 139 relief. The information provided below is only applicable to the Federally declared disaster related to COVID-19 and the term "Qualified Disaster Area" as used hereafter refers to the area covered by the Federally declared disaster.

Temporarily relocating employees: A temporary relocation of an employee is any relocation that is expected to last for 1-year or less, assuming that the employee has a "tax home."[3] To the extent an employer wishes to temporarily relocate an employee to work at a different location, a deduction for certain travel related expenses (*i.e.*, airfare, temporary lodging, etc.) may be allowable as a deduction for the employee under Section 162 as unreimbursed business expenses.[4] To the extent such expenses are paid directly or reimbursed by an employer, the amount of expenses may be excludable from compensation of the employee as a working condition fringe benefit.[5] Therefore, there should be no need to consider additional relief under IRC Section 139. However, in the event a relocation expense does not constitute a working condition fringe benefit, the facts and circumstances of the expense should be examined in order to assess if the amount paid to the employee, or for the benefit of the employee, may be treated as a tax-free Section 139 qualified disaster payment.

Permanently relocating employees: A permanent relocation of an employee would be any relocation that is expected to last for more than 1-year, assuming that the employee has a "tax home."[6] For tax years 2018 through

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[3] Various rulings that address temporary assignments and establishing a tax home. For example, see Rev. Rul. 93-86.
[4] IRC Section 162(a) provides for the deduction of ordinary and necessary business expenses. However, effective for taxable years beginning after December 31, 2017 under the Tax Cuts and Jobs Act, all miscellaneous itemized deductions that were subject to the two-percent floor under prior law are eliminated. As a result, unreimbursed employee business expenses are not deductible by an individual, but they are an *allowable* deduction under Section 162.
[5] IRC Section 132(d)
[6] Rev. Rul. 93-86

2025, the deduction of moving expenses is suspended for nonmilitary taxpayers.[7] Therefore, to the extent an employer wishes to permanently relocate an employee, the travel and move related expenses are ordinarily nondeductible to the employee and included in compensation.

However, an employer permanently relocating an employee as a result of COVID-19 may be able to provide an employee with a payment under IRC Section 139 to cover some of those costs on a tax-free basis. In order to do so, the employer would need to consider if the costs are reasonable and necessary personal, family and living expenses that meet the requirements of Section 139. It may be difficult for employers to argue that all costs for a permanent relocation can qualify as a tax-free qualified disaster payment and may require a review of each expense under the standard that its incurred as a result of a qualified disaster. For instance, the transportation of household goods may not qualify whereas travel assistance may be permissible. The tax treatment will be determined by the facts and circumstances of each situation.

Employee family expenses: While expenses that are related to an employee's family are typically taxable if paid or reimbursed by the employer, it may be possible that an employer can provide an employee with a payment under IRC Section 139 to cover certain expenses on a tax-free basis. As discussed above, the employer would need to determine that these are reasonable and necessary personal, family and living expenses incurred with respect to a qualified disaster before excluding the reimbursements or payments from wages. As an example, if an employee requires assistance with the transport of his or her family out of the Qualified Disaster Area, those expenses may qualify for relief under IRC Section 139. In the alternative, expenses which are not incurred as a result of the current Federally declared disaster related to COVID-19, such as relocating the employee's family from locations outside the Qualified Disaster Area, may not meet the requirements for a qualified disaster relief payment.

Expenses of a quarantined employee: The tax treatment of any expenses incurred while an employee is quarantined will be driven by facts and circumstances of each case. If the employee is quarantined away from their "tax home" for a temporary period, the living expenses (*i.e.*, lodging and meals) should be excludable from compensation as a working condition fringe benefit, to the extent paid directly or reimbursed by the employer.[8] In addition, it may be possible these expenses could qualify for relief under IRC Section 139(b). For example, such expenses may include amounts incurred for lodging and meals because the employee is unable to return to their normal place of business as a result of a travel ban or quarantine.

When an employee is working from home on a temporary or permanent basis, certain ordinary and necessary business expenses incurred while carrying on the employer's business may be treated as a working condition fringe benefit and excludable from income.[9] However, the type of qualified business expenses (*e.g.*, monitors, headsets, other necessary computer hardware) that be treated as a working condition fringe benefit will depend on the facts and circumstances of each situation. In addition, depending on facts and circumstances, it may be possible to treat expenses as a qualified disaster relief payment under Section 139.

