

GMS Flash Alert



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OECD – COVID-19: Recent Guidance on Tax and Cross-Border Workers

Updated guidance¹ recently released by the Organisation for Economic Cooperation and Development (OECD) looks at the many issues faced by cross-border employees and their employers around:

- permanent establishment (i.e., home office, dependent agent PE);
- changes in an individual's residence and how treaty tie-breaker rules apply; and
- income from employment, such as payments under stimulus packages, stranded workers, cross-border (frontier) workers, and teleworking from abroad.

The guidance reflects an appreciation for the situations that cross-border workers and their employers have faced in confronting the impact of the coronavirus pandemic on customary work patterns and business practices, and the reconsideration by taxing authorities of the conventional application of treaty provisions (i.e., the OECD Model treaty and the UN Model treaty), and how, in practice and policy, adjustments have been made by those authorities to the new reality.

WHY THIS MATTERS

The updated guidance should help taxing authorities, tax professionals, and cross-border workers and their employers better understand the current situation around taxing rights, tax obligations, and how several countries have sought to address the exceptional circumstances arising from the public health emergency.

Greater clarity is brought by the guidance to treaty-related issues relevant to the adaptations in cross-border working arrangements due to the pandemic that endures to this day, and may do so for the foreseeable future.

Context

In our April 2020 [report](#), we looked at guidance issued then by the OECD initially addressing the tax implications of the coronavirus pandemic on cross-border workers and other related cross-border matters (e.g., tele-work and right of taxation, residency, permanent establishment) in light of the travel restrictions and other restrictive measures imposed by countries around the world to combat the spread of the virus, and how policymakers were reacting to these changes.

The OECD updated guidance is mostly the same as the April 2020 guidance. Still, with the perspective of several months' experience as the pandemic has unfolded, and heretofore unseen situations have arisen involving cross-border employees which under normal circumstances would trigger conventional applications of domestic law and treaty provisions, and competent authorities around the world have been issuing guidance and enacting policies, the updated OECD guidance is more "evolved."

In its updated guidance, the OECD revisits many of these issues with the pandemic waxing and waning and morphing over the course of many months, with countries imposing a variety of measures to combat the virus and address its economic and social impacts, and with tax authorities around the world introducing guidance and relief to address situations created by what have come to be known as work-from-home arrangements, displaced workers, and remote workers.

Updated Guidance

Permanent Establishment (PE)

The updated 2021 guidance largely reiterates the OECD's views that the COVID-19 pandemic's temporary dislocation of employees to jurisdictions other than those in which they regularly work should not create new PEs for the employer. Similarly, the temporary conclusion of contracts in the homes of employees or agents create PEs for their businesses. And a construction site PE should continue to not be regarded as ceasing to exist when work is temporarily interrupted.

What's New

The updated guidance:

- recommends that jurisdictions consider "stopping the clock" for determining whether the PE threshold has been satisfied during certain periods when operations are suspended by governmental public health measures to prevent the spread of the COVID-19 virus;
- provides sample guidance on the creation of a PE based on pandemic-related work practices from Australia, Austria, Canada, Germany, Ireland, New Zealand, the United Kingdom, and the United States; and
- points out that different conclusions could be reached if workers continue activities in their pandemic-related locations after the safety measures and restrictions have been lifted.

Home Office

The 2021 guidance maintains that individuals working from home because of governmental measures related to the COVID-19 pandemic should not create a fixed place of business PE for the business or the employer. The test is generally based on a place both having a certain degree of permanency and being at the disposal of the business to be considered a fixed place of business for PE purposes.

An employee conducting intermittent business activities in a home office does not mean the place is at an employer's disposal. A home office may be a PE if it is used on a continuous basis for carrying on the employer's business and the

employer has required the individual to use that home office for the employer's business. The 2021 guidance notes that whether the business requires an individual to work from home is an important factor, and cites the example of a business not providing an office to an employee where the nature of the business clearly requires an office.

The updated guidance states that if an individual continues to work from home after the public health measures are lifted, the home office may be considered to have certain degree of permanence. However, that change alone will not necessarily result in the home office giving rise to a PE and a further examination of the facts and circumstances will be required to determine whether the home office is now at the disposal of the employer.

Agency PE

An individual who works from home temporarily for a nonresident company can give rise to a dependent agent PE if the worker habitually concludes contracts on behalf of the company. When work from home results from governmental measures during the COVID-19 pandemic, the 2020 guidance concluded it would not be considered as being performed "habitually." However, if the worker was habitually concluding contracts on behalf of a company in the home country before the pandemic, then the work from home required by the pandemic would not change the assessment. The updated guidance states if an employee continues to work from home after the public health measures are lifted and continues to conclude contracts on behalf of the nonresident company, it would be more likely that activity would be considered to be habitual.

Construction Site PE

Consistent with the 2020 guidance, the updated guidance concludes that a construction site PE would not be regarded as ceasing to exist when work in the site is "temporarily" interrupted. In light of the extraordinary circumstances, however, the 2021 guidance notes that jurisdictions may consider excluding from the calculation of time thresholds for construction site PEs certain periods when operations are shut down by the local governmental public safety measures.

Changes in Residence

The updated OECD guidance looks at issues arising from changes to a cross-border employee's residence status during this coronavirus pandemic as he moves – sooner than expected – from his normal place of work in the host location (i) back to the home location or (ii) to another jurisdiction, or he is stranded in the host employment location.

As earlier noted, the updated OECD guidance makes references to Australia, Canada, Finland, France, Greece, India, Ireland, New Zealand, the United Kingdom, and the United States as countries that have issued guidance and pragmatically addressed issues around residence which have arisen due to new work-from-home arrangements, remote workers, and displaced workers (largely presumed to be temporary in nature and in response to the pandemic and measures introduced by countries that limit mobility and restrict travel).

The fact patterns first examined in the April 2020 guidance get a fresh look in the update. In the example where a person who is temporarily away from home is stuck in the host location and is caught by the host country's residency rules, the new analysis would consider the treaty tie-breaker test to attribute the person's residence legally to his home location – this being the case as the person would not have, generally speaking, a "permanent home" available to him in the host location.

In the other example, when a person who had attained residence in the host country moved back to the home country – "previous home jurisdiction" – to ride out the pandemic, the OECD's analysis and conclusion are fuzzier in light of the person's stronger attachment to the previous home jurisdiction. There are also situations where in light of the applicability of the tie-breaker rule, tests and factors such as "habitual abode," as well as personal and economic ties, enter into the picture.

KPMG NOTE

The new guidance contemplates a “post-coronavirus restrictions” scenario when the mobile employee’s change in location persists even though the restrictions that induced the change are no longer applied, noting that a different approach may be appropriate.

Income from Employment

Double taxation risks arise in situations where employees move (or travel back and forth) from one country to another for work. In the OECD Model, Article 15 governs the taxation of income from employment by allocating taxing rights to the jurisdiction in which the employee physically exercises her employment. In the new guidance, the OECD elaborates further on issues around income from employment. The OECD looks at how, under different circumstances as a result of policies to combat coronavirus, Article 15 might be applied, such as:

- When a wage subsidy and similar income are received by cross-border workers that cannot perform their work due to restrictions;
- A worker who is stranded in a jurisdiction in which he is not resident but previously exercised an employment;
- A worker who works remotely from a jurisdiction for an employer who is resident in another jurisdiction.

The analysis implies that “an exceptional level of coordination between jurisdictions” would be useful in helping sort out double taxation risks and confusion over taxing rights in cases where “an involuntary and temporary change” of the place of work takes place.

Moreover, with payroll tax and withholding matters, the OECD notes, changed work patterns for cross-border employees can muddle compliance and administration, and lead to heavier burdens and higher costs.

KPMG NOTE

The OECD in its updated guidance refers to the temporary nature of the coronavirus-driven work arrangements and the measures countries have put in place to address the pandemic. It also raises the flag for all stakeholders to be prepared to address, from a tax perspective, the persistence of these changed work patterns and the mitigation of double taxation risk after national policies and restrictions that were put in place to cope with the pandemic have been rolled back and lifted.

KPMG NOTE: Parting Considerations

As we have seen, jurisdictions have exercised varying degrees of flexibility in terms of the creation of permanent establishment, residency rules, and taxing rights over income from employment in light of the changes induced by the coronavirus pandemic. The updated OECD guidance reflects, in general terms, the policies and approaches of many of these jurisdictions currently in place as they confront the challenges of the coronavirus pandemic and it provides points of reference and authoritative and substantive support when evaluating the tax implications of cross-border employees' changed work patterns and the obligations of their employers.

As vaccines are developed, approved for use, distributed and administered, therapeutics are developed, and the world gradually returns to some "normalcy," then government-imposed restrictions could be lifted. This could create another "new" situation where work patterns changed by the coronavirus pandemic may persist, or they may return to pre-pandemic conventional work arrangements – or we could see a combination of both. Questions remain as to how tax authorities will address such situations. Companies should monitor the evolving approaches and policies of the tax authorities – perhaps in consultation with their tax advisers – and be prepared to address their employees' work arrangements and their tax obligations.

FOOTNOTE:

1 OECD, "Updated guidance on tax treaties and the impact of the COVID-19 crisis" at: <https://www.oecd.org/tax/treaties/guidance-tax-treaties-and-the-impact-of-the-covid-19-crisis.htm> .

Also see:

- Blog post: [Towards increasing certainty in uncertain times: revising tax treaty guidance](#) (21 January 2021).
- Policy response: [OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis](#) (3 April 2020).
- See the OECD's The Forum Network webpage "[OECD issues recommendations on implications of the COVID-19 crisis on cross-border workers and other related cross-border matters.](#)"
- See "[OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis](#)" (2020).

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Contact us

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