



## GES NewsFlash

### United Kingdom – International Social Security: Secondary NIC Extended to Non-U.K. Employers

May 28, 2010

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**Do you currently have arrangements where only primary (employee) NIC is paid in respect of employees covered by the EU social security legislation?**

#### Summary

In the last week, HM Revenue & Customs (HMRC) has provided clarification on a number of practical issues related to the new EU social security regime which comes into force on 1 May 2010. As a result of this additional information, it is clear that HMRC's interpretation of the transitional rules means that employers based elsewhere in the EU will no longer be able to avoid the employer's liability to U.K. NIC after 1 May 2010.

#### EU Transitional Rules

One of the key differences under the new rules concerns employers which have no presence or place of business in the U.K. Under the new regulations these employees are required to take on the NIC responsibilities and liabilities of a U.K.-based employer.

Employees who already have an E101 issued under existing regulations which has an end date beyond 1 May 2010 can continue to use the certificate until it expires or until there is a relevant change in the employee's situation. For some time, HMRC had the view that this also meant that no secondary (employer) NIC was due if the employer had no place of business in the U.K. and there was no U.K. host in respect of work in the U.K. However, HMRC has just advised that as the old rules are largely being repealed the new regulations must be applied in all cases. So, where an employee is liable for U.K. primary NIC and his employer is based elsewhere in the EU, the foreign employer will now be required to account for secondary NIC.

As a result, a non-U.K. employer will be required to:

- Register with HMRC as a payer of National Insurance Contributions (NIC),

- Pay over secondary (employer's) NIC as well as the primary (employee's) NIC, and
- Operate employer delivered benefits such as Statutory Sick Pay, Statutory Maternity Pay and Statutory Paternity Pay.

#### **Deloitte's View**

Deloitte believes that a non-U.K. employer should not be given the responsibilities of a U.K. employer to pay employer's share of NIC and operate employer provided benefits until an old E101 has expired. Deloitte has been in correspondence with both HMRC and the European Commission but as yet no concession or delay to the implementation of this rule has been agreed. We feel that employers in these circumstances should be given some time to make the necessary adjustments.

HMRC seems reluctant to agree to a delay in bringing into force this aspect of the regulations to allow non-U.K. employers time to adjust to the new regime. In principle HMRC will be able to identify relevant cases from their list of direct collection cases, although it may take them a while to do so. They have said that where secondary NIC is currently being paid by a U.K. host employer that entity can continue to pay the NIC on the foreign employer's behalf.

#### **Dual Contracts**

In some cases, employees who work internationally within Europe have contracts with more than one European entity. Under the EU rules, an employee can only pay social security contributions in one EU State at any one time. If an individual has employers in more than one EU State they will pay contributions in the State in which they are habitually resident (where their long-term personal ties are strongest) whether they work in that country or not. Under the old rules, this would mean that if, for example, an employee was habitually resident in the U.K. and worked in the U.K. under a U.K. employment contract and worked in Germany under a German employment contract then U.K. NIC would be payable by the employee and the U.K. employer. However, if the German employer had no place of business in the U.K. then U.K. NIC was not payable by the German employer (there could not be a U.K. host employer for work done in Germany).

Under the new rules, the German employer will be required to register with the U.K. authorities and pay secondary U.K. NIC in the normal way from 1 May 2010.

#### **Deloitte's View**

While dual contract structures have rarely been implemented solely to generate U.K. National Insurance savings, the interaction of EU regulations and U.K. domestic legislation has, for many years, led to reduced employer NIC costs. Where the non- U.K. contract is with an EU-based entity, this will no longer be

the case. Deloitte can review your contractual arrangements and see if any there are any commercially viable ways of preserving the current treatment and we would encourage all organizations with dual contract structures within the EU to take action immediately.

## Exceptions

HMRC will continue to apply all of the provisions of old regulations (for a maximum period of 10 years) to third country nationals moving between EU Member States. They have decided not to adopt the new rules in respect of third country nationals. They accept that in this situation a non-U.K. employer with no U.K. presence or place of business continues to be exempt from secondary (employer) NIC.

It would seem that this will also apply where Switzerland or one of the EEA countries (Iceland, Liechtenstein and Norway) is involved - although this is subject to confirmation by HMRC. Switzerland may adopt the new EU rules (possibly in the next few months) and Norway have said that they may adopt them from 1 January 2011 (but if not they expect not later than Spring 2011).

## People to Contact

If you have any questions concerning the issues in this GES NewsFlash, please contact one of the tax professionals as follows:

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