Childcare expenses: If child or dependent care costs are incurred as a result of the current Federally declared disaster related to COVID-19 (*e.g.* school or care home closures), it may be possible to apply the provisions of IRC Section 139(b) to payments made by an employer. Employees should also consider utilizing other employer tax-favored plans, such Section 125 Flexible Spending Accounts for Dependent Care, to assist with their needs. In addition, employees may wish to seek advice from their own personal tax advisors about Child and Dependent Care Tax Credits.

What should employers do now?

Employers considering making qualified disaster relief payments or delivering new compensation and benefits to employees should consider taking steps to ensure the payment achieves the desired level of assistance to the employee and the desired tax treatment. Employers should consider the following:

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[7] Tax Cuts and Jobs Act, Pub. L. No. 115-97, Section 13304, 131 Stat. 2054, 2123 (2017)
[8] IRC Section 132(d)
[9] IRC Section 162(a) & 132(d)

- Monitor the status of new legislation and regulatory guidance on a regular basis given the current pace of change;
- Bring stakeholders to the decision-making process early in order to address issues on a holistic basis (for instance, Human Resources, Tax and Legal);
- Identify the scenarios and types of expenses where the organization is prepared to provide assistance to its employees, such as qualified disaster relief payments or working condition fringes;
- Establish a process for deciding which expenses are eligible for payment or reimbursement by the company and confirm tax requirements for making tax-free payments or providing compensation and benefits;
- Establish dollar limits on the relief provided, with escalation or review processes for requests in excess;
- Establish a process by which an employee can request assistance or reimbursement for those scenarios, and enable tracking of such requests (*e.g.* specific expense system codes to be used); and
- Document and communicate the assistance available to employees.

Deloitte's view

Events related to COVID-19 are changing and evolving daily and employers are continually prioritizing the health and well-being of their employees and, in some cases, proactively relocating employees or encouraging them to work from home. It's important for employers to consider the income and payroll tax aspects of arrangements that may be considered to support employees in order to achieve the desired goals in a potentially tax-efficient and compliant manner.

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Individual residency and taxation due to workers stranded as a result of COVID-19

Introduction

The Organisation for Economic Co-operation and Development (OECD) has provided guidance related to potential cross-border issues for employers and employees resulting from the COVID-19 crisis. Included in the OECD guidance are recommendations on the implications of the COVID-19 crisis on cross-border workers and other related cross border matters, and an OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis.

A link to the OECD's recommendations and analysis may be found online.
URL: https://www.oecd-forum.org/users/369395-pascal-saint-amans/posts/65032-oecd-issues-recommendations-on-implications-of-the-covid-19-crisis-on-cross-border-workers-and-other-related-cross-border-matters

OECD observations and recommendations

The OECD Center for Tax Policy and Administration (CTPA) drafted the guidance which acknowledges that as a result of travel restrictions many workers are unable to physically perform their duties in their country of employment and may have to tele-work from another jurisdiction. Such conditions may complicate the determination of taxing rights between jurisdictions. The OECD provided several examples of circumstances that governments will need to consider.

OECD examples

Until specific country guidance is published with respect to COVID-19, the scenarios included in the OECD's recommendations and analysis yield some learning and insight for parties seeking to navigate the complexities related to cross-border work and tax residence status of individuals.

Three issues noted by the OECD are described below:

1. Tax residence considerations for stranded workers
2. Stimulus relief income sourcing
3. Complexities associated with remote work in a location other than the normal work location

Note: In the treaty context, state means the jurisdiction(s) in question; below state and country are used interchangeably.

Tax residence if stranded in a country other than the normal work country: If a person is stranded in a country that is not the normal country of residence, it is unlikely the current COVID-19 situation will affect the treaty residence position, and a person is likely to remain a resident of their normal residence country. The OECD guidance analyzes two examples:

1. A person stranded in a country that is neither their current work country nor their current tax residence country; and
2. A person stranded in their previous tax residence country (neither their current work country nor their current tax residence country).

As noted, in both examples, the residency tie-breaker provisions are likely to favor the normal country of residence due to the transient and unusual nature of the temporary living period in the country in which they are stranded.

Sourcing of subsidy income: Some governments have enacted stimulus packages to support employment including subsidizing unpaid salaries on behalf of eligible companies. Stranded workers may receive compensation and/or governmental subsidies as replacement income while working, or while not working, while temporarily residing in a country other than their normal country of employment. The OECD analysis treats the payment as a termination payment which is typically sourced to the location where the employee would have otherwise worked.

Considerations associated with remote work: The OECD discusses a scenario where a cross border worker is ordered to shelter-in-place and is unable to travel to perform services in their work country. As a result, the employee temporarily becomes a remote, or tele-worker. The OECD model treaty indicates wages are taxable in a person's state of residence unless the employment is exercised (physically performed) in the other state. Cross-border workers are usually taxed on their earned income in their work state and any tax obligation on the same income arising in their home state is typically relieved through a tax exemption or credit.

The temporary tele-worker is exercising their employment outside their normal work country (*e.g.*, in the home country). This may inadvertently shift the primary right of taxation from the work country to the home country and there is a possibility that employers may have ongoing withholding obligations for work country payroll taxation that is no longer underpinned by a substantive right of taxation. The OECD notes that some bi-lateral agreements have provisions which may allow for days to be worked from the home country and still be taxed in the first place by the work state. Additionally, some countries have announced a temporary modification to the way work days and days of presence are counted under force majeure circumstances, to mitigate the tax impacts arising from work performed by stranded cross-border workers.

Deloitte's view

The OECD guidance is not specific to any country and does not impact the laws in any particular country. However, the guidance does serve to clarify considerations related to several common stranded employee work patterns. The OECD encourages countries to work together to alleviate unplanned tax implications and mitigate potential new tax burdens that arise due to the crisis. To this end, the analysis specifically makes mention of recent guidance from tax authorities in the United Kingdom, Ireland, and Australia which all address the treatment of days spent in their respective country as a result of COVID-19 circumstances.

The guidance also highlights that Treaty applications cannot immediately resolve the more complex pattern of a stranded cross-border worker, and there continues to be some ambiguity in the case of a worker stranded in a prior residence country. There are a growing number of tax authorities clarifying days counting rules, residency tests and other related provisions, and these actions will certainly provide relief so that employers and employees can make choices for the safety and health of their people without onboarding complex and inefficient tax obligations.

The guidance also reveals a range of questions that employers and employees should be aware of, such as:

- Work patterns that include non-Treaty country combinations,
- Recognition that not all Treaties align with the OECD Model Treaty upon which the guidance was based, and
- Conditions which need to be in place to rely on the "force majeure" concept upon which some of the OECD guidance was based.

It is encouraging to see countries unilaterally adopting relief measures to guard against tax burdens inadvertently arising from stranded worker situations, and to note that the OECD is continuing to work "…with countries to mitigate the unplanned tax implications and potential new burdens arising due to the effects of the COVID-19 crisis."

As employers navigate their evolving compliance obligations, they are likely to target high exposure scenarios such as non-Treaty country combinations or employees stranded in high tax rate jurisdictions. In addition, employers and employees will benefit from careful application of treaty positions and consistent monitoring of jurisdiction-specific relief mechanisms. This OECD guidance can help employers understand potential actions that many countries may follow.

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Proactive perspective – It's what's needed most

What is the change?

Working remotely from Singapore due to COVID-19

On 6 April 2020, the Inland Revenue Authority of Singapore (IRAS) announced that individuals who work for overseas employers outside Singapore but are working remotely from Singapore due to COVID-19, will not be treated as exercising employment in Singapore, and therefore will not be subject to income taxes in Singapore. The IRAS announcement applies to the following groups:

Singapore citizens and Singapore Permanent Resident (SPR) employees who returned to Singapore to work remotely during the COVID-19 pandemic: The IRAS announcement applies from the date of return to 30 September 2020, although this date is subject to review as the COVID-19 situation evolves. The following conditions must be met:

1. There is no change in the contractual terms governing the overseas employment of the individuals before or after their return to Singapore; and
2. This is a temporary work arrangement due to COVID-19.

Where both conditions are met, the employment income of such individuals will not be taxable in Singapore from the date of return to 30 September 2020. However, the general taxation rules for income earned in Singapore will apply where either condition is not met.

Non-resident foreigners who came to work in Singapore on short-term business assignments, but are unable to leave at the end of their assignments due to COVID-19: The following conditions must be met:

1. The extended stay in Singapore is for a period of not more than 60 days; and
2. The work performed during the extended stay is not connected to their business assignment in Singapore and would have been performed overseas if not for COVID-19.

