



Mobility: Tax alert

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Sweden

Prepares to tax foreign employees with a Swedish economic employer

Executive summary

The Swedish Government has now published its proposed legislation, introducing an economic employer concept within the Swedish tax legislation for certain situations. When interpreting Swedish tax legislation for non-residents as well as certain tax treaties, an employer will be defined not by the organization that pays the remuneration, but by the entity that benefits economically from the work.

A Swedish tax liability will therefore arise for many foreign employees working temporarily in Sweden, and the foreign employer will have Swedish reporting obligations. The legislative changes are suggested to be applicable as from 1 January 2021.

Background

Under the current Swedish tax legislation, a legal or formal employer concept is used. This means that the assessment of who is considered to be the employer, is based on who is actually paying the employee's remuneration. The formal employer concept will, according to the proposed legislation still be used in Sweden going forward, however in certain situations an economic employer concept will instead be used. This approach is now used in a number of countries around the world when interpreting local laws and the dependent services articles (covering remuneration paid to employees) of double taxation treaties.

When introducing a so-called economic employer concept, several other factors will instead be taken into account such

as e.g. who the work is carried out for, who bears the risk of the employees work and who benefits from it. Who bears the cost and who gives instructions to the employee will also be considered.

This will have an effect when determining if foreign employees are liable to tax in Sweden for their work performed in Sweden.

Detail

According to the main rule within the Special Income Tax Act for non-residents (SINK), employees are tax liable in Sweden for their work performed in Sweden. The 183 days rule in the SINK legislation can however limit this tax liability if the following conditions are met:

- ▶ The employee spends not more than 183 days in Sweden in a 12-month period, and
- ▶ The remuneration is not paid by or on behalf of an employer who is domiciled in Sweden
- ▶ The remuneration is not borne by a permanent establishment that the foreign employer has in Sweden.

In the proposed legislation, above exemption will not be applicable if the employee's work can be seen to involve hiring of labor to a Swedish company, i.e. to a Swedish economic employer. Hiring of labor means that an individual is directly or indirectly made available by a foreign employer to perform work in a company's business in Sweden and the work is performed as an integrated part of that company's activities and under the Swedish

company's control and management. Further clarification on what the "Hiring out of Labor" includes may be forthcoming by future Swedish case law and guidelines, but it is believed to also include intra group assignments.

It has however been suggested that some exemptions will apply to limited working days in Sweden. According to the proposal, the regulation regarding hiring of labor should not apply if the work in Sweden is carried out for a maximum of 15 consecutive days and for a maximum of 45 days per calendar year. Furthermore, if the 45 days threshold is exceeded, only the exceeding days should be evaluated (and possibly reported) to determine if the work in Sweden can be seen as hiring out of labor. This will to some extent limit the number of foreign employees who will become tax liable in Sweden.

See examples below:

Example 1

If a foreign employee is working in Sweden for nine consecutive days during six different stays in Sweden in one calendar year, the five first trips to Sweden will fall under the exemption. The reason for this is that all stays are less than fifteen consecutive days and not more than 45 days during the full calendar year. The sixth trip however will need to be evaluated to confirm if the work in Sweden can be seen as hiring out of labor.

Example 2

In the same example, if the first visit to Sweden amounted to 16 consecutive days, this first trip will need to be evaluated to confirm if the work in Sweden can be seen as hiring out of labor. The first period in Sweden (16 days) should not, however, be taken into account when calculating the 45 days threshold in the calendar year.

Once a Swedish tax liability has been confirmed according to Swedish domestic legislation, applicable tax treaties should be applied to avoid a double taxation with regards to the temporary work in Sweden. However, since the Swedish government chose to include an exemption to the so called 183 days rule in the SINK-legislation it is somewhat unclear how double tax treaties should be applied going forward.

In the Nordic tax treaty, there is an exception for hiring of labor where an economic employer concept should be used within the Nordics if applicable. However, other tax treaties generally do not include this hiring of labor exception. In EY's view, the 183-day rule may then be applicable in many cases going forward such that a Swedish tax liability could possibly be avoided for tax residents in Sweden with e.g. its center of vital interest in the other country, provided that the other requirements are fulfilled. Case law will determine the application of tax treaties going forward.

The suggested legislation will lead to increased employer obligations in Sweden for foreign employers. It is proposed that foreign legal employers **without** a permanent establishment in Sweden should be required to withhold preliminary tax for its employees, to the extent the work has been performed in Sweden for a local economic employer. The foreign employer paying out the salary must then register as an employer in Sweden to be able to monthly file employer PAYE returns and report and pay the withheld preliminary tax to the Swedish Tax Agency. According to the suggested legislation this obligation cannot be satisfied by the entity who is considered to be the Swedish economic employer.

Next steps

The proposed legislation will come up for vote in the Swedish parliament shortly and is expected to be approved and to take effect from 1 January 2021. This will lead to more foreign employees being tax liable in Sweden, and foreign employers having Swedish employer obligations.

In order to meet the new requirements, foreign employers are recommended to start to review their employees' travel pattern and work tasks in Sweden in order to determine what employees could create Swedish obligations.

The current situation, where short-term workers and business travelers into Sweden are much reduced, creates an opportunity for foreign employers to prepare for the new rules.

Once Swedish employer obligations have been confirmed the following actions should be taken:

- ▶ Necessary employer registrations with the Swedish Tax Agency
- ▶ Establish a monthly wage tax withholding system in Sweden
- ▶ Tax filing in Sweden for the employees
- ▶ Establishment of an internal process to track workers and business travelers into Sweden in order to identify employees who are not on formal assignment but who create a liability under this rule.

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ey.com

Marie Liebich

Tel: +46 72 573 12 40

Email: Marie.Liebich@se.ey.com

Sevim Güven

Tel: +46 72 230 95 20

Email: Sevim.Guven@se.ey.com

Katrin Norell

Tel: + 46 70 318 98 07

Email: katrin.norell@se.ey.com

Andreas Bråthe

Tel: +46 73 397 24 33

Email: Andreas.Brathe@se.ey.com