

Legal Compass

Employment Law and Social Insurance | Tax

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Workation - Is mobile working from anywhere in the world your future working model?

The term "workation" has become established as a term for the combination of work and vacation, referring to remote working from any location - for example a chalet in the Swiss mountains, a finca in Mallorca or even on the road in a van. It is hard to imagine the modern professional world without the flexible work location model. Although Swiss employers are generally more conservative already in terms of home office compared to other European countries, an upward trend with regard to a flexible work place can be observed.

However, the legal implications of relocating the workplace should be carefully examined in advance, especially in a constellation with cross-border elements. These are examined below from a general perspective. In addition, the following explanations are generally limited to employed gainful activities.

1. Employment Law

A change of the workplace from the existing setting (i.e. from the employer's premises to home office within Switzerland or abroad) is in principle a change of contract, which must be agreed accordingly in the required form between the parties to the employment relationship. This applies in particular if employees are no longer to have their own workplace at the employer's office in the future. In this case, a regulation on the reimbursement of expenses should also be included in the amendment to the contract. When implementing the contract amendment, care should also be taken to ensure that, as far as possible, subordination to Swiss law is ensured by means of a written governing law clause.

If an employer wants to unilaterally impose a change of work location (to a home office) without the employee's consent, this is in principle a notice of termination with an offer of re-employment under altered conditions.

2. Information and Consultation

If a majority of employees are affected by a change of workplace, it must be checked whether the employees' representative body, or if there is no such representation, all employees, must be informed and consulted in good time before the contract amendment comes into effect.

3. Social Security Law

An employment relationship abroad always raises the issue of the competent social security authority. This competence can also change subsequently. In the event of a de facto change of workplace, this question should therefore always be assessed in relation to the specific individual case.

As part of the bilateral agreements in connection with the free movement of persons, Switzerland has concluded an agreement with the EU on the coordination of social security systems, which is why, in principle, the same rules for determining the applicable social security system apply in constellations between Switzerland and an EU state. Switzerland has concluded bilateral agreements with certain third

Authors



Andrea Baetscher
Partner



Olivier Dunant
Partner



Patricia Meier
Senior Associate

countries, while in relation to others no such agreement exists. Especially in the latter scenario, the local foreign law must always be taken into consideration in the analysis of the applicable social security law.

As a rule of thumb, the country of employment principle applies; i.e. the social security law at the place of employment can regularly be used as a basis, unless the conditions for a merely temporary posting are met. In relation to the EU, the principle applies that employees are socially insured in their country of residence if they usually perform at least 25% of their total activity there.

However, there are also exceptions to the country of employment principle, and therefore, the applicable social security law must always be clarified beforehand and regularly checked as to changes in the overall circumstances. This also applies if the gainful employment is carried out in several countries.

4. Right of Residence

In case of a stay abroad with gainful employment, the requirement for a local residence and work permit must always be considered. It is advisable to clarify this sufficiently in advance, even in case of only short-term activities abroad, and to plan the application process accordingly.

5. Insurance Coverage

Before allowing employees to perform their work at a place other than the employer's premises, it is advisable to check the insurance coverage. It is in particular possible that accident insurance coverage does not extend to places of work other than the employer's premises. It is even more important to check the need for adjustment of the insurance policy if a temporary relocation of the workplace abroad is envisaged.

6. Income Tax Liability

Whether or not a short-term activity abroad leads to an additional income tax liability of an employee at the foreign place of employment must be examined on the basis of the legal requirements of the respective country. As a general rule, the unlimited tax liability of an individual remains at the domicile of that person. The domicile is to be determined on the basis of the definition of domestic law - for Switzerland, this is the place of residence with intention to settle, i.e. the personal centre of life, which is to be determined with the help of the actual circumstances. In principle, there is an unlimited tax liability at the place of tax domicile.

In case of regular residence abroad, limited tax liability may arise at the place where the activity is carried out even without a change of tax domicile (also applies to cross-border commuters). The point in time at which tax residence arises is defined by local law. In Switzerland, the tax liability begins on the day on which the taxpayer takes up residence or regularly stays in a country for the purpose of gainful employment. For weekly residents and cross-border commuters, however, special provisions usually apply within the framework of double taxation agreements. In case of a change of workplace, there may also be consequences with regard to the deduction of withholding tax.

If there is double residency in the cross-border relationship due to tax residence, this must be resolved on the basis of the applicable double taxation agreement. In principle, income from employment is taxable in the state of residence, but the state in which the work is carried out usually has a limited right of taxation with regard to the work performed there. If there is no double taxation agreement between the two countries, there is a risk that both countries will claim unlimited tax liability, resulting in effective double taxation.

It is advisable for employees who voluntarily move their workplace to another country to clarify what effect this will have on their tax burden. The exemption provisions which were introduced due to government sanitary measures in connection with the COVID-19 pandemic are generally no longer applicable after the pandemic measures have been lifted.

Employers who allow their employees to choose their own workplace are well advised to stipulate in the contract that the consideration of the tax consequences of this change of workplace is the sole responsibility of the employees.

7. Permanent Establishment

If employees perform their work at a location other than the employer's business premises, it should be examined to what extent this leads to other or additional tax connecting factors at company level. Depending on the duration, regularity and seniority level of the employee and his or her ability to represent the company externally or to make decisions essential to the company's profit-making (e.g. through the authority to conclude contracts), there is a risk that, as a result of an economic affiliation, a permanent establishment of the employer will be established at the employee's foreign workplace. In addition to value-creating activities, an actual administrative activity may also be sufficient to qualify the foreign workplace as a permanent establishment. As a consequence, additional administrative obligations may arise for the company at the place of the permanent establishment (e.g. the obligation to file a tax return) and at least a limited tax liability of the company for the profit attributable thereto. If insufficient substance remains in the company's state of domicile, there is even the risk that the other State may deem the local establishment as an effective place of management and thus claim unlimited tax liability.

8. Data Protection and Data Security

When relocating the workplace (outside the employer's premises), various data protection implications must be considered. In addition to technical security measures to protect company and customer data from unauthorised access through cyberattacks, organisational measures are also necessary. From the employer's point of view, it is particularly important to ensure that employees can work undisturbed and that family members or other third parties cannot listen in on business telephone calls or view documents. Likewise, it should not be ignored that when working on the train or in a public café, third parties may be able to view the employee's laptop screen if no appropriate protective measures are taken.

In addition, all applicable data protection regulations must be complied with. If the employee works abroad and has access to the employer's server, it can be assumed that data is transferred abroad. In order to sufficiently fulfil its duty of care and not become liable, the employer must accordingly comply with the general principles of the Data Protection Act and ensure the adequacy of protection in the destination country. Data processing at the foreign workplace must be carried out in accordance with applicable local laws.

9. Further Legal Implications

Subject to the legal provisions of the State where work is de facto performed and taking into account the conflict of laws provisions in international constellations, it must be considered that a place of jurisdiction may be established at the effective place of work. Swiss procedural law provides that employees have a place of jurisdiction for actions arising from the employment relationship at their usual workplace, which they cannot waive in advance. Given the current circumstances, the workplace at which the employee mainly performs his or her work may also qualify as the usual workplace. It is therefore possible that employees could claim salary payments for overtime against the employer before a court abroad. If the circumstances of the actual performance of work change not only during a short, temporary period, the usual place of work may also change in the course of the employment relationship.

In addition, local statutory law may apply. Various countries have mandatory labour law provisions based on the concept of employee protection, which are automatically and mandatorily applicable if the actual workplace is in the respective country. This can lead to unforeseen problems for employers, especially in countries with more extensive protection against dismissal compared to the relatively liberal dismissal provisions under Swiss law. Furthermore, the local working and rest time regulations at the usual workplace must regularly be complied with.

Your contacts for employment and labour law



Peter Haas
Managing Partner

T: +41 328 75 75
peter.haas@eversheds-sutherland.ch



Olivier Dunant
Partner

T: +41 22 818 45 00
olivier.dunant@eversheds-sutherland.ch

Your contact for tax law:



Andrea Baetscher
Partner

T: +41 22 818 45 00
andrea.baetscher@eversheds-sutherland.ch

Your contact for data protection law:



Markus Naef
Partner

T: +41 44 204 90 90
markus.naef@eversheds-sutherland.-sutherland.ch

eversheds-sutherland.ch

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