Where both conditions are met, the employment income for the period of the extended stay in Singapore will not be taxable in Singapore. However, the general taxation rules for income earned in Singapore will apply where either condition is not met.

Permanent establishment (PE): Where employees of a foreign company remain in Singapore due to travel restrictions related to COVID-19, the IRAS has announced that such unplanned presence in Singapore will not create a PE for the foreign company, provided the following conditions are met:

1. The foreign company does not have a PE in Singapore for year of assessment 2020 (accounting period ending 2019);
2. There are no other changes in the economic circumstances of the company (including the company's principal activities and business model, the nature and conduct of the company's business operations in Singapore and elsewhere, and the usual locations in which the company operates);
3. The unplanned presence of employees in Singapore is due to travel restrictions related to COVID-19, and their physical presence in Singapore is temporary (*i.e.*, not more than 183 days in calendar year 2020 from the date of first arrival in Singapore); and
4. The activities performed by employees during their unplanned presence would not have been performed in Singapore if not for the travel restrictions.

To support a company's claim that it has no PE in Singapore, the company should maintain relevant documentation and records, and provide this information to the IRAS upon request.

What does the change mean?

Employees: Generally, if an individual is based outside Singapore for work purposes, the income derived from employment exercised overseas is not considered Singapore-sourced and should not be subject to tax in Singapore.

However, where an individual exercises his or her employment in Singapore, any income derived from the employment is considered Singapore-sourced. The income should, therefore, be reported for tax purposes in Singapore, unless the individual may be exempt from tax under domestic law, or a double tax treaty.

The IRAS announcement clarifies that Singapore citizens or SPR employees who work for overseas employers outside of Singapore, but who returned to Singapore to work remotely due to the COVID-19 situation, will not be subject to income tax in Singapore provided the conditions noted above are met. The exemption applies only from the date of return to 30 September 2020 initially, although this date is subject to review.

The exemption applies also to foreigners who have completed their assignments in Singapore but are unable to leave the country due to COVID-19, and therefore have to work remotely for their overseas employers during their extended stay in Singapore. The income derived during the extended period will not be taxable in Singapore where all the conditions are met. The period of extended stay must not exceed 60 days, and foreigners must keep track of the time they spend in Singapore.

Where an individual is given another business assignment in Singapore during the extended stay, the employment income for the whole period of stay in Singapore for both assignments will be subject to tax.

Employers: Employers are not required to report income for employees who work outside of Singapore but are working remotely in Singapore due to COVID-19 during the specified exemption period, where all conditions are met.

PE: Generally, where an employee of a foreign company exercises his or her employment in Singapore, there may be potential corporate tax implications (*i.e.*, PE exposures) for the foreign company, depending on the employee's activities, and duration of stay in Singapore.

Where employees of a foreign company remain in Singapore due to travel restrictions related to COVID-19, and the employees meet all of the conditions noted above, the foreign company must retain the relevant documentation and records and provide this information to the IRAS upon request.

Deloitte's view

The measures announced by the IRAS provide welcome support and clarifications to affected employees and employers in these unprecedented times.

Contacts

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South Korea:
FY2019 tax return payment deadline for individual taxpayers

What is the change?

The original deadline for 2019 Korean individual tax return filing and payment is 1 June 2020. In accordance with the government's efforts to mitigate the economic impact of the coronavirus (COVID-19), the government announced it will extend the annual individual income tax payment deadline to 31 August 2020.

Individual taxpayers may now pay the income tax due (including local tax surcharge) by 31 August 2020, instead of the original deadline of 1 June 2020, without any penalties or interest.

However, this due date extension only applies to income tax payments, not the filing of individual income tax returns. Individual income tax returns should still be filed by the original due date, 1 June 2020, although the due date for any tax payments has been extended to 31 August 2020.

Who will it impact: All individual taxpayers who file individual income tax returns with additional taxes due.
When will it come into effect: The deadline extension is effective immediately.

Deloitte's view

The deadline for income tax payments has been extended to 31 August 2020, which is three months later than the original due date of 1 June 2020. Regardless of the three-month payment extension, the deadline for filing individual income tax returns remains the same, and late filing penalties will be imposed on individuals who submit their individual income tax returns after 1 June 2020.

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United States:
The IRS Releases Guidance on Travel Disruptions Arising from the COVID-19 Pandemic

What is the change?

The COVID-19 pandemic has created significant travel disruptions for individuals traveling internationally, including many individuals who were living and working abroad. For example, US citizens and residents on foreign assignments may have been required to return to the United States. Similarly, business travelers visiting the US may have been forced to remain in the United States due to travel disruptions or stay-at-home orders. These changed circumstances may create an unexpected US tax residency status for an individual stranded in the US or may limit the ability to qualify for certain tax benefits under US law. Additionally, spending unexpected days in a country could impact the ability to claim benefits under a bilateral income tax treaty.

On April 21, 2020 the Internal Revenue Service (IRS) released Revenue Procedures 2020-20 and 2020-27 which provide guidance and various exceptions to US tax rules surrounding tax residency requirements, qualification for certain treaty benefits, and eligibility for the foreign earned income exclusion. Additionally, the IRS posted frequently asked questions (FAQs) to the IRS website providing information for nonresident aliens and foreign businesses impacted by the COVID-19 travel disruptions.
URL: https://www.irs.gov/pub/irs-drop/rp-20-20.pdf
URL: https://www.irs.gov/pub/irs-drop/rp-20-27.pdf

IRS Frequently Asked Questions
URL: https://www.irs.gov/newsroom/information-for-nonresident-aliens-and-foreign-businesses-impacted-by-covid-19-travel-disruptions

Revenue Procedure 2020-20

Revenue Procedure 2020-20 provides guidance surrounding US tax residency requirements and qualification for certain treaty benefits for individuals unable to leave the US because of COVID-19 travel restrictions.
URL: https://www.irs.gov/pub/irs-drop/rp-20-20.pdf

US Tax Residency: Under current US tax law, non-US taxpayers are classified as US tax residents if they meet the substantial presence test. An individual is a resident under the substantial presence test in the tested calendar year if:

1. The individual is present in the United States on at least 31 days during the tested calendar year; and
2. The sum of:
    a. The number of days of presence in the tested calendar year;
    b. One-third of the number of days of presence in the preceding calendar year; and
    c. One-sixth of the number of days of presence in the second preceding calendar year totals 183 days or more.

An exception to this rule applies if the individual intended to leave the US but was unable to do so because of a medical condition that arose while the individual was present in the US (the "medical condition exception").

Revenue Procedure 2020-20 provides that certain days of presence in the United States as a result of the COVID-19 pandemic can be excluded for purposes of the substantial presence test under the medical condition exception. Specifically, up to 60 consecutive days of presence may be excluded from the substantial presence test for individuals who intended to leave the United States during the 60 days but were unable to do so due to COVID-19 travel disruptions. The consecutive 60-day period must begin on or after February 1, 2020 and on or before April 1, 2020. The individual is presumed to have intended to leave the US on any day during this period unless the individual has applied, or otherwise taken steps, to become a lawful permanent resident of the US.

In order to qualify for exempt days under this exception, the individual should:

1. Not have been a US resident at the close of the 2019 tax year,
2. Not be a permanent resident (Green Card holder) at any time in 2020,
3. Be present in the US on each of the excluded days of presence, and
4. Not become a US resident in 2020 due to days of presence outside of the excluded period.

An individual that qualifies for this COVID-19 relief may claim it in addition to, or instead of, other exceptions to the substantial presence test they may qualify for, such as the closer connection exception or the standard Medical Condition Exception for medical conditions other than COVID-19.

To claim this exception, an individual must attach Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition*, to their 2020 tax return. Individuals not required to file a 2020 tax return are not required to file Form 8843 but should retain records to document their circumstances. Revenue Procedure 2020-20 provides specific details for how to complete Form 8843 if required.

Treaty benefits: Many income tax treaties that the US has entered into with other countries provide that an individual can exclude income from their US income tax return under the dependent personal services / income from employment article(s) of the treaty. To claim this treaty benefit, the individual must be in the US for less than a certain number of days, generally 183, in that year or any 12-month period beginning or ending in that year. Revenue Procedure 2020-20 allows an individual to exclude up to 60 consecutive days of US presence when determining eligibility for treaty benefits with respect to income from employment or the performance of other dependent personal services within the United States. As with the exception to the substantial presence test, the consecutive 60-day period must begin on or after February 1, 2020 and on or before April 1, 2020.

To claim this treaty benefit, the individual should provide Form 8233 to his / her employer to indicate that the income is exempt under the treaty. If Form 8233 is not provided to the employer or if the employer has already withheld income tax from income that would be exempt under the treaty, the individual can file Form 1040NR attaching a statement containing the required information on Form 8233 and noting on the statement "COVID-19 MEDICAL CONDITION TRAVEL EXCEPTION", the period of days that the individual is excluding, the applicable tax treaty, and the tax treaty article.

Revenue Procedure 2020-27

Revenue Procedure 2020-27 provides guidance for US taxpayers who were living and working abroad and had to return to the US because of the COVID-19 pandemic. The foreign earned income exclusion of section 911 allows eligible individuals to exclude certain amounts of foreign earned income from US taxation. To qualify for this exclusion, an individual must, in addition to other requirements, meet either the Bona Fide Residence or Physical Presence Test. The Bona Fide Residence Test is met by being a US citizen and a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire taxable year. The Physical Presence Test is met by a US citizen or resident who is physically present in a foreign country or countries for 330 days during any period of 12 consecutive months.
URL: https://www.irs.gov/pub/irs-drop/rp-20-27.pdf

Bona fide residence test: Current US tax law provides an exception to the Bona Fide Residence Test for individuals that would have met the requirements of the test but were required to leave a foreign country due to certain adverse conditions which preclude the normal conduct of business, as determined by the Secretary of the Treasury after consultation with the Secretary of State. The IRS annually releases a list of countries for which this exception applies. As a result of the COVID-19 pandemic, the following countries have been determined to meet this requirement:

- The People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau (China), as of December 1, 2019; and
- Globally, as of February 1, 2020.

To qualify for this relief, the individual must have established residency in the foreign country on or before the dates stated above. An individual who is absent from one of the above countries during the COVID-19 pandemic after the stated date will be considered to have met the requirements of the Bona Fide Residence Test for the period beginning on the date the individual began their period of absence from the relevant foreign country. The individual must otherwise reasonably expect to meet the requirements of the test and the period of excluded absence cannot extend beyond July 15, 2020. This date is subject to further extension.

Physical presence test: Revenue Procedure 2020-27 provides a similar exception to an individual seeking to qualify under the Physical Presence Test. If the individual was physically present in the foreign country on or before the dates specified above and could reasonably have been expected to have been present in the foreign country or countries for 330 days in a 12-month period, but for the COVID-19 pandemic, they may use any 12-month period to meet the test. As with the Bona Fide Residence Test, the individual would only be eligible to claim the benefits of the exclusion related to the days of qualifying physical presence in the foreign country.

IRS FAQs

In addition to the individual provisions addressed in the Revenue Procedures summarized above, the FAQs address certain business determinations related to activities conducted by individuals who are temporarily present in the US due to the emergency travel disruptions. The IRS first clarifies that a nonresident alien or foreign corporation will not be treated as engaged in a US trade or business if activities were performed by any individuals temporarily present in the US during the same time period referenced above, if the activities would not have been performed in the US but for the travel disruptions. Secondly, the IRS clarifies that these activities performed by individuals temporarily present in the US will not be taken into account to determine whether a permanent establishment has been created in the US.
URL: https://www.irs.gov/newsroom/information-for-nonresident-aliens-and-foreign-businesses-impacted-by-covid-19-travel-disruptions

Deloitte's view

These Revenue Procedures and FAQs provide much needed guidance for international employees and entities whose living situation has been disrupted due to the COVID-19 pandemic. Many questions had been raised regarding the tax treatment of these individuals, and the IRS has now provided clarifying guidance for these employers and employees.

Other income sourcing rules may still impact the overall tax liability of these employees, but this guidance provides some relief for taxpayers in this situation.

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OECD:
Permanent Establishment and related considerations due to workers stranded as a result of COVID-19

Introduction

The Organisation for Economic Co-operation and Development (OECD) has provided guidance related to potential cross-border corporate taxation issues triggered by employees stranded and performing services in non-employment countries as a result of the COVID-19 crisis. Included in the OECD guidance are recommendations on the implications of the COVID-19 crisis on the creation of permanent establishment (PE) and concerns related to corporate residency, and an OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis.

