

# Expatriate News

**Special Edition** June 2005: The New EC  
Social Security Regulation



During the last BDO Global Expatriate Services Conference a number of surveys helped to document the technical content of the conference. The BDO Global Expatriate Team is using a series of special newsletter editions to share the information gathered in the surveys and at the conference.

We would like to thank everybody who shared the specific country information that made it possible for us to produce this newsletter and who made the Brussels Expatriate Services Conference a huge success.

Some of the information below may now be subject to change. In all specific cases you should check the current position with your BDO Expatriate Services contact.

This special edition of our newsletter is about EC social security Regulation 883/2004. A special thank you goes out to Ms. Nancy Slegers from BDO Antwerp office for her contribution to this newsletter.

## **Social Security Regulation 883/2004**

About one year ago, just before the entry of ten new member states into the European Union, the European Council (the Council) succeeded in adjusting, simplifying and modernising one of the most difficult and technically complicated texts of the European social security law, EC Regulation 1408/71 (the Regulation or the current Regulation). This Regulation is a fundamental part of the European Community (EC) law and one of the first regulations to be adopted. It will be replaced by a new Regulation 883/2004 at the earliest in 2007.

## **Origin and evolution of the present EC-Regulation 1408/71**

Following the establishment of the EC, one of the main tasks of the Council was to establish the social

security measures necessary within the framework of free movement of persons.

The free movement of persons is one of the cornerstones of European integration and one of the four freedoms laid down in the EC Treaty. The most important instruments adopted by the Council in order to achieve this objective are EC Regulation 1408/71 on 14 June 1971 and EC Regulation 574/72 regarding the application of Regulation 1408/71.

The Regulation co-ordinates the application of the national legal social security systems of the various EU member states in order to ensure equality of treatment in all matters related to social security for employees, self-employed persons and their family members moving within the EC.

Since 1971 amendments have been made and the Regulation has been supplemented by various rulings from the European Court of Justice (ECJ) and recommendations from the Committee responsible for social security for migrant workers.

As a result of these changes, the number of countries now covered by the Regulation, the specific stipulations and changes in their domestic social security legislation, as well as new European migration trends, it was clear that the Regulation had become too complicated and technical and no longer guaranteed the main goal of promoting the free movement of persons. Therefore, a simplified, modernised text was required.

## The process of adjustment

The rewriting of the Regulation has taken a number of years. As far back as 1992, the European Council of Edinburgh called for simplification of the Regulation. On 21 December 1998 the European Commission submitted a proposal for a new regulation to the Council.

The member states wanted consensus before 1 May 2004, the date of entry of the ten new member states into the EU. They finally succeeded and on 26 January 2004 the new Regulation was accepted by the Council under the reference 883/2004 (the new Regulation). The new Regulation was published in the Official Journal of the European Parliament on 30 April 2004.

However, acceptance did not result in immediate entry into force of the new Regulation because the effective date is linked to the date of effect of a new application regulation. The Commission still needs to submit a proposal to the Council to amend the current application Regulation 574/72. It is expected

that this will be done later this year and that the new Regulation will not come into force before 2007.

In the meantime, the present Regulation remains applicable.

**This newsletter outlines the basic principles and territorial coverage of the present and new Regulations, as well as the most important changes in the new Regulation in comparison with the current Regulation.**

## Basic principles of the present and new Regulations

### Unifying the applicable legislation

This principle aims to guarantee that persons will only be subject to one legislation. In order to achieve this, it is necessary to guarantee not only that a person will pay social security contributions in only one member state, but also to avoid that they would be subject to no legislation at all.

### Equality of treatment under different national legislation

This principle prohibits discrimination between persons of different nationalities. The Regulation specifies that all persons to whom the Regulation applies will have the same social security rights and obligations.

### Exportation of accrued social security entitlements

This principle aims to guarantee that migrating persons can export their social security rights and allowances when residing or living abroad or returning to their home country. No social security benefit can be withheld, cut or suspended simply because a person is domiciled in a different member state to the one where the institution responsible for the remittance is established.

### Aggregation of insurance periods

On the basis of this principle, in order to check whether a person complies with the requirements regarding the length of the insurance period, their professional activities or residence, a member state needs to consider equivalent periods of insurance, professional activities or residence under the legislation of other member states.

### Territory covered

The current Regulation covers all nationals of:

- The 25 member states of the EU

- Iceland, Norway and Liechtenstein (member states of the EEA)
- Switzerland
- Third countries nationals who are legally residing in one of the member states of the EU (except Denmark) and who work or who have worked in the territory of one of those member states (except Denmark).

### **Significant changes in the new Regulation**

The following are the most significant adjustments to the personal and material scope of the Regulation and to the simplification of the reference rules.

#### **Personal scope**

The present Regulation gives an exhaustive list of people covered, which has gradually been extended since 1971.

The new Regulation contains no such list and therefore covers every person, active or non-active, who is covered by the domestic social security legislation of a member state. Therefore, the new Regulation will apply if the following conditions are fulfilled:

- A person (or his family members or his descendants) is legally domiciled or residing in a member state; and
- this person is subject to, or has been subject to, the social security system of a member state.

#### **Material scope**

The current Regulation provides an exhaustive list of the social security benefits within its scope, which has been broadened to all legislation covering pre-retirement benefits. Paternity allowances have also been brought within the scope of the new Regulation, but it does not apply to supplementary systems defined by individual or collective agreements outside the scope of the regulation (even if they are generally binding by government order), nor to social assistance, nor to social security agreements between a member state and a third country.

#### **Simplification of the reference rules**

The reference rules of the new Regulation have been simplified. The current separate provisions for transport workers, civil servants and personnel of diplomatic missions and consular posts have been deleted. The same basic principles as those which apply under the current Regulation have been adopted for the different professional categories and a wide range of exceptions has been taken out.

## **General application rules**

The basic principle in the current Regulation that for a person moving within the EU only one social security system of one member state can apply at any time is retained in the new Regulation. In principle this is the social security legislation of the state of activity.

The new Regulation clarifies the position of “post-active” persons. Post-active persons are persons who have ceased their activities in a member state. Under the current Regulation post-active persons who are no longer subject to the social security system of the state of activity are subject to the social security system of the state of residence.

In the new Regulation the category of active persons now includes post-active persons who benefit from a social security allowance due to unemployment, pre-retirement or sickness. Active persons will be subject to the legislation of the state of activity, irrespective of whether they live in another member state or works for an employer residing in another member state.

The category of non-active persons includes persons who receive a social security allowance due to disability, old age, occupational disease or industrial accident or illness that requires treatment for an indefinite time. Non-active persons will be subject to the social security system of the state of residence.

The allocation of the applicable social security legislation, by reference to the state of activity or the state of residence, automatically excludes the legislation of another state.

## **Exceptions to the general rule**

As under the current Regulation, the new Regulation provides exceptions to the general rule:

### **Secondment**

The specific provisions on secondment for employees and self-employed persons remain in place in the new Regulation.

The system of relocation foresees the possibility to remain subject to the social security legislation of the state of residence. The reason for this exception is to avoid unnecessary administrative complications for the employer and employee where the employee has to perform activities in another member state for a limited period of time.

In the current Regulation the maximum secondment period for employees and self-employed persons is 12 months. This period is extendable to 24 months under various conditions. In practice, situations have

occurred where the exemption is applied for a period of five years and more.

In the new Regulation this rule has been made more flexible by stipulating that the maximum secondment period for employees (as well as for self-employed persons) will be 24 months. In principle, no extension will be granted.

Furthermore the conditions for secondment in the new Regulation have been adapted in accordance with ECJ case law. Consequently, an employee will only be able to apply for the secondment rule provided that he “normally” carries out his activities in the state of his residence. Through this stipulation the new Regulation aims to avoid the situation where employment agencies hire employees in one member state in order to use the secondment rule to avoid high social security contributions in the member state where the activities are performed.

For self-employed persons the secondment rule will only apply if the activities undertaken in the state of activity are “similar” to the activities performed in the state of residence.

### **Simultaneous employment in two or more member states**

Under the current Regulation if an employee or a self-employed person concurrently performs part of his activities in the state of residence and in the state of activity, he is compulsorily subject to the social security system of the state of residence. This principle is basically unchanged in the new Regulation.

The new Regulation states that in the event of such concurrent employment, the social security system of the state of residence will only apply provided that a ‘substantial’ part of the activities is performed in that state. However, the meaning of ‘a substantial part’ is uncertain and the lack of a definition could mean that the different views of the member states will need to be taken into consideration. It is obvious that in practice this could result in conflicts between the different member states.

It is yet to be seen whether the new application Regulation will bring some clarification to this area.

### **Concurrent employment and self-employment in two or more member states**

Another significant adjustment in the new Regulation is the removal of Annex VII to the present Regulation.

If a person works as an employee in one member state and as a self-employed person in another member state, it is possible under the present

Regulation that in a number of situations more than one social security system applies. These situations are described in Annex VII to the current Regulation.

As an example, in the current Regulation a person resident in the Netherlands who is working as a self-employed person in Belgium (say, as a director of a Belgian company) and as an employee in the Netherlands (say, as a director of a Dutch company) will be subject to the social security legislation for self-employed persons in Belgium as well as to the social security system for employees in the Netherlands.

Under the new Regulation this will no longer be the case and the person in the previous example will become subject to the Dutch social security system for employees.

It is also important to note that the new Regulation does not define the terms ‘employee’ and ‘self-employed’ persons. In order to determine whether an activity qualifies as the work of an employee or a self-employed person, one will have to look at the social security legislation of the member state where the activity is undertaken. This principle already exists by virtue of ECJ rulings.

### **Date of effect**

As mentioned above, the effective date of the new Regulation is linked to the date of the new application Regulation, which is some way in the future. In the meantime, the current Regulation remains applicable and no rights can be acquired under the new Regulation before this date.

### **Transitional rights**

After the new Regulation comes into effect, transitional provisions will apply.

Consequently, where as a result of the new Regulation, a person would become subject to a social security legislation which is different to the one applicable under the present Regulation, he will be able to remain subject to the original legislation as long as the relevant situation remains unchanged. However, this right can be altered by the application of the new Regulation at the request of the person concerned.

If the request is submitted within three months of the date of effect of the new Regulation, the person will be subject to the new legislation from that effective date. If the request is made after this time, the changeover will take place on the first day of the month following the request.

## **Repeal of Regulation 1408/71**

As from the effective date of the new Regulation, the current Regulation will be substantially repealed.

However, the current Regulation will remain in force and continue to have legal effect for the following Regulations and agreements as long as these Regulations and agreements are not repealed or modified in the light of the new Regulation:

- EC Regulation 859/2003 which extends the provisions of Regulation 1408/71 and its application Regulation 574/72 to third country nationals who are not already covered by those Regulations solely on the grounds of their nationality.
- EC Regulation 1661/85 applicable to migrant workers with regard to Greenland.
- The EEA Agreement and the Agreement between the EC and its member states, on the one part, and the Swiss Confederation, on the other part, regarding free movement of persons, together with other agreements which contain a reference to Regulation 1408/71.

## More information

For more information, please contact your local BDO expatriate contact or in the Netherlands contact Armand Lahaije via email at [armand.lahaije@bdo.nl](mailto:armand.lahaije@bdo.nl) or by telephone on **+31-10-24 24 600**.

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This newsletter aims to provide general information etc. For completeness' sake we mention that if a particular country was not mentioned in this newsletter; the conclusion cannot be drawn that in that particular country an exit charge does not exist. We have mainly focused on the countries that submitted documentary information for our Brussels 2004 expat conference.