Cross-border Telecommuting Guide

Introduction

The practice of telecommuting has seen a meteoric rise in Switzerland during the Covid-19 pandemic. In the 3rd quarter of 2021, 39.6 percent of salaried workers worked at home at least occasionally, according to data of the Federal Statistical Office (FSO). Several studies show that the practice is going to remain a lasting feature in a growing number of companies.

The increase in telecommuting raises numerous legal and practical questions. In order to respond to issues raised by employers, the Swiss Employers' Union (UPS), in concert with its member associations in francophone Switzerland published a "Telecommuting Convention" on October 15, 2020: https://www.arbeitgeber.ch/fr/marche-du-travail/une-convention-de-teletravail-pour-encadrer-une-pratique-en-plein-essor/.

Telecommuting concerns a large number of cross-border workers. According to the FSO, 348,000 cross-border workers holding permit G were working in Switzerland in the second quarter of 2021, including some 150,000 in the francophone cantons. According to several studies, nearly 20% of francophone Swiss GDP comes from cross-border workers. This shows the importance of this workforce for francophone Swiss companies.

The telecommuting of cross-border workers may have considerable consequences, both for the employer and for the employee, particularly in terms of social insurance and fiscal matters.

In order to clarify this situation, the economic organisations of francophone Switzerland, including the group of Latin Chambers of Commerce and Industry, the Federation of francophone Swiss companies (FER Genève), the association of multinational companies (GEM) and the Employers' Convention of the Swiss watchmaking industry prepared, in collaboration with the francophone Switzerland branch of the UPS, this "Cross-Border Telecommuting Guide".

This document addresses the main legal questions raised by cross-border telecommuting, cites the risks incurred by employers and contains some recommendations. It is made available to all Swiss companies that employ cross-border employees.

Definition of cross-border worker
A person who has his or her residence in one State and who exercises a salaried activity within the territory of another State, returning to his or her residence in general every day or at least once a week (art. 1 letter f of the CE Regulation no. 883/2004 of the European Parliament and of the Council dated April 29, 2004, pertaining to the coordination of social security systems).

Definition of telecommuting
The term telecommuting refers to remote work performed through information and communication technologies. It refers to persons who work outside of the employer's workplace.

Cross-border telecommuting during normal times
During normal times, the performance by a cross-border telecommuter of part of his or her salaried activity by telecommuting from his or her country of residence may cause a change in status with respect to the social security authority, as well as a change with respect to taxation schemes.

Cross-border telecommuting during Covid-19
During the exceptional health-related situation linked to Covid-19, Switzerland and its European neighbors agreed to suspend the application of certain rules. As a result, cross-border workers working from home remain subject to the Swiss social security authority. This extraordinary arrangement remains in effect until June 30, 2022.
From a fiscal perspective, France and Switzerland also agreed that the continued work from home arrangement for cross-border workers will have no consequences, given this situation of force majeure, with respect to the taxation scheme that normally applies to them. This agreement is in force until June 30, 2022 (31, March 2022 for Liechtenstein).

Summary

This guide addresses the main legal questions raised by cross-border telecommuting. It cites the risks incurred by employers and contains some recommendations addressing the following five areas: liability with respect to social insurance authorities, fiscal aspects, territorially competent tribunal, applicable law and data protection.

This guide does not replace a legal advisory and does not incur the liability of its authors. Specific questions must be addressed in a case by case, concrete manner by a specialist for and in each particular case.

Liability with respect to social insurance authorities

Upon hiring a cross-border worker, the company must determine which State has the jurisdiction to collect social contributions from this worker and must pay out social benefits (pension, survivors' benefits, disability, unemployment, accident, illness, etc.). In reference to European citizens residing within the EU, coordination rules provide that the worker is in principle liable to the social security agency that has authority with respect to his or her employment.

If the cross-border worker performs his or her activity in several States (for example, in the case of telecommuting), the worker will be subject to the social security authority of his or her place of residence for the entirety of his or her paid activity if he or she performs a substantial activity (at least 25% of his or her work time and/or his or her compensation) in his or her State of residence. If such is the case, the employer will have to perform all the proper procedures in order to affiliate the employee in his or her State of residence and will have to pay out social contributions on the basis of the social contribution rates of this State (which may be markedly higher than the rates of Swiss social contributions).

An employer who wishes to avoid liability with respect to the cross-border worker's State of residence should ensure that the rate of salaried activity performed in this State (including in the case of telecommuting) is less than 25%.

Fiscal aspects

The hiring of a cross-border employee brings about complex and varied consequences according to the countries and the cantons taxing the employee and the duty of the company to collect a withholding tax. The hiring of a cross-border employee may also have an impact on taxation of the company if the fiscal authority qualifies the place of the cross-border telecommuter as a "permanent establishment".

In terms of taxation of a cross-border employee, it is helpful to distinguish between two situations:

1) The employer is established in Geneva and in the cantons that are not party to any specific international agreement with France (Fribourg, for example).

In Geneva and in the cantons that are not party to any specific international agreement with France (Fribourg, for example), the employer of a cross-border employee is required to collect a withholding tax, in compliance with the applicable cantonal legislation. The employer thus collects a Swiss withholding tax on the entirety of the salary of the cross-border employee.

Nevertheless, in the case of telecommuting of the cross-border employee in France, the employer established in Geneva and in the cantons that are not party to any international agreement with France (Fribourg, for example) should no longer collect a Swiss withholding tax for the part of the work performed by its employee from France. In such a situation, French law will require the Swiss employer to designate a fiscal representative in France, which is at the current time, incompatible with Swiss law and may incur criminal liability.
To avoid any risk and until this problematic issue is resolved (discussions between Switzerland and France are underway), we recommend that companies remain very careful to avoid any administrative and criminal issues.

2) The employer is established in the cantons of Vaud, Valais, Neuchâtel, or Jura: the principle is that the cross-border employee is taxed and files his or her tax declaration in his or her country of residence. In this case, the Swiss employer has no obligation in fiscal matters with respect to its cross-border employee, in particular in terms of withholding tax, provided that it provides the fiscal authority with a certification of domicile, which its cross-border employee must provide to it.

For these cantons as well as Bern, Basel-Stadt, Basel-Landschaft, and Solothurn, telecommuting by a cross-border employee may have consequences for the Swiss employer when such work exceeds one day per week. In this case, the cross-border employee indeed runs the risk of losing his or her status as a cross-border employee, according to the evaluation conducted by the competent cantonal fiscal authorities. The company is then required to collect a withholding tax for the work performed in Switzerland. If the company fails to collect this mandatory withholding tax, it could be required to retroactively pay this withholding tax, if applicable with interest for late payment, and possible penalties. In parallel, it may be subject to French administrative constraints which require it to designate a fiscal representative in France, which is, at the current time, incompatible with Swiss law and may incur criminal liability.

To avoid these risks, it is recommended that companies do not authorise telecommuting for more than 20% of the contractual work time.

Territorially competent tribunal

The hiring by a Swiss employer of a cross-border worker, just as with telecommuting work from a country other than where the headquarters of the employer are located, creates links abroad. At that point, one is required to determine before which tribunal cases will be heard in the event of litigation related to the contractual relationship.

According to the Lugano Convention of October 30, 2007, with respect to judicial competence, the recognition and execution of decisions in civil and commercial matters, if the telecommuting activity of the cross-border worker is 50% or greater, the worker may initiate legal action before the tribunal of his State of residence. To avoid this, the employer should limit the telecommuting activity performed to less than 50%.

Applicable law

In principle, Swiss law applies to the labour relationship established between a cross-border worker and a Swiss employer, according to the following two situations:

- When the parties have chosen to apply Swiss law to their employment relationship. Or in the absence of any choice,
- When the cross-border worker normally performs his or her activity in Switzerland.

It may however happen that a European tribunal enlisted to resolve litigation does not apply all of the rules stemming from Swiss law, in particular when more protective rules for the worker are in effect in his or her State of residence.

In order to limit this risk, companies are recommended to agree upon, in the work contract, the exclusive applicability of Swiss law and provide that a preponderance of the activity (>50%) take place in Switzerland.

Data protection

Telecommuting in a State within the European Union (EU) may incur obligations, and perhaps involve risks in terms of data protection for the employer in Switzerland and its telecommuters.

In order to limit the application of European regulation, particularly the General Data Protection Regulation (GDPR) and the risk of heavy fines that may occur in the event of a violation, the employer is recommended to:

- Notify in writing – in the work contract or in a telecommuting convention – that only Swiss law applies with respect to the (tele)employment relationship and
- Conduct no monitoring of the behaviour of its employees.

Summary

Areas	Risks	Maximum recommended rate of telecommuting
Social insurance	Affiliation obligation in the State of residence	< 25%
Fiscal aspects	• Geneva and Fribourg: designation of a representative in France for the collection of tax • Vaud, Valais, Neuchâtel, Jura: loss of cross-border status, collection of a withholding tax in Switzerland by the company, designation of a representative in France for the collection of tax	< 0% < 20%
Territorially competent tribunal	Competence of a tribunal abroad (legal action initiated by the employee)	< 50%[1]
Applicable law	Application of foreign law	< 50%[2]
Data protection	• Application of foreign law (GDPR)[3] • Maximum fines: - 250,000 CHF (new LPD) - 20 million euros or 4% worldwide annual revenue (GRPD)	< 50%

Conclusions

The telecommuting of cross-border workers may bring about considerable consequences both for the employer and for the employee, particularly in the areas of social insurance and fiscal matters. In order to avoid certain risks identified in this document, it is recommended:

- To remain very cautious when authorising telecommuting, even for one day, because of the obligation that the employer faces in Geneva and in the cantons which are not party to any specific international agreement with France (Fribourg for example) to name a fiscal representative in France.
- To limit telecommuting to 20% of the workload (one day per week for a full-time position) for cross-border workers, paying particular attention to the question of multiple professional activities, in all the other cantons (Vaud, Valais, Neuchâtel, Jura, Bern, Basel-Stadt, Basel-Landschaft, and Solothurn, which do not collect withholding tax from cross-border workers).

[1] The risk exists independent of the rate of telecommuting if the action must be introduced by the employer
[2] The risk remains in part independent of the rate of telecommuting when the procedure takes place abroad
[3] In the event that employee behaviour is tracked, the risk remains independent of the rate of telecommuting

- To set out in writing any telecommuting conditions, for example, by setting in place a telecommuting Convention with the employees concerned.
- To articulate in the employment contract the exclusive applicability of Swiss law
- To regularly ask the cross-border worker if he or she performs another salaried activity in another State
- To refrain from tracking the behaviour of telecommuting employees.

Liability with respect to social insurance schemes

1. Applicable rules

When a company hires a cross-border worker, it should determine the State in which he or she is covered in terms of social security. For workers who are citizens of Switzerland or the European Union, and who reside in the EU, the coordination rules are listed in Regulation (CE) 883/2004 which apply in relations between Switzerland and the EU and also in the relations between Switzerland and the EFTA.

This regulation provides two base principles in order to determine the applicable social security authority:

- **Singularity of the applicable legislation**: a worker is only subject to a single social security authority for all of his/her paid activities, even if he or she works in several States for several employers. All the employers should therefore affiliate in the same State that has competence in terms of social security in application of the aforementioned regulation.
- **Liability at the worksite**: a worker is subject to the social security authority of the State in which he or she performs his or her paid activity. This base rule does however have exceptions in cases of multiple jobs and secondment.

Multiple employment

In the event a worker has multiple activities, meaning when a worker usually performs his or her paid activity in several States (Switzerland-EU), whether for a single or for several employers, one must determine the State in which social contribution must be paid and which State will be authorised to provide services in all the areas of social insurance (retirement, survivors' benefits, disability, unemployment, accident, illness, etc.), because a single State has competence by virtue of the principle of the singularity of the applicable legislation.

To do so, the first issue is to find out if the worker performs a substantial portion of his or her paid salaried activity in his or her State of residence. The activity is considered substantial if the worker performs there at least 25% of his or her work time and/or obtains there 25% of his or her earning (global evaluation). To perform this evaluation, it is appropriate to combine all the salaried activities performed by the worker, whether in the service of a single or several employers. To evaluate substantial activity, the situation anticipated for the 12 coming months should in principle be taken into account.

- If the worker performs a substantial activity (25% of his or her work time and/or his or her pay) in his or her State of residence, he or she is subject to the social security authority of his or her State of residence for all of his or her activities.
- If he or she does not perform a substantial activity in his or her State of residence, he or she is subject to the social security authority of the State in which his or her employer has its headquarters (or employers if they have their headquarters in a single State). If the employers have their headquarters in several States, of which one is the State of residence, the competent State is the other State (which is not the State of residence) and if the employers have their headquarters in at least two States other than the State of residence, the competent State is that of the State of residence.
- If the worker is not a Swiss national, or a national of an EU or EFTA country, the aforementioned rules do not apply and it will be necessary to inquire after the applicable authority through consultation with its compensation fund.

Telecommuting

The fact that a cross-border worker telecommutes from home is considered an activity performed in his or her State of residence. Thus, a cross-border worker shall be subject to the social security authority of his or her State of residence if he or she performs at least 25% of his or her time working from home.

Example 1: A cross-border worker is hired by an employer in Switzerland at 100%. The employer offers the worker the opportunity to telecommute 2 days per week. To the extent that he thus performs more than 25% (in this case 40%) of his activity from his State of residence, he is subject to the social security authority of his State of residence.

Attention: If the cross-border worker performs, in parallel with his or her activity for the employer in Switzerland, another salaried activity in his or her State of residence for another employer, the work time performed in his or her State of residence for this other employer should be taken into account in order to determine if he or she performs a substantial activity in his or her State of residence.

Example 2: A French cross-border worker is occupied at 80% by an employer in Switzerland and at 20% by an employer in France. As he only performs 25% (in this case 20%) of his activity in his State of residence, he is subject to Swiss social security (see the rules above). On the other hand, if the Swiss employer asks him to perform one day of telecommuting per week, the worker would perform 40% of his activity in his State of residence, such that he is subject to French social security. Thus, the Swiss employer will be required to pay French social contributions on the salary that it pays the employee.

Note that Swiss and European authorities have agreed that telecommuting performed due to the health situation (date defined) should have no influence on the determination of the applicable legislation.

Procedure

Liability with respect to social insurance is determined by the competent institution of the State of residence. In Switzerland, the competent institution is the AVS (old-age and survivors' insurance) compensation fund of the employer. In France, it is the primary health insurance fund of the department where the salaried worker resides in France (CPAM). After analysing the situation of the worker, the competent institution delivers an A1 attestation that mentions the State that has competence in terms of social security. In the event of multiple activities, the employer will ask the worker to contact the competent authority of his State of residence in order to obtain an A1 attestation that he or she will provide to his or her employer or employers. If necessary, the employer may also, in parallel, inform its AVS compensation fund of this; the AVS compensation fund will contact the foreign organisation.

For other States, one should contact the competent institution within the State concerned.