A link to the OECD's recommendations and analysis may be found online.
URL: https://www.oecd-forum.org/users/369395-pascal-saint-amans/posts/65032-oecd-issues-recommendations-on-implications-of-the-covid-19-crisis-on-cross-border-workers-and-other-related-cross-border-matters

OECD Observations and recommendations

The OECD Center for Tax Policy and Administration (CTPA) drafted guidance which acknowledges that as a result of travel restrictions, many workers are unable to physically perform their duties in their country of employment and as a result may be tele-working from another jurisdiction. Such conditions give rise to the concern that a company has created a PE in that other jurisdiction, and the scope and duration of employee activities could trigger new entity filing requirements and potentially new tax obligations. The OECD provided several examples of circumstances that corporations and governments should consider when evaluating corporate residency and PE.

OECD Examples

Until specific country guidance is published with respect to COVID-19, the scenarios included in the OECD's recommendations and analysis yield some learning and insight for parties seeking to navigate the complexities related to cross-border work and related PE considerations for employers.

Two issues noted by the OECD are described below:

1. Impact to the determination or creation of a PE resulting from activities being performed in a country as a result of COVID-19
2. Impact to the residency status of a company as a result of change in the "place of effective management" due to the displacement of key executives

Note: In the treaty context, state means the jurisdiction(s) in question; below state and country are used interchangeably.

PE determination considerations within the context of COVID-19: The OECD analysis reviewed the following situations:

- **Home Office:** In general, a PE should have a "degree of permanency and be at the disposal of the enterprise" (emphasis added). Where an individual is working from home as a result of COVID-19, they are typically doing so at the directive of a government under force majeure circumstances. The condition is likely to be temporary and it is the government, not the company, that has required the employee to conduct business from their home. Therefore, it is unlikely that either condition for a PE would be met. The OECD does note that their guidance is predicated on the basis that teleworking from home does "…not become the new norm over time."
- **Agency PE:** The OECD specifically looks at whether the activities of an employee who habitually concludes contracts and is temporarily working from home for a non-resident employer, could give rise to a dependent agent PE. The OECD analysis focuses on the "habitual" requirement providing interpretations based on Treaty Commentary from 2014 and 2017, noting that the employee presence in the non-resident country is likely to be considered merely transitory and therefore unlikely to be considered habitual if force majeure caused the employee work circumstances.
- **Constructions site PE:** The OECD notes that activities on construction sites are temporarily being interrupted due to COVID-19 and in general these temporary interruptions should be included in determining the life of a site and will therefore affect the PE determination.

Company Residence and Place of Effective Management: The OECD reviews concerns regarding a change in a company's tax residency, or the creation of a dual residency, due to the emergence of a new "place of effective management" as a result of key executives' inability to relocate or travel due to COVID-19. The OECD notes that as the circumstances are transitory, the executive should not be considered to meet the standard of "usually" carrying on their activities from the location in which they are stranded. The application of tie-breaker provisions should resolve conflicts arising from executive activity in a non-resident country, and where such provisions are not determinative, the parties could rely on competent authority procedure.

Deloitte's view

The OECD guidance is not specific to any country and does not impact the laws in any particular country. However, the guidance does serve to clarify considerations related to several common stranded employee work patterns. The OECD encourages countries to work together to alleviate unplanned tax implications and mitigate potential new tax burdens that arise due to the crisis. To this end, the analysis specifically makes mention of recent guidance from tax authorities in the United Kingdom, Ireland, and Australia which all address the treatment of days spent in their respective country as a result of COVID-19 circumstances.

The guidance also highlights that Treaty applications cannot resolve situations where a treaty does not apply or where a country's domestic laws (including subdivision laws within a country such as states in the US) may contain a lower threshold for determining corporate residency and/or PE. As a result, country tax administrators are "…encouraged to provide guidance on the application of domestic law threshold requirements…to minimise or eliminate unduly burdensome compliance requirements for taxpayers in the context of the COVID-19 crisis."

As noted in our prior alert, the guidance also reveals a range of considerations that companies should be aware of, such as:

- Work patterns that include non-Treaty country combinations could also give rise to corporate taxation concerns,
- Recognition that not all Treaties align with the OECD Model Treaty upon which the guidance was based, and
- Conditions may need to be in place to rely on the "force majeure" concept upon which some of the OECD guidance was based.

As employers navigate their evolving compliance obligations, they are likely to focus on high exposure scenarios such as non-Treaty country combinations or PE exposures in high corporate tax rate jurisdictions. In addition, companies should consider careful application of treaty positions and consistent monitoring of jurisdiction-specific relief mechanisms.

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