

United Kingdom: New HMRC and OECD guidance – time to review displaced workers

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In brief

A year has passed since the first COVID-19 lockdown in the United Kingdom (UK) and lockdowns are still in force in many parts of the world. Since then, employers have been dealing with displaced workers globally – some of which may still now be stranded in an unexpected location.

Both the UK tax authorities (HMRC) and the OECD have recently published additional guidance on the taxation of temporary displaced employees in response to concerns on the tax impact of COVID-19.

In practice, due to ongoing travel restrictions, many displacements which were originally thought to be temporary have now exceeded 183 days – often a key trigger for tax obligations. Employers are now managing many complex working scenarios – from those employees who are still stuck elsewhere and are unable to return due to travel restrictions to those employees who wish to remain in their displaced location and are asking to formalise arrangements.

As the first tax year of COVID-19 ends (2020/21 UK, 2020 for calendar year countries), employers need to be confident as to who their displaced workers are/were, understand and action any employer requirements versus employee obligations and consider their overall policy for ongoing displacements and virtual working requests.

In detail

HMRC guidance

On the UK side, there are several potential relaxations to consider when assessing the impact of COVID-19 displacements on an individual's UK tax residence status and tax position.

Non-UK resident taxation of COVID-19 UK workdays

The [latest update](#) from HMRC is directed to non-UK residents. It confirms that HMRC would not seek to tax income related to UK workdays performed if an individual is genuinely stuck in the UK.

The exemption applies to the period between the dates the individual intended to leave and actually left the UK providing that:

- the individual is a non-UK tax resident under domestic rules (exceptional circumstances should be considered when determining tax residence);
- the individual was genuinely stranded in the UK due to COVID-19 restrictions;
- the workdays are taxed in the individual's home country; and
- the individual left the UK as soon as they reasonably could.

Unfortunately, HMRC mandates that an individual must file a UK income tax return complete with residence pages to claim this exemption. Practically, we anticipate this will cause difficulties – from registering with HMRC to filing the tax return: non-residents cannot use HMRC's online service and instead will need to file by post (with an earlier 31 October deadline), or use commercial software/engage a tax agent to file on their behalf.

In addition, HMRC are not currently commenting on what constitutes 'stuck in the UK' and will review circumstances on a case-by-case basis. The example given in their guidance is in respect of an individual self-isolating. However, HMRC have indicated that they will look favourably at claims from individuals who can demonstrate that they were genuinely stranded in the UK (e.g. by travel restrictions).

Overseas workday relief

In the UK, non-domiciled individuals claiming the remittance basis are eligible for tax relief for overseas workdays in their first three years of UK tax residence, if their earnings are paid abroad and not remitted to the UK.

HMRC have confirmed that if an individual has spent more time working in the UK due to COVID-19, they will seek to tax the additional days: there is no relief for workdays which would have ordinarily been performed outside of the UK.

UK domestic residence – exceptional circumstances

When assessing an individual's residence position in the UK under the Statutory Residence Test (SRT), UK legislation allows up to 60 days to be discounted from certain day counts under "exceptional circumstances" (see our [previous insights](#) on the detail of this relaxation in the context of COVID-19). In summary, HMRC accept that exceptional circumstances include COVID-19 quarantine periods, official government advice not to travel due to COVID-19, inability to leave the UK due to travel cancellations and request from an individual's employer to return to the UK temporarily.

Notably despite restrictions persisting for longer than expected, HMRC have stated that there are no plans to extend the 60-day limit. In addition, exceptional circumstances do not apply to UK workdays. Therefore, if an individual was relying on becoming a tax non-resident under full-time work abroad (and one of the necessary criteria is to spend no more than 30 workdays in the UK) and subsequently spent more than 30 days in lockdown working remotely in the UK, they will not meet the criteria to be tax non-resident under this part of the SRT.

Global position – updated OECD guidance

Individuals will need to assess their tax residence position under domestic law in both their 'home location' and displaced location whether it is UK or elsewhere.

On 21 January 2021, the OECD published [updated guidance on tax treaties and the impact of the COVID-19 pandemic](#) (see [PwC insights](#)). It provides a useful round-up of how different countries are dealing with displaced workers and the relaxations given. Their guidance is also a call to action for tax authorities to review and consider adopting similar approaches and for an exceptional level of coordination to mitigate compliance and administrative costs for employees and employers.

In summary:

- The OECD stresses that their guidance seeks to avoid double taxation but cannot be relied upon in instances of double non-taxation.
- Ultimately tax authorities may take a different approach and therefore it is important to check locally with each tax authority on the position – particularly different state rules (e.g. U.S.).
- Many tax authorities have issued practical guidance on the approach to taxing rights considering COVID-19 and the OECD summarises key examples globally. This includes specific country-by-country agreements and provisions.
- The OECD's view is that when COVID-19 and related public health measures/restrictions have caused an exceptional and temporary change to the location of employees working from home, this should not create a new permanent establishment (PE). For construction site PEs, jurisdictions may need to consider 'stopping the clock' for suspended periods.
- Employers need to consider when a COVID-19 temporary displacement becomes the 'new normal' and review accordingly – particularly for those employees who continue to work remotely after public health restrictions cease.
- The OECD's view is that it is unlikely corporate tax residence should change as a result of the temporary change of location of board members (e.g. with virtual board meetings) or other senior executives – as it is an extraordinary and temporary situation.
- For individuals, the OECD comments on two specific scenarios. The first is an individual temporarily stranded abroad (e.g. on holiday or in another work location) because of COVID-19. The second is an individual working in one jurisdiction but who temporarily returns to their previous home jurisdiction because of COVID-19. For both examples, the OECD's view is that if the individual is a tax resident in both jurisdictions, the treaty tie-breaker tests should discount the COVID-19 displacement period and treaty residence is likely to default back to the pre-COVID-19 work location.
- In terms of the taxation of employment income, the OECD's view is that if an individual is prevented from leaving one jurisdiction due to COVID-19 restrictions and would have otherwise left and qualified for exemption under the employment income article of a Double Taxation Agreement (DTA), it is reasonable for tax authorities to disregard the days for the purposes of the 183-day count. The OECD suggests that this should cover those prevented from travelling because they are in quarantine and when either the government has banned travelling or when flights have been cancelled. Notably the OECD does not view it to cover those who follow a recommendation from governments to avoid unnecessary travel. They also note that some countries may take a different view and suggest contacting tax authorities locally for confirmation of the position.

In practice, although the additional guidance is very welcome, it clearly highlights that displaced workers are a tricky landscape for tax authorities, employers and employees to navigate. Tax authority guidance varies from one country to another and is regularly changing – in particular, once tax authorities review and consider this latest OECD commentary, more updates will likely follow.

From a UK point of view, HMRC believes that the guidance they have issued to date is consistent with the [previously published OECD guidance](#) on 3 April 2020 (see our [previous insights](#)). No update has yet been given by HMRC on this new guidance and it will be interesting to see whether HMRC believe any adjustments are necessary.

The takeaway

COVID-19 has a continuing impact on where and how people are working, and countries are interpreting their laws and OECD guidance in different ways. Therefore, employers and employees need to have a clear understanding of the impact and where there may be inconsistencies to resolve between jurisdictions on the positions adopted.

Employees

Employees have a personal tax responsibility and need to understand both the individual tax residence but also wider tax (e.g. social security, immigration) impact of their COVID-19 displacement, even if temporary. The UK tax authorities have requested UK tax returns if work was undertaken in the UK – even for a very short displacement!

For those who have spent more than 183 days in a jurisdiction, they need to carefully consider and check with local tax authorities if this will trigger a change in tax obligations or if there is a relaxation. Employees should consider if the displacement is indeed temporary as in practice, some employees may be considering remaining permanently in the displaced location.

While the OECD guidance is helpful in the case of employees who are dual residents, a number of employees may find that their residence position has completely changed which will bring its own complexities – tax may need to be reclaimed from one jurisdiction and paid in another.

Furthermore, we are seeing in practice disagreements between jurisdictions as to who has taxing rights on employment income whilst displaced and even instances of potential double non-taxation. Whilst the OECD is asking jurisdictions to coordinate, it may take time and effort to agree and mitigate double taxation when there is a fundamental disagreement, particularly if there is no DTA in place.

Finally, employees need to keep detailed records of any flights booked, cancelled, and rearranged and notes on travel restrictions to support any claims.

Employers

As the first tax year of COVID-19 ends (2020/21 UK, 2020 for calendar year countries), employers need to consider whether there are any compliance obligations for their displaced workers and should consider:

- Auditing and documenting where employees are located, and the time spent working remotely/plans to return;
- Documenting which globally mobile employees have been impacted by government subsidy schemes/furlough payments;
- Review of home/host tax, social security liability, immigration and tax residency positions both under domestic rules and under DTAs;
- Greater complexity in tax return filing and compliance support including a potential impact of prior year returns;
- Working together across teams – whether that be HR, Global Mobility, Corporate Tax and Payroll to ensure policies and guidance are being applied in a consistent manner considering all angles;
- Assessing employment tax and payroll risks in the home and displaced locations;
- Consider whether any displacements are still due to COVID-19 public health measures or whether some are now the 'new normal' and require additional actions; and
- Consider overall policy position and whether any support will be offered to displaced workers.

Let's talk

For a deeper discussion of how this impacts your business, please contact your Global Mobility Services engagement team or one of the following professionals:

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