



ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL AFFAIRS

EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
BELGIUM

Your ref

Our ref
19/3515-

Date
11 December 2019

Request for information concerning the exportability of Norwegian sickness benefits, work assessment allowance and attendance allowance

Dear Mr Pétursson,

Reference is made to the EFTA Surveillance Authority's letter 4 November 2019. The Authority refers to the press conference held on 28 October 2019 by the Norwegian Minister of Labour and Social Affairs, Anniken Hauglie. Following the press conference, the Authority has opened an own initiative case to examine Norwegian legislation and practice regarding the application of Article 21 of Regulation 883/2004. For the purpose of this examination, the Authority has requested the Norwegian Government to provide information and explanations regarding 11 questions.

The Norwegian Government would like to underline that this matter is handled with great seriousness. The Government has appointed an external commission, which has been given a deadline of 1 June 2020 for their final assessments. Further, Parliamentary hearings will be held on 9 and 10 January 2020.

1. Please explain what measures have now been taken by Norway to ensure the correct application of Regulation 883/2004 in the future and in respect of ongoing cases.

The Ministry of Labour and Social Affairs has instructed the Labour and Welfare Directorate to ensure correct application of Article 21 of Regulation 883/2004.

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The Labour and Welfare Administration and several agencies are now engaged to conduct a complete review of all such cases and rectify the mistakes that have been made.

The Labour and Welfare Administration has updated its circulars for work assessment allowance, sickness benefit and attendance allowance. New cases in these areas are now being handled according to new routines.

The Government has appointed an external commission.¹ The commission will investigate how such a misinterpretation could arise and continue over a long period of time, as well as the roles of the various parties involved. The commission will also assess whether practices prior to 2012 should also be reviewed. The commission has been given a deadline of 1 June 2020.

In parallel with this review, the Director of Labour and Welfare has called for an internal audit report on how the Labour and Welfare Administration follows up the Regulation. This is done in order to secure assessments that could provide a basis for improvements that can be implemented relatively quickly.

The Ministry of Labour and Social Affairs has asked the Directorate of Labour and Welfare to prepare reports on how this matter is followed up. The Ministry has also asked the Directorate for a detailed account of how it works with EEA regulations, as well as a self-assessment of the Directorate's competence as regards making sure that the practices are in line with the regulations.

2. Please explain how Norway plans to identify those individuals who have been affected by the wrongful application by the Norwegian Authorities of Regulation 883/2004, and potentially its predecessor.

The Directorate of Labour and Welfare has initiated extensive work to review all earlier cases back to 2012 to find out which individuals are entitled to repayment of previously collected amounts and who is entitled to benefits that have previously been denied or stopped. Each case is assessed individually. Dedicated resources have also been set up with the Labour and Welfare Administration's Call Center to respond to questions from the public.

According to present estimates, about 2 400 people have received wrongful demands for repayment due to misinterpretation of the regulations regarding work assessment allowances, sickness benefits and attendance allowance. About 90 per cent of the cases relate to work assessment allowances. No cases have been identified involving wrongful demands for repayment of attendance allowance.

¹ The mandate of the commission is available online here:
<https://www.regjeringen.no/no/aktuelt/granskingsutvalget-i-eos-saken-er-klart/id2677280/>

The cases have been identified through machine searches in the IT systems of the Labour and Welfare Administration and a manual review of cases that may be relevant. It cannot be ruled out that further investigations will reveal additional cases.

It is challenging to get a total overview of how many people may have been refused benefits to which they may actually have been entitled. In the initial phase, persons that have been convicted, charged and those who have wrongfully received repayment claims are prioritised. The Directorate of Labour and Welfare has indicated that it is extremely difficult to identify all others who have been affected by the misinterpretation.

Due to the challenges in identifying all relevant cases, the Labour and Welfare Administration has used the media and www.nav.no to urge persons who believe they may have been impacted by this misinterpretation to contact the Labour and Welfare Administration. This can contribute to a faster processing of the cases.

3. Please explain how Norway intends to ensure that it provides appropriate remedies for those individuals who have suffered as a result of the wrongful application of EEA law in relation to the export of benefits.

The Labour and Welfare Administration will review all complaints and appeal cases that have been subject to a decision by the appeal body or the National Insurance Court after 1 June 2012 linked to incorrect application of the right to receive sickness benefits, work allowance benefits and attendance allowance in connection with stays in another EEA state. While reviewing these cases, the Labour and Welfare Administration has initiated a temporary suspension of deductions in all relevant cases.

The Government has established a legal aid system for those who wish to appeal the result of the new decision made by the Norwegian Labour and Welfare Administration (following the above-mentioned review).² This system also institutes a legal aid scheme for persons who submit claims for compensation as a consequence of the misinterpretation of the EEA regulations. In criminal cases, the accused is entitled to free legal advice without means testing in cases relating to compensation following criminal prosecution.