II. Risks

An affiliation in the employee's State of residence engenders an obligation on the part of the employer to complete administrative procedures, with the following in particular:

- Complete all procedures in order to affiliate oneself as an employer in the State of residence of the worker;
- Register the worker with all the social security organisations of the worker's State of residence;
- Establish for the worker a salary statement that includes foreign social contributions;
- Pay the competent foreign social institutions the social contributions in effect in the State of residence on the basis of the contributions rate applicable in this State (the social contributions of another State may be 2 to 3 times higher than in Switzerland, see Social contribution rates around the world);
- Report insurance cases (accident, health, maternity, etc.) with the competent foreign institutions;
- Collect the applicable social services in the State of residence (indemnities in the event of an accident, disease, maternity, etc.) which may differ from those set forth by the Swiss social security authority.

In the event of erroneous liability, the employer may have to pay foreign social contributions, even retroactively. In this case, the Swiss compensation fund will reimburse the employer for any incorrectly paid contributions in Switzerland.

Furthermore, the social coverage of the worker (accident, illness, maternity, etc.) may not be guaranteed as long as the liability has not been rectified, which can considerably slow down and complicate the payment of benefits.

III. Recommendations

- If the employer does not want the worker to be subject to a foreign social security authority, it will ensure that the rate of telecommuting does not reach 25% of all the activities performed in this State (this requires asking the worker if he or she performs another salaried activity in his or her State of residence).
- Ask the cross-border worker to fill out the assistance form intended to determine if his or her activities are performed in several States of the EU/EFTA and in Switzerland.
- In the event that the cross-border worker performs the totality of his or her work time from his or her home for a defined period of time, in order to avoid any liability in this State, the Swiss employer may make a detachment request with its AVS compensation fund to maintain liability in Switzerland up to 2 years.
- In the event of full-time occupation, the employer may contractually forbid the worker from performing another salaried activity in parallel. In the event of a part-time occupation, the employer is advised to regularly ask the cross-border worker if he or she is performing another salaried activity in another State.

IV. More information

- Directives regarding liability to AVS and AI insurance (DAA) (starting with 2009 figure)
- Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland
- Determination of the applicable legislation in case of multiple activities
- French social contributions
- Affiliation in France as a foreign company + links to forms, contributions estimator
- Social contributions rates around the world
- List of foreign liaison organisations

Fiscal aspects

This chapter focuses solely on cross-border workers residing in France.

The term “cross-border worker” in this chapter designates any person residing in one State who performs a salaried activity in another State for an employer established in this other State and who returns, as a rule, every day to the State in which the employee is a resident.

1. Applicable rules

Principle

According to fiscal law, generally speaking, the place where an employee is taxed is the place of his or her residence (the place where he or she lives with the intention of staying there in a lasting way).

The place of taxation of the company is located at the place of the effective headquarters of the company, with a spread of the tax over the capital and the profit, when the company has stable establishments in places other than the place of the headquarters.

A consequent office may be considered in some cases as a stable establishment which incurs a partial taxation of the profit and the capital of the company at this location. This can in particular be the case if the office at the residence of the employee (where he or she performs his or her remote work) is not strictly reserved for the personal use of the worker (for example, if he or she frequently hosts colleagues and the installations are significant).

If an employee residing in one State (State A) works in another State (State B) for an employer of this other State (State B), he or she is in principle subject to the taxation of this other State (State B) for the work days performed in this other State (State B) (principle of taxation at the place of work).

However, the taxation of cross-border workers is the subject of specific agreements that Switzerland has reached with its five neighboring countries.

Cross-border workers residing in France

Switzerland has reached particular accords with France in order to regulate the taxation of cross-border workers. According to these agreements, salaries, processing, and other similar forms of compensation received by cross-border workers are taxable in the State of residence (State A, residence).

Methods of taxation and distribution vary, but the worker fills out his or her taxation declaration in his or her country of residence for calculating the tax due in his or her country.

A minimum of flexibility is accepted so that the taxation authority at the place of residence of the cross-border worker is maintained even if, in exceptional cases, the cross-border worker does not return to his or her residence, but remains sometimes to sleep in the State where he or she performs his or her activity (State B).

Over the course of the year, a certain number of nights spent in the State where the activity is performed (State B) may in fact be allowed. This stay at the place of activity must however not exceed, over the course of a year, one night per work week so that this situation remains exceptional.

With respect to part-time activities or activities performed only part of the year, the calculation is made of the maximum number of days in the following way:

- For employees who perform their activity during a period less than the calendar year, the maximum of forty-five days is adjusted to 20% of work days;

- For employees who perform employment part-time throughout the entire year, the limit of forty-five days is diminished proportionally (part-time at 80%: 36 days; part-time at 70%: 31 days, etc.). If the proportion amounts to a result including a half-day (for example: 31.5 days for a rate of activity of 70%), it is the lower number of full days that is selected, meaning 31 days in our example above.

In the event of telecommuting performed by a French cross-border worker, the risk exists that in the future (end of the exceptional scheme connected to Covid-19), France will require the Swiss employer to name a representative in France for the payment of the withholding tax according to telecommuting days. The designation of a fiscal representative in France is subject to authorisation by the competent authorities (Federal Finance Department) and, failing authorisation, falls under the article 271 of the Swiss penal code[4]. As of today, nothing guarantees that this authorisation will be granted. When confronted by this legal contradiction which could put the employer (as opposed to the entrepreneur) in difficulty on an administrative and criminal level, employers are recommended to remain extremely cautious and well-informed with the help of a specialist regarding the consequences of telecommuting authorisation for cross-border workers.

Geneva and the other cantons which are not part of any specific international agreement with France (Fribourg for example)

Even if the taxation of cross-border workers is set at the place of residence, companies located in the canton of Geneva must collect a withholding tax on the revenue of cross-border workers. However, the employer should not collect withholding tax for the days when the cross-border worker telecommutes at his or her residence. In fact, the portion of the compensation paid to the cross-border worker connected to the activity that he or she performs at his or her residence in France is taxable in France, without collecting withholding tax founded on Swiss law. This requires the employer who hires a French cross-border worker to keep a precise register of telecommuting days of his or her employee in order to determine the share of the salary which should be subject to withholding tax. However, in practice, employers collect a tax on the totality of the salary of the cross-border employee, even if or she completes a day of telecommuting. An agreement is currently under discussion on this subject.

Vaud, Valais, Neuchâtel, Jura, Bern, Basel-Stadt, and Basel-Landschaft and Solothurn

The Swiss Confederation, in the name of the cantons of Vaud, Valais, Neuchâtel, Jura, Bern, Solothurn, Basel-Stadt, and Basel-Landschaft, has reached an agreement with France, which in principle provides for a taxation at the place of residence of the employee. As opposed to in Geneva, in these cantons, the tax authority does not collect withholding tax from French cross-border employees, as these employees are taxed exclusively in France. However, to be exempted from withholding tax, the worker has to provide his or her employer with an attestation of residence. The attestation must be submitted to the tax authority by the employer every year or in the event of a modification of the information contained within this document (change of employer, address, etc.). If the employer does not have an attestation filled out in proper and due form, the employer is required to collect the withholding tax.

II. Risks

- In Geneva and the cantons that are not part of any specific international agreement with France (Fribourg, for example), the employer must collect a Swiss withholding tax. The telecommuting of a cross-border worker incurs administrative complications in the sense that the employer must maintain a precise register of the telecommuting days in order to adjust the collection of the withholding tax, which will be limited to the days of work performed in Switzerland. There is a risk that France will require the Swiss employer to designate a fiscal representative in France to collect

[4] article 271 of the Swiss penal code which stipulates that "Any person who, without authorisation, has proceeded within Swiss territory for a foreign State, to commit acts which come under the jurisdiction of public authorities, such person who has proceeded to commit such acts for a foreign party or another organisation abroad, such person who has encouraged such acts, will be sentenced to a to maximum period of confinement of three years or to a fine, and in serious cases, to a sentence of confinement of at least one year".

the tax linked to the telecommuting activity starting on the 1st day, which is not authorised at this time in Switzerland. This could put the Swiss employer into administrative and legal difficulties.

- In all the other cantons (Vaud, Valais, Neuchâtel, Jura, Bern, Basel-Stadt, Basel-Landschaft, and Solothurn, which do not collect withholding tax from cross-border workers), if the employee who benefits from cross-border status performs too large a portion of telecommuting, he or she could lose his or her fiscal status as a cross-border worker. The limit is one day maximum per week, according to the evaluation of the competent cantonal fiscal authorities. If the conditions of the cross-border scheme are not fulfilled, the employer must in all cases collect a withholding tax for the work days performed in Switzerland. In this case, France may intervene to demand that the Swiss employer designate a fiscal representative in France, which is not authorised at this time in Switzerland. This could put the Swiss employer into administrative and legal difficulties.

- For the employer, the telecommuting performed by its cross-border workers could lead, in certain circumstances, to a fiscal liability of the company abroad. This is the case if the telecommuting activity results in the creation of a stable establishment abroad from a fiscal point of view. Thus, for example, the question must be clarified whether the activity that is indeed performed through telecommuting by the cross-border worker represents a significant portion of the overall activity of the Swiss company, which could justify the qualification of a stable establishment subject to taxation.

III. Recommendations

- For employers of the canton of Geneva and in the cantons that are not part of any specific international agreement with France (Fribourg, for example), one must remain very cautious in terms of authorising telecommuting, even for a single day, due to the obligation that could be imposed upon the Swiss employer to designate a fiscal representative in France. This caution is appropriate to avoid administrative and legal problems.

- In all the other cantons, only authorise telecommuting by cross-border workers up to 20% maximum in order not to compromise the cross-border worker status in terms of fiscal law. If this threshold is exceeded, France will require the collection of withholding tax using its own services. It will then require the Swiss employer to designate a representative in France, which could place the employer into administrative and legal difficulties.

- Have a specialist verify exactly the fiscal and therefore financial consequences of telecommuting performed abroad, by taking care in every case not to exceed one day in order to maintain the cross-border status in terms of fiscal law.

- In every case, ensure that the telecommuting location in the State of residence does not constitute a stable establishment. The location for telecommuting may in particular be considered as a stable establishment if it is not reserved for the exclusive use of the cross-border worker in his or her country of residence.

IV. More information

- Convention between Switzerland and France for purposes of avoiding double taxation in tax on revenue and on wealth.
- Agreement between the Federal Council and the Government of the French Republic regarding taxation on the earnings of cross-border workers dated April 11, 1983. In this accord, Switzerland represents the Vaud, Valais, Neuchâtel, Jura, Bern, Solothurn, Basel-Stadt, Basel-Landschaft cantons.
- Definition of cross-border worker as set forth in article 3 of the accord between the Government of the French Republic and the Swiss Federal Council dated April 11, 1983 (PDF 916 kB, 14.09.2016)

- **Geneva**
  Agreement between the Swiss Federal Council (acting in the name of the Republic and the canton of Geneva) and the Government of the French Republic on financial compensation relative to cross-border workers working in Geneva dated January 29, 1973 (PDF, 517 kB, 14.09.2016) FF 1983 II 559
- **Vaud**
  https://www.vd.ch/themes/etat-droit-finances/impots/pour-les-employeurs/impot-a-la-source/personnes-imposees-a-la-source-sourciers/
- **Jura**
  https://www.jura.ch/fr/Autorites/Contributions-NEU/Impots-speciaux/Frontaliers.html
- **Neuchâtel**
  https://www.ne.ch/autorites/DFS/SCCO/Pages/frontaliers.aspx
- **Valais**
  https://www.vs.ch/documents/508074/6140988/Directives2020_français.pdf/df11f313-b18a-43d9-9d8d-65e079bccdec
  https://www.vs.ch/web/scc/source
  http://www.vs.ch/frontaliers-francais
- **Solothurn**
  https://so.ch/verwaltung/finanzdepartement/steueramt/sondersteuern-quellensteuer/quellensteuer/merkblaetter/
- **Fribourg**
  https://www.fr.ch/sites/default/files/2020-12/f_instructions_2021.pdf

Territorially competent tribunal

I. Applicable rules

The Lugano Convention (articles 18 to 21), to which Switzerland and the five neighboring countries belong, establishes a distinction between the actions initiated by the worker and those initiated by the employer.

Legal action initiated by the worker:

The worker has the choice of initiating an action before:

- The tribunal of the domicile or headquarters of the employer
- The tribunal of the location where he or she usually performs his or her work
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In principle, the cross-border worker must initiate an action before the Swiss tribunal of the headquarters of his or her employer, unless he or she usually works in another State. The activity is usually performed in the State in which it is performed if it represents more than 50% of the total activity.

Action initiated by the employer

For actions initiated against the worker, the action of the employer can only be brought before the tribunal of the State in which the worker has his or her domicile.

It is only if the worker first initiates an action in Switzerland that the employer can take advantage of the initiation of the action and file its petition there (known as counter-claim).

Similarly, if the employer initiates an action in Switzerland and the worker does not object, the case will be held before the Swiss tribunal (this is known as a tacit acceptance of competence).

It is also possible to agree that the competent tribunal is that of the headquarters of the employer in Switzerland, but this is only lawful if the litigation has already begun.

Any clause that provides notice that any litigation must be dealt with by a Swiss tribunal only, mentioned in the work contract or in a convention, but outside of any litigation, is in principle null and void.

II. Risks

- If the activity performed by the cross-worker through telecommuting represents 50% or more of his or her total activity rate, the employer may be required to defend itself in the event of a lawsuit before the tribunal of the domicile of the worker.
  Attention: when it is the employer that must initiate an action against a worker domiciled abroad, it can only file the case with the foreign tribunal! The telecommuting activity rate is not the determining factor.

III. Recommendations

- In order to prevent a worker from initiating a lawsuit against the employer before a foreign tribunal, the employer should limit the activity performed through telecommuting to a maximum of 50%.
- In the event that an employment lawsuit is initiated, the employer may agree with the worker that the competent tribunal will be that of the company headquarters.
- In the event of litigation, the employer may also try to initiate its action before the Swiss tribunal in the anticipation that the worker will provide his or her tacit acceptance.

IV. More information

- Lugano convention: RS 0.275.12 (admin.ch)
- Practical guide: “Labour contracts for activities abroad” (admin.ch)

Applicable law

Applicable law refers to the entirety of the laws of a State applicable with respect to work between a cross-border worker and a Swiss employer.

I. Applicable rules

When a Swiss employer hires a cross-border worker, it must determine the laws to which their contractual relationship is subject. This question must be distinguished from the question of the territorially competent tribunal to rule on possible litigation (previous chapter). In fact, in some situations, the tribunal of a State may have to apply, in whole or in part, the laws of another State.

The response to this question may differ according to whether the parties have or have not chosen the law applicable to their labour relation, according to the frequency and location of the telecommuting, as well as according to the tribunal, whether Swiss or European, which will be positioned to issue a ruling in the litigation.

Applicable law with respect to labour in the absence of a choice made by the parties

Whenever litigation is filed before a tribunal, whether Swiss or European, the tribunal will apply the law of the State in which the worker usually performs his or her work. If it is not possible to determine the usual place of work, or if the worker usually performs his or her work in several States, the tribunals will apply the law of the State in which the employer is established.

In the absence of a choice made by the parties, Swiss and European tribunals will thereby apply:

- Swiss rule of law, in all situations in which the center of gravity of the activities performed by the worker is located in Switzerland;
- The rule of law of the State of residence of the worker, whenever the worker performs there a large part of his or her activities and works only occasionally in Switzerland.
-

Applicable law with respect to work as chosen by the parties

When concluding the work contract, the Swiss employer and the cross-border worker may choose the law applicable to their contractual relation. In particular, they may choose the law of the State in which one of the parties is established, has domicile, or regular residence.

A Swiss employer and a cross-border worker can then validly choose to subject their employment relationship to Swiss law, which will then in principle be applied in the event of litigation, either by a Swiss or European tribunal[5].

However, when the worker regularly performs his or her work in his or her State of residence, the European tribunal involved will also have to apply the imperative rules of the law of this State which would be most favourable to the worker and which will take precedence over those which correspond in Swiss law, despite the choice of the parties[6].

[5] Note that the Swiss provisions of public labour law (Law on employment and its ordinances of application) do not apply for the portion of the activity performed abroad, as these provisions apply only when the activity takes place within Swiss territory (principle of territoriality).

[6] In fact, according to European rules in terms of the choice of applicable law, to which European tribunals involved refer, this choice cannot result in depriving the worker of the protection that the imperative provisions of law which would have been applicable in the absence of a choice assure.

Example: A Swiss employer and a cross-border worker residing in France choose Swiss law to apply to their contractual relationship. If the worker regularly performs his work in France, and litigation is filed with a French tribunal, the latter must apply, in general, the provisions of Swiss law. But the imperative rules of French law that would be the most favourable to the worker shall take precedence over the corresponding rules of Swiss law, despite the choice of the parties[7].

The limit of internal provisions of public order and so-called "police" laws or laws of immediate application

Independently from law applicable by default or law designated by the parties, the tribunal involved, whether Swiss or European, must always apply certain rules of its State whose respect is determined to be crucial, by said State, for the preservation of its public interests.

In particular, the Swiss tribunal will always apply all the rules contained in the Law on employment (for example, health and safety, maximum duration of work, duration of breaks, work at night, on Sundays, and holidays) to the portion of activity performed in Switzerland.

In the same way, the European tribunal of the State of residence of the worker will always apply the rules of his or her State in terms of health and safety, security and duration of the work, at the very least for the portion of the activity performed in this State.

II. Risks

- Habitual performance of work in a State other than Switzerland may lead to:
    - The application of the law of this State to the entirety of the employment relationship between a Swiss employer and a cross-border worker, in the event the parties did not choose which legal system applies;
    - The application of certain rules of the State of residence that are more protective for the worker, notwithstanding the choice of Swiss law by the parties.
- Whenever litigation is brought before a tribunal in the European Union, that tribunal always has the authority to divert from the rules of Swiss law in favour of certain rules of its State, such as those in matters of health, safety, and the duration of work, at the very least for the part of the activity that is performed in that State.

III. Recommendations

- Always agree in the work contract on the exclusive applicability of Swiss law.
- Set forth that a preponderance of the activity (>50%) will take place in Switzerland.
- For the portion of the activity performed abroad, inquire of and draw the attention of the worker to the imperative rules in effect in their State of residence regarding in particular the protection of worker health, the duration of work and rest, and work at night, holidays, and Sundays.

IV. More information

- Federal law on international private law, art. 121.
- Rule (CE) no. 593/2008, art. 8.

[7] Regarding French law, particularly pertinent are the rules regarding the termination procedure or rules regarding the duration of work.

Data Protection

I. Applicable rules

As indicated above, it is recommended that the employer set forth in writing the exclusive application of Swiss law with respect to the work that links it to its employees.

Processing of data regarding the employee engaged in telecommuting in a State within the EU

According to article 328b of the Code of Obligations (CO), *the employer can only process data*[8] *concerning the employee to the extent that these data pertain to the aptitudes of the employee to fulfill his or her employment or are necessary for the execution of the work contract. What's more, the provisions of federal law (…) on the protection of data (Data Protection Law) are applicable*.

In addition, it is in principle forbidden for an employer to monitor the behaviour of workers at their work station (see article 26 paragraph 1 of the Order 3 of the Federal Law on Labour – OLT3).

Example: If the employer establishes a journal of IT systems used (connections) by its employees, without anonymising it, such a practice may be considered tracking behaviour[9], prohibited by law.

In parallel, the General Data Protection Regulation (GDPR) could also apply in the event of cross-border telecommuting in a country of the EU despite the choice by the parties of Swiss law (see in particular article 3 §2 letter b). The GDPR applies in fact, particularly with respect to the processing of data[10] of persons located – while telecommuting – within the EU territory, when the processing supervisor – the employer – performs tracking of the behaviour.

It should be noted that tracking behaviour is prohibited by Swiss law (OLT3), chosen by the parties as the law applicable to their employment relationships.

The GDPR does not in principle apply to employment relationships between an employer in Switzerland and his or her employee who works remotely in a State within the EU.

Processing of data regarding third parties by the employee telecommuting in a State within the EU

In application of article 6 LPD, the employer and the employee must ensure that the legislation of the country of the location of (remote) work guarantees an adequate level of data protection. Good news: all countries bordering Switzerland present such a degree of adequate protection.

What's more, to the extent that the goods and services offered by the employer are not offered within the territory of the EU – meaning that the clients are in Switzerland and outside of the EU -, the GDPR does not apply (see article 3 §2 letter a) GDPR).

Example: An employee of a consulting company whose headquarters are located in Switzerland telecommutes from his residence in a State within the EU. His work consists of establishing pay records on behalf of a company that is his employer's client and which is also headquartered in Switzerland. As the salary data constitute personal data, by preparing these pay records from his residence in France, the telecommuter performs the cross-border transmission of data[11]. However, as the client company has

[8] Personal data (data): All the information pertaining to an identified or identifiable person.
[9] Profiling: Automated processing of the data intended in particular for analysis or prediction of the elements regarding the work yield. Profiling consists of "tracking behaviour".
[10] Processing: Any operation related to personal data – regardless of the means and procedures used – particularly the collection, conservation, utilisation, modification, communication, archiving, or destruction of data.
[11] Cross-border communication of data (article 6 LPD): Fact of making personal data accessible, for example by authorising their consultation, by transmitting them or by distributing them to or from abroad. Access, via a "VPN" connection (Virtual Private Network), by a telecommuting employee abroad to data stored in Switzerland constitutes a cross-border transmission of data.

its headquarters in Switzerland, the services offered by the employer are not offered within the territory of the EU and the GDPR therefore does not apply.

Nevertheless, the GDPR could apply if the residence of the telecommuter in a State within the EU were to be considered a stable establishment (see article 3 and considering 22 GDPR).

II. Risks

Risks are mainly in terms of damage to image and financial sanctions.

- An injunction to cease and desist, noting the possible violation in terms of protection of the character, by the wronged party – which may be the employee – against the employer and/or the employee, if the responsibility of the latter is involved.
- Right to correction, destruction, or blocking of personal data or mention of the litigious nature of the data for the wronged party against the employer and/or the employee, if the responsibility of the latter is involved.
- Denunciation of the employer and/or the employee if the responsibility of the latter is involved, to the administrative authority, i.e. the federal agent tasked with data protection.
- Legal sanctions (articles 34, 35, and 15 LPD, see 179bis and 179quater of the Penal Code, in particular a fine, may be inflicted against the employer and/or the employee in the case of intentional non-compliance with the obligations to inform, declare, and collaborate with the authorities, particularly the federal Agent tasked with the protection of data or in the event of a violation with respect to the duty of discretion, and this, solely upon issuance of a complaint.
- If the responsibility of the employee (particularly according to article 321e CO) is involved, for example in the event of loss or leak of data: damages and interest, possible indemnity for a moral wrong, may be claimed against the employee at fault by the employer.
- In application of the new LPD (data of entry into force not known): maximum fine of CHF 250,000.
- Sanctions set forth by the GDPR if this rule applies, i.e. warning, formal notice, temporary or definitive limitation of data processing, reminders, or a fine of a maximum of 20 million euros or a fine corresponding to 4% of their worldwide annual turnover (article 83 GDPR).

III. Recommendations

- Compliance with the provisions of the LPD, including in the event of telecommuting outside of Swiss territory, particularly in a country within the EU.
- Make one's employees aware of the principle of security in case of data processing.
- Provide clear directives and instructions, for example, by formalising a telecommuting agreement with the employees concerned.
- Refrain from tracking employee behaviour.

IV. More information

- Federal law on the protection of data (LPD): https://www.fedlex.admin.ch/eli/cc/1993/1945_1945_1945/fr
- General regulation on the protection of data (GRPD): GRPD https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:32016R0679
- Order 3 of the Federal law on labor (OLT3 - https://www.fedlex.admin.ch/eli/cc/1993/2553_2553_2553/fr
- Swiss criminal code: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/fr

Website of the Federal Agency for the protection of data and transparency, in particular:

- Guide for personal data processing in the labor sector: https://www.edoeb.admin.ch/edoeb/fr/home/protection-des-donnees/dokumentation/guides/traitement-des-donnees-personnelles-dans-le-secteur-du-travail.html

- Transmission of data abroad: https://www.edoeb.admin.ch/edoeb/fr/home/protection-des-donnees/handel-und-wirtschaft/uebermittlung-ins-ausland.html
- Security measures for audio and video conferences: https://www.edoeb.admin.ch/edoeb/fr/home/actualites/aktuell_news.html#1739424457
- The GRPD and its consequences on Switzerland: https://www.edoeb.admin.ch/edoeb/fr/home/documentation/datenschutz/Datenschutz%20-%20International/DSGVO.html

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