European Union: Court ruling on 'employer' for multi-state workers could have far-reaching implications

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In brief

The European Court of Justice (ECJ) has issued a long-anticipated judgment on the interpretation of who is the 'employer' of a cross border worker. This determination is important in European social security coordination legislation (Regulation no. 883/2004 and Regulation no. 987/2009) because where the employer is registered may determine whether social security will be payable in one member state or another. In this recent case, the court ruled that the employer was the undertaking that in reality exercised the functions of the employer rather than the other undertaking with which the employees had their formal employment contracts.

In detail

Background

In this case, Dutch resident long-distance lorry drivers had entered into employment contracts with Company A, registered in Cyprus. The lorry drivers performed 'multi state' activities in the EEA for several Dutch transportation companies which had concluded fleet management arrangements with Company A.

Under EC Regulations, an individual should be subject to the social security legislation of a single member state. The lorry drivers did not perform a 'substantial' portion (more than 25%) of their work within their member state of residence; per EU regulation 883/2004, article 13, the social security contributions therefore would fall to the member state where their employer was registered, i.e., Cyprus.

Confirmation of the social security liability is confirmed by obtaining an A1 certificate. To obtain this certificate, it is necessary to apply for a determination of the legislation applicable in the individual's member state of residence.

An application was duly made to the Dutch authorities (SVB). The SVB did not agree with the arrangements for these individuals and challenged that the deemed employer should be the Dutch fleet management company who managed the drivers, executed authority, and bore the relevant wages.

Court ruling

The court concluded that in this case;

"...Article 13(1)(b)(i) of Regulation (EC) No 883/2004... on the coordination of social security systems... must be interpreted as meaning that the employer of an international long-distance lorry driver... is the undertaking which has actual authority over that long-distance lorry driver, which bears, in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her, and not the undertaking with which that long-distance lorry driver has concluded an employment contract and which is formally named in that contract as being the employer of that driver."

In practice, this means that, despite having their formal contract concluded with Company A registered in Cyprus, the employees will be treated as employed in the Netherlands and therefore subject to Dutch social security legislation (which could be significantly more expensive) while performing multi-state work.

The ruling closely aligned with the provisional opinion supplied by the Advocate General of the ECJ which was covered in a previous Global Mobility Insight.

Wider implications

While the court only ruled on the specific case that was brought, the effect of this judgment may in time prove to be far-reaching. The court dismissed the formal, contractual relationship in favour of the economic reality to determine the employer. If one entity holds the contract, but another exercises day-to-day authority, pays wages, and may dismiss the employee, the latter undertaking is more likely to be treated as the employer for purposes of determining where social security is payable.

A similar fact pattern may apply to many different industries and businesses. Where multi-state working employees are formally hired by a company in member states with lower social security rates, such as Cyprus, but in practice are controlled and directed by a separate undertaking in a different member state, there is now a much greater likelihood that authorities will seek to challenge the position so that social security becomes payable where the economic employer is registered.

Extending the principle more widely also could bring many posting arrangements into doubt. Under the EC regulations, individuals posted by an employer in one member state to work temporarily in another may remain insured under the social security system of their 'home' member state for up to 24 months.

Many short-term postings assume a continuing 'organic link' with the home employer, but in practice most secondment arrangements cede much day-to-day control to the receiving host entity. Businesses may need to review who retains the right of hire and fire, who pays the wages and whether the home entity has some involvement in the activities undertaken during the secondment to be confident that the home entity remains the employer and the posting conditions are met, otherwise social security may become payable in the host country.

The takeaway

We will need to wait to see how member state authorities react to this ruling and how proactively they may seek to begin challenging arrangements that they consider to be artificial. Authorities could change the format of A1 application forms to include an assessment of the economic employer and it is unclear at this stage whether any authority will use this ruling as a basis to challenge A1s that already have been issued based on the contractual employer status.

Employers should consider whether the practical reality of their employment set up for cross border workers is consistent with the contractual arrangements in place. In cases where the social security liability falls to a member state on the basis of the contractual employer being registered there, but where the employee is functionally controlled by an undertaking in a different member state, employers should take this into consideration when determining where social security should be paid and when making applications for A1 certificates.

Let's talk

For a deeper discussion about this issue, please contact your PwC Global Mobility Services engagement team or the following team members:

Global Mobility Services – United Kingdom

Leo Palazzuoli, *Global and UK Leader*
+44 7738 310312
leo.palazzuoli@pwc.com

Martin Muhleder, *Global Social Security*
+44 07980595907
martin.muhleder@pwc.com

Gary Chandler, *Global Social Security*
+44 7796941035
gary.chandler@pwc.com

Alfie Ramshaw, *Global Social Security*
+44 7483423261
alfred.ramshaw@pwc.com

Global Mobility Services – United States

John Shea, *US Leader*
+1 (310) 809-9234
john.w.shea@pwc.com

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