The Office of the Director of Public Prosecutions is in contact with the Norwegian Criminal Cases Review Commission regarding those who have been convicted based on misinterpretation of the regulations. The Criminal Cases Review Commission can provide guidance for those who wish to reopen a criminal case, and can also assist in appointing a public defender. All identified persons who have been convicted and/or charged have been contacted.

The Government is considering setting up a special compensation scheme to ensure that all those who have been affected will receive the fastest and easiest possible resolution.

² <https://www.regjeringen.no/no/aktuelt/ny-rettshjelpsordning-skall-sikre-berorte-i-eos-saken/id2680904/>

The Government has proposed additional funds to the Labour and Welfare Administration and the National Insurance Court in the fiscal budget for 2020. This will allow the Labour and Welfare Administration to ensure sufficient follow-up of those directly impacted by the case. The National Insurance Court will receive additional resources to ensure the shortest possible processing time.

4. Please confirm whether the practice and underlying national legislation in breach of Article 21 of Regulation 883/2004 only concern the following types of benefits: sickness benefit (sykepenger), work assessment allowance (arbeidsavklaringspenger) and attendance allowance (pleiepenger).

The Labour and Welfare Administration informed the Ministry by letter dated 27 October 2019 that they had changed their practice concerning the right to receive sickness benefits, work assessment allowance (WAA) and attendance allowance while staying in another EEA State according to Article 21. The National Insurance Court have stated in its rulings that the incorrect practice of the law applies to sickness benefit and work assessment allowance. As far as we know, the National Insurance Court has not decided on this issue in any cases regarding attendance allowance. We also refer to the answer to question 2, second paragraph.

The Labour and Welfare Administration has established a group to examine other benefit and service areas, in light of Norway's obligations under the EEA Agreement. The Ministry will follow up the conclusions of the group if needed.

The Government would like to point out that further issues under Regulation 883/2004 may be identified as part of the ongoing review. The Ministry has already instructed the Labour and Welfare Administration to change practice on one specific matter, regarding applicable legislation after Article 11 for a subgroup of WAA-recipients.³

5. According to Minister Hauglie, the incorrect practice started in June 2012, when Regulation 883/2004 entered into force in the EEA EFTA States. Does the Norwegian Government consider that the principle of exportability of sickness benefits in cash provided for in Regulation 1408/71, the previous version of Regulation 883/2004, fundamentally differs from the current legal situation, if so, please explain the reasoning behind this.

Whereas Regulation 883/2004 maintains and clarifies key aspects of the social security coordination set out in Regulation 1408/71, there are also notable differences. Regarding the specific regulation of exportability of sickness benefits there are, as the Ministry sees it, two main differences.

³ For further details, see <https://www.regjeringen.no/no/dokumenter/eksport-av-arbeidsavklaringspenger-for-ikke-yrkesaktive---tolkning-av-trygdeforordning-8832004-artikkel-11/id2681122/>

First, Article 10 of Regulation 1408/71 (Waiving of residence clauses) does not apply to sickness benefits, but only to invalidity, old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants. In contrast, under Regulation 883/2004 the general principle of the retention of a right when residing in another EEA State applies to all cash benefits covered by the Regulation, unless otherwise set out therein, cf. Article 7.

Second, Regulation 1408/71 contains no general provisions on persons residing in the competent State but staying in another EEA State. Under Article 22 of that Regulation such persons are entitled to cash benefits from the competent State in two situations. Article 22(1)(a) applies to persons whose condition require benefits in kind which become necessary on medical grounds during a stay in another EEA State. Article 22(1)(c) applies to persons who have been authorized by the competent institution to go to the territory of another EEA State to receive there the treatment appropriate to his condition. The wording and the structure of the provisions on cash benefits in the Chapter on sickness in Regulation 1408/71 indicates that there is no general and unconditional right to cash benefits for persons residing in the competent State while staying in another EEA State. In contrast, the wording of Article 21 of Regulation 883/2004 indicates that there is such a general and unconditional right under that Regulation.

The Ministry would like to add that the finding that a national measure is consistent with a provision of secondary EEA law does not as such have the effect of removing that measure from the provisions of the EEA Agreement. The question remains whether regulations of residence or stay, and corresponding requirements as to prior authorisation, amount to a restriction under the free movement provisions, and – if so – whether a restriction is justified. Each individual case must be assessed in the light of all relevant facts applicable to that case. One essential question to assess is, in that respect, whether the situation falls within the scope of one of those freedoms, notably Article 28 (freedom of movement workers and self-employed persons) or Article 36 (freedom of movement of services).

For the sake of completeness, it is recalled that there is no provision in the EEA Agreement corresponding to Article 21(1) TFEU (the right of citizens of the European Union to move and reside freely within the territory of a Member State other than which they are nationals).

The question asked is, however, within the mandate of the independent commission of inquiry, and the Ministry will therefore await their findings before drawing a final conclusion on this matter.

6. In the context of a complaint case (Case No 77886) concerning the exportability of a work assessment allowance for a person wanting to move residence from Norway to Sweden, representatives of the Authority received the following reassurances from the Norwegian Government concerning potentially conflicting national legal provisions when they met to discuss the case in 2017: