



ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL AFFAIRS

EFTA Surveillance Authority
Rue Belliard 35
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BELGIUM

Your ref

Our ref

Date

20/4486-8

7 January 2020

ESA - Request for information concerning remedies for individuals affected by the wrongful application of EEA law in relation to the export of sickness benefits in cash

The Norwegian Ministry of Labour and Social Affairs refers to your letter where you require information concerning remedies for individuals affected by the wrongful application of EEA law in relation to the export of sickness benefits in cash. The answers are prepared in collaboration with the Ministry of Justice and Public Security.

1. A full account of the number of individuals entitled to sickness benefits in cash affected by the "stay in Norway" criterion in relation to recovery orders, suspension, criminal sanctions etc.

As of 10 December 2020, the Norwegian Labour and Welfare Service (Nav) has identified 3,143 people affected by the misinterpretation of the EU Regulation. 733 people have wrongfully had to repay benefits, while 2,157 people have received an wrongful benefit suspension or rejection. 253 people have suffered both wrongful repayment and benefit suspension/rejection.

In total, approximately 1,050 people have been affected by wrongful repayment claims. The case processing relating to these cases is due to be completed by the end of 2020/start of 2021. The efforts to identify additional people affected by wrongful suspension, rejection and reduction in benefits are ongoing. It is therefore too early to state the total number of people affected by the misinterpretation.

Of the 3,143 people, 78 have been convicted as a result of the misinterpretation. Some of these people have had extensive stays abroad but have stayed only a few days/weeks within the EU/EEA. It is therefore uncertain whether these periods will have an impact on the criminal cases. The number of cases that will be reopened as a result of Nav's misinterpretation of the EU Regulation has not yet been clarified.

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2. Regarding the searches undertaken by NAV in its database(s) with a view to identifying the affected individuals:

a. Which search parameters have been applied, besides the cut-off date of 1 June 2012, to narrow the focus of the search.

Different requirements, conditions and data sources have been adopted to identify people who might have been affected by the misinterpretation. The approach is as follows:

1. All cases labelled “abroad” are identified first.
2. A gross list is then created. This list contains all users who have received the benefits during the period in question.
3. The gross list is narrowed down using one or more of the following methods:
 - a. Checking whether the decisions meet specific conditions in the case management system
 - b. Searches for certain terms or combinations of terms in text fields from decisions, memorandums or other free-text fields that may indicate stays in EEA countries.
 - c. Machine learning models using the occurrence of terms as input and substantiating relevance by weighing these against the occurrence of similar terms in cases that have been sent for further processing.

Where text searches have been performed, searches have been performed for the occurrence of words that appear in defined glossaries. These include words and expressions assumed to be indicative of a higher probability of the case being relevant or a higher probability of the opposite. The glossaries include, among other things, countries, places and cities in the EEA, but also references to words such as “holiday” and “travel,” relevant legal clauses or frequently used wording from decision letters. Searches have been conducted in relevant documents in the specialist systems and meeting minutes.

b. Whether any searches, even of a preliminary nature, have been undertaken as regards decisions adopted prior to 1 June 2012 and, if so, according to which parameters. If the answer to this question is in the affirmative, please describe the results.

Nav has not conducted any searches regarding cases dating prior to 1 June 2012. Once the Norwegian Supreme Court has made a ruling after receiving a statement issued by the EFTA Court, the Norwegian Authorities will decide if there will be searched among cases prior to 1 June 2012 and if so, by which search parameters.

3. Regarding, specifically, the identification of individuals having faced criminal sanctions in the form of fines and/or prison sentences:

a. How the search for affected individuals has been organised and according to which parameters.

The search for affected individuals has mainly been carried out by manual searches in the case processing systems.

By letter of 30 October 2019 The Attorney General informed all public prosecutors and Chiefs of Police of incorrect application of law with regard to Regulation (EC) 883/2004.

Attached to the letter were two lists that The Attorney General had received from Nav:

- 1) A list of reports from Nav to the police from 1 June 2012 to 19 June 2019 of cases that had not been decided by judgement or dismissal. The cases were identified by police district and case number.
- 2) A list from Nav Kontroll of cases decided by court judgements from 1 June 2012 to 25 October 2019. The list was prepared on the basis of judgements received from Nav. The cases were identified by the convicted individual's birth number, police district and case number.

The Attorney General instructed each police district to review the cases on the relevant lists and assess whether there were incorrect application of law in the reports and judgements. The police districts were also instructed to carry out searches for possible additional cases. The Attorney General underlined the high priority of the review.

The Attorney General further requested the Directorate of Labour and Welfare, by letter of 30 October 2019, for an assessment of both time period and type of social security benefits the incorrect application of law included.

In a letter of 31 October 2019 addressed to all public prosecutors and Chiefs of Police, The Attorney General referred to his letter to the Directorate of Labour and Welfare (of 30 October 2019). In the Attorney General's opinion, the legal situation was so uncertain that all reports from Nav Kontroll related to social security benefits for persons that had been residing or staying abroad in the EEA area should be suspended until further qualified assessments had been made.

In parallel with the review by the police districts, the Court Administration urged the district courts to search for criminal cases concerning work assessment allowance, sickness benefits or attendance allowance where the convicted individual had temporarily stayed abroad in the EEA area after 1 June 2012.

The district courts reported the cases to the Court Administration. In addition to the cases included in the Attorney General's original list received from Nav Kontroll, another 20 cases were identified. For 11 additional cases the District Courts did not have sufficient information in order to decide the type of benefit or which country outside of Norway the convicted individual had stayed in. These cases were also sent to the Attorney General for further investigation.

In addition, the Prison and Probation Service made searches for cases of incorrect application of law with regard to Regulation (EC) 883/2004.

b. Whether the Norwegian Government can be certain that all relevant criminal cases have been identified and, if so, why it is confident that this would be the case.

The police's case processing system does not have the necessary functionality for identifying cases exclusively by automatic search. Hence, manual review was necessary, and absolute certainty that all cases of incorrect application of law with regard to Regulation (EC) 883/2004 cannot be obtained. We are nevertheless confident that the thorough automatic and manual reviews have identified the relevant cases.

A review was made by Nav of current cases which were forwarded to the police district for follow-up. In addition, instructions were given by The Attorney General that the police districts should carry out their own searches in addition to cases included in Nav's list. The Police Directorate assisted in this matter. Coordinating public prosecutors to assist in this process were also appointed. Furthermore, the courts/the Court Administration and the Prison and Probation Service have also carried out searches to identify relevant cases.

4. Whether reimbursements (including of overturned fines) and pay-outs include compound interests and penalty interests

a) Reimbursement requests.

In the event of reimbursement, recipients will receive what they have previously paid back, including any interest they have paid in connection with the claim.

b) Reduction in benefits.

In cases where benefits have been suspended (reduced) for a period due to stays abroad in the EU/EEA, the benefits for the period shall become payable.

c) Suspension and rejection of benefits.

In the event of suspension and rejection of benefits, benefits shall be paid retroactively for the period during which the persons met the conditions for receiving the benefit.

Interest shall be added to all payments pursuant to Section 22-17 of the National Insurance Act, cf. Section 22-13, paragraph 7 or Section 22-14, paragraph 4. The interest rate shall be determined by the Ministry and shall constitute around half of the interest rate pursuant to Section 3 of the Act dated 17 December 1976 no. 100 relating to interest on overdue payments.

5. As described above, an independent commission has been charged with reviewing decisions by NAV denying a claim for compensation for economic loss pursuant to the Damages Compensation Act. The Norwegian government is invited to:

a. Describe which conditions must be fulfilled in order to receive compensation for economic loss.

Nav has primarily compensated persons affected by the misinterpretation of Regulation 883/2004, Article 21 on benefit law through repayment of sickness benefit, work assessment allowance and attendance allowance. Nav has also paid interest on the payments pursuant to Section 22-17 of the National Insurance Act.

In addition, Nav provides information about the opportunity to claim compensation for economic loss incurred as a result of Nav's misinterpretation.

Claims for compensation for economic loss are assessed in accordance with Section 2-1 (Employer's Liability for Employees) of the Damages Act, no. 1 and 2.

There are three conditions that must be met in order for Nav, as the employer, to be liable for errors made by employees:

1. Nav employees must have made a negligent error (basis for liability).
2. The injured person must have suffered financial losses that can be substantiated.
3. There must be adequate causation between Nav's negligent error and the financial losses that have been substantiated by the injured person.

The government has found that the misinterpretation made by Nav employees concerning the rules on the right to retain sickness benefit, attendance allowance and work assessment allowance during stays within the EEA is an error that entails liability on the part of the employer. Nav has therefore been instructed to take this into account in the processing of compensation claims. Condition 1 is therefore not considered in each individual case if the person who is claiming compensation has been affected by the misinterpretation of Regulation 883/2004, Article 21, but automatically found to be fulfilled.

When considering condition 2 and 3, Nav assumes that the evidence requirement is ordinary preponderance of the evidence (more than 50 per cent) of the injured person having suffered a financial loss and for this loss to have adequate causation with Nav's misinterpretation of the Social Security Regulation (foreseeable liability on the part of Nav as the tortfeasor).

b. Explain how the economic loss will be calculated.

Nav, as the tortfeasor, shall cover necessary and foreseeable expenses to rectify the damage. The position of the injured person after compensation shall be as though the damage had not occurred. The financial loss is based on the difference between the situation with the damage and the situation as it would have been without the damage.

The financial loss may relate to loss of income on the part of the injured person or additional expenses that have been incurred as a result of the negligent action from Nav.

Some examples of financial loss for which Nav has paid compensation:

- moving expenses
- travel expenses
- financial expenses (interest, costs, charges)
- legal fees

- costs associated with the sale of residential property
- expenses for the rental of residential property
- loss of benefit rights that the person in question was undoubtedly entitled to
- interest on consequential loss

In addition to the compensation for financial loss resulting from the misinterpretation of Article 21 of the Social Security Regulation, the injured person shall be entitled to interest on overdue payments from 30 days after the individual submits a claim for compensation, cf. Section 2, paragraph one, first and second sentence of the act relating to interest on overdue payments.

c. Provide a detailed account of the typical reasons why NAV has rejected the majority of the claims submitted to date. Please provide sample decisions.

Nav's liability, as an employer, for negligent errors made by employees applies to economic loss only.

The main reason why Nav has rejected claims for compensation in connection with the misinterpretation of Regulation 883/2004, Article 21 is that the injured person has not been able to substantiate having suffered economic loss as a result of the error. The injured party has claimed compensation for non-economic loss ("pain and suffering"). Nav does not have a legal basis to pay compensation for such loss resulting from the legal misinterpretation that has been made.

Nav's misinterpretation of the right to retain sickness benefit, attendance allowance and work assessment allowance in connection with stays within the EEA is a negligent error that may form the basis for compensation of financial losses from Nav as the employer. Nevertheless, the misinterpretation was not made by individuals who have demonstrated such a degree of guilt (gross negligence or wilