EDITION 2

Global Mobility Newsletter

In this edition, we have curated insightful contributions from esteemed professionals across different jurisdictions. Their expertise sheds light on crucial subjects that affect international, expatriates, and employers alike.

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Let's take a sneak peek at the captivating articles awaiting your perusal

1

Teleworking: Perspectives from France and Austria

Gain valuable insights into the intricacies of telework from both French and Austrian standpoints. Our experts discuss topics such as permanent establishment risks, social security implications, and exit tax considerations.

2

Cross-border Telework in the EU, the EEA, and Switzerland

Explore the exciting advancements in cross-border telework arrangements within the European Union, the European Economic Area and Switzerland. Discover how these developments can impact employees and employers across borders.

3

Navigating Mexican Tax Implications for International Commuters

Delve into the intricacies of Mexican tax laws and their implications for professionals commuting across international borders. Uncover the key considerations that can ensure compliance and optimize tax efficiency.

4

Germany's Never-Ending Leave Entitlement

Gain a comprehensive understanding of Germany's unique leave entitlement regulations. Our experts shed light on the intricacies and implications of this policy, helping you navigate the complexities of managing employee benefits effectively.

5

Spain's Changes for Inbound Expats

Stay up to date with the latest updates in Spain's regulations affecting inbound expatriates. Explore the evolving landscape and gain valuable insights into how these changes may impact your international workforce.

We extend our thanks to the contributors who have enriched this edition with their invaluable expertise: Corinne, Mathilde and Sandrine from Baker Tilly France; Pia from TPA Austria; Audrey from Baker Tilly Belgium; Miguel and Eduardo from Baker Tilly Mexico; Stephanie from Baker Tilly Germany, and María from Baker Tilly Spain.

Should you have any queries or seek further clarification on any of the articles or other expat-related matters, please don't hesitate to contact us. Our dedicated team is here to provide you with the support and guidance you need.

Peter Polman
Partner Baker Tilly Netherlands and chair of the Baker Tilly International Global Mobility Team

Enhancing Cross-border Tax Practices: Insights from Baker Tilly France's Internship Program

By Corinne Lecocq, Mathilde Julienne, Sandrine Epailly and Pia Spanblochl

As part of the esteemed Baker Tilly France Internship Program, we had the privilege of hosting a tax consultant from TPA Austria at our Paris office. This unique opportunity allowed us to engage in a fruitful exchange and comparison of tax practices, particularly in key areas such as permanent establishment (PE) and teleworking, exit tax, the impatriate regime and tax-neutral step-up.

Permanent Establishment and Teleworking

With the rise of teleworking during the Covid-19 pandemic, remote work has gained immense popularity and continues even after the pandemic subsides. However, in cross-border scenarios, teleworking can pose potential risks of creating a PE for the employer. According to general rules, a PE is defined as a fixed place of business through which the enterprise's activities are partially or wholly conducted.

To determine the creation of a PE through remote work, several criteria need to be fulfilled. These include the employer having control over the home office, the continuous nature of home office activity, and the performance of the employer's business activity. The Organisation for Economic Co-operation and Development (OECD) asserts that the employer's control is established by employees using the home office continuously for business purposes.

In Austria, a 'safe harbour' rule exists regarding the definition of 'continuous' home office activity.
The Austrian Tax Administration considers home office activity less than 25% as not meeting the continuous basis requirement. Hence, more than 25% home office (generally, more than one day per week) may lead to potential PE risks.

If home office activity for a foreign employer creates a PE in Austria, the earnings may become subject to Austrian income tax. Furthermore, the foreign employer is obligated to carry out wage tax collection in Austria for the portion of the salary attributable to home office working days.

From a French tax perspective, the French tax authorities have not yet provided specific guidelines on interpreting OECD guidelines post-pandemic. Consequently, the rules applicable prior to the pandemic continue to be in effect. To establish a PE in France, the criteria outlined in the double tax treaty between France and the respective country must be met, such as having a fixed place of business or a dependent agent.

Social Security Implications of Teleworking

When it comes to social security considerations, teleworking employees fall into a unique employment relationship category that is neither secondment nor expatriation. It represents a hybrid employment arrangement where the employee either settles abroad for personal reasons (not sent on a mission by the employer) or remotely works for a French company without physically being present in France.

To determine the applicable social security legislation in such cases, Article 11 of Regulation (EC) No 883/2044 establishes the principle of single legislation, which applies universally. In addition to the criterion of the place where professional activity is carried out, there is a residence criterion for individuals who do not have a professional activity or replacement income from social security.

Consequently, an employee in a teleworking situation abroad must be affiliated with the social security system of the country where they perform their activity and concurrently reside. This arrangement necessitates the employing company to fulfil registration formalities (varies by country) as an employer in the employee's country of residence, in addition to addressing any potential permanent establishment concerns.

Please note that some new social security implications are entering into force for some countries as from 1 July 2023 (see next page, in article about cross-border telework).

Exit Tax Considerations

Austria implements an exit tax regime when an individual transfers their residence to another jurisdiction. The Austrian exit tax is levied at 27.5% on the difference between the fair value at the time of departure and the acquisition costs of financial instruments, derivatives, and crypto assets. If the transfer occurs to another EU/EEA jurisdiction, the exit tax assessment can be deferred until the assets' effective sale, whereas it is immediately levied.

Enhancing Cross-Border Telework in the EU, the EEA and Switzerland

By Audrey De Bevere

In our previous newsletter, we discussed the growing trend of employees living and working in different countries, emphasising the challenges associated with social security considerations. Today, we are pleased to share an exciting development in this area.

Effective from 1 July 2023, a European model framework agreement will enable employees engaged in telework to retain the social security benefits of the country where they are employed, even when residing and teleworking in another country. This arrangement applies as long as the employee spends less than 50% of their working time in their country of residence.

According to European Regulation 883/2004, an employee can only be subject to the social security system of one country. If an individual is employed by a foreign employer while simultaneously working in both the host country and their home country (eg teleworking), they are subject to the social security system of their home country once they engage in a substantial activity in that state. A substantial activity is defined as work accounting for at least 25% of their total working time.

The Covid-19 pandemic and related lockdown measures prompted widespread adoption of remote work arrangements. To address the evolving nature of work, a transitional regime was established, allowing employees who performed more than 25% of their work in their state of residence due to telework to remain under the jurisdiction of the competent member state where their employer is registered. This temporary arrangement was extended until 30 June 2023.

Recognising that telework has become the new norm, a group of experts has developed a model framework agreement for EU member states to endorse. By signing this agreement, member states commit to applying the social security regulations of the member state where the employer's registered office is located, provided that the employee spends less than 50% of their total working time in their country of residence.

At present, the following states have signed this framework agreement: Germany, Switzerland, Liechtenstein, the Czech Republic, Austria, the Netherlands, the Slovak Republic, Belgium, Luxembourg, Finland and Norway. We remain hopeful that more member states will join this agreement, and we will continue to provide updates on this matter.

The prospect of enhanced cross-border telework arrangements marks a significant step forward in facilitating flexible work arrangements for employees and harmonizing social security considerations within the EU, the EEA and Switzerland.

Mexican Tax Implications for International Commuters

By Miguel Angel Blanco
and Eduardo Marroquin

Mexican Tax Implications for International Commuters

The number of individuals classified as 'international commuters' residing in the areas near the northern border of Mexico with the United States was just under 90,000 until 2020. Among them, 55,000 were born in Mexico, while 32,000 were born in the United States. The term 'commuters' refers to individuals who travel to work on a daily basis. In the case of international commuters, it refers to individuals who travel regularly between their home country (eg the United States) and their destination country (eg Mexico) for work.

Tax Residency Status

In Mexico, there are two types of tax residency status applicable to employees assigned from Mexico to the US or vice versa:

1 Tax residents

For Mexican tax purposes, an individual is considered a tax resident if they establish a home in Mexico. However, if the individual can demonstrate that they also have a home in another country, the determination of tax residency is based on the location of their centre of vital interests. This is determined by factors such as the percentage of income originating from Mexican sources or the main location of their professional activities.

2 Non-tax residents

If an individual does not meet the requirements mentioned above, they are considered non-tax residents. Non-tax residents, including Mexican citizens without foreign residence, are only taxed on their Mexican source income and are not required to file a Mexican tax return. In most cases, international commuters maintain their tax residency status in their home country, which leads to the following scenarios for Mexican tax purposes:

- If the home country is Mexico, the employee might be a tax resident in Mexico
- If the home country is the US, the employee might be a non-tax resident in Mexico.

Income tax for residents

Tax residents are subject to Mexican income tax on their worldwide income. However, there are certain exemptions depending on the type of allowance or benefit received. The tax return should be filed by 30 April of the following year in which the income was received. Employers are responsible for withholding taxes, with a maximum tax rate of 35%. Mexican tax residents have various obligations, including obtaining a tax identification number (RFC), filing a Mexican tax return, complying with the rules of the Mexican Labour Law, and paying income tax through withholding or monthly tax payments if the salary is paid abroad.

Income tax for non-residents

Foreign residents (from the home country, eg the United States) who earn income from salaries and dependent services in Mexico are considered to have their source income in Mexico. However, this applies only to income received in cash, credit, services, or assets. If these employees spend less than 183 consecutive or non-consecutive days within a twelve-month period in Mexico, they are exempt from income tax.

If the employee exceeds the 183-day period, their salary income will be subject to taxation at rates ranging from no tax on income below MXN $125,900 obtained in a calendar year to a 30% rate on income exceeding MXN $1,000,000 obtained in a calendar year.

It is crucial to determine the tax residency status of individuals coming to work in Mexico and understand their tax obligations. If you require assistance with Mexican tax implications and obligations for commuter employees in Mexico or the US, please contact the Baker Tilly Mexico office for support.

How to Avoid Never-ending Leave Entitlement

By Stephanie Breitenbach

How to Avoid Never-Ending Leave Entitlement

The German Federal Labour Court (BAG) has recently made significant decisions regarding leave entitlements that carry great importance for employers. Let's delve into these decisions and explore practical steps that employers can take to manage this issue effectively.

In the first decision (9 AZR 266/20), the BAG ruled that statutory leave entitlements are subject to a three-year limitation period. However, this period only begins at the end of the calendar year in which the employer informs the employee about their specific leave entitlement, expiry periods, and the consequences of not taking the leave. If the employer fails to fulfil this duty to inform, the three-year limitation period does not start, and claims for compensation for unused leave will not be time-barred.

The second crucial decision (9 AZR 244/20) addresses the treatment of outstanding leave entitlements upon termination of an employment relationship. In such cases, the remaining leave is converted into a monetary claim. However, the claim for leave compensation is subject to the regular three-year limitation period, starting from the year when the employment relationship ends. The employer's fulfilment or non-fulfilment of the duty to provide information does not affect this limitation period.

To ensure compliance and avoid potential issues, we strongly recommend that employers follow these guidelines:

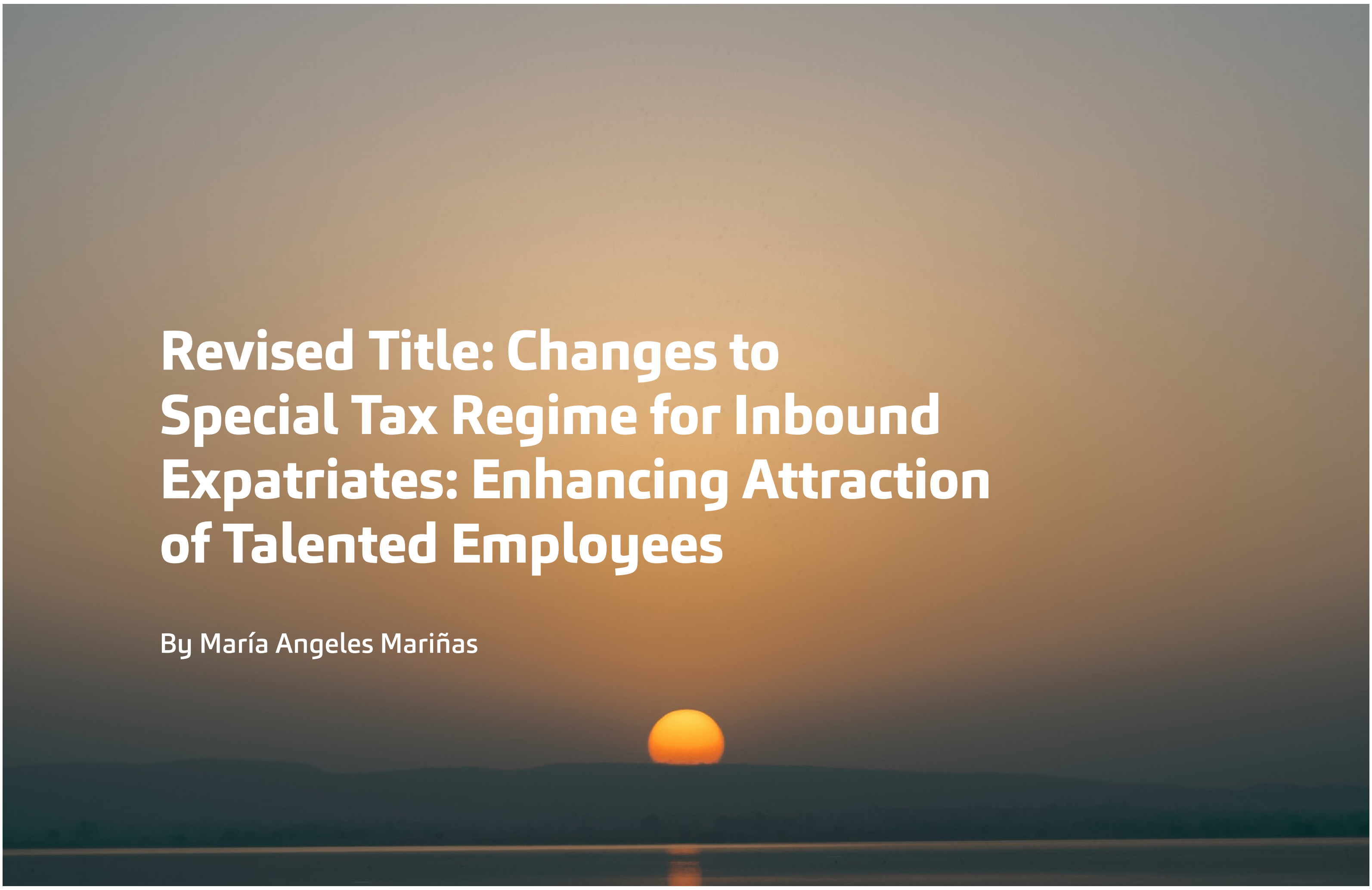
1 Inform your employees:

Employers should inform employees of their outstanding leave entitlements at least once a year. This communication should include (a) informing employees about their remaining leave, (b) encouraging them to take their statutory leave within the current calendar year, and (c) clearly stating that failure to do so may result in the forfeiture of their leave entitlement. It is essential to document these communications as proof, particularly in case of any future disputes. It is even better to notify employees both at the beginning of the year and, at the latest, the beginning of the third quarter.

2 Review employment contracts:

For voluntary additional leave, which goes beyond the statutory minimum, employers can establish different arrangements. However, it is crucial that the employment contract explicitly and clearly distinguishes between the statutory minimum leave (typically 20 days based on a 5-day week) and any voluntary contractual additional leave.

Employment contracts should include valid forfeiture clauses, usually with a three-month timeframe, to cover compensation claims for leave not yet taken upon termination of employment. Typically, the entitlement to compensation can be made subject to these forfeiture clauses.By adhering to these recommendations and implementing effective leave management practices, employers can ensure compliance with the recent BAG decisions and avoid the potential pitfalls of never-ending leave entitlements.



Revised Title: Changes to Special Tax Regime for Inbound Expatriates: Enhancing Attraction of Talented Employees

By María Angeles Mariñas

From 1 January 2023, Spain has implemented modifications to its special tax regime for expatriates with the aim of attracting skilled workers from other nations. In an effort to broaden eligibility and facilitate entry into the programme, the requirements have been relaxed. Under this revised scheme, individuals admitted to the special regime are subject to the Non-Resident Income Tax rules instead of the Spanish Personal Income Tax rules during the tax period in which they acquire Spanish tax residence and the subsequent five tax periods. Consequently, these individuals are only taxed on their Spanish source income, with certain exceptions for income derived from employment and entrepreneurial activities.

Key changes that came into effect in early 2023 include:

1 Reduced previous tax residency requirement

It is now mandatory to have not been a tax resident in Spain for the five years preceding the year in which the employee moves, down from the previous requirement of ten years.

2 Expanded reasons for relocation

The updated regulation now permits the special tax regime to be applicable in the following cases, in addition to physical relocation due to an employment relationship or the acquisition of the status of Director (with a shareholding of less than 25%):

- Teleworking employees, regardless of whether the employer mandates the posting. This condition is deemed to be met if the employee holds an international telework VISA.
- Performance of an innovative and/or economically significant entrepreneurial activity in Spain, supported by a favourable report from ENISA, the National Innovation Entity in Spain.
- Engagement in economic activities by highly qualified professionals rendering services to start-ups or involved in training, research, development, or innovation activities.
- Individuals assuming Director roles in Spanish companies, irrespective of their shareholding percentage in the entity. However, the 25% shareholding limit still applies for asset-holding companies.

3 Inclusion of family members

The special regime may now be extended to the spouse and children under the age of 25 or disabled children with no age limit, a provision that was not previously available.

Summary of Taxation under the Special Tax Regime

Employment or entrepreneurial activities income:

- Flat tax rate of 24% for the first €600,000 and 47% for amounts exceeding that threshold.
- No deduction of expenses or personal and family allowances.
- Total employment income earned during the special regime is considered to be obtained in Spain and is therefore taxable in the country, regardless of where it was earned or paid, except for income derived from an activity conducted prior to moving to Spain.

Dividends:

- Only dividends from Spanish entities are subject to taxation under this regime; dividends from foreign entities are not taxed in Spain.
- Spanish dividends, like other types of savings' income, are taxed progressively, ranging from 19% to 28%.

Rental income from real estate:

- Income from real estate located outside Spain is not subject to taxation in the country. Only income from Spanish properties is taxable at a rate of 24%.

Wealth tax:

- Wealth Tax applies to the worldwide assets of Spanish tax residents. However, for taxpayers covered by the special regime, it only applies to their Spanish assets.
- Final taxation may vary depending on the Spanish region.

Formal Obligations (720 Form):

- There is no requirement to file the annual informative declaration on assets and rights held abroad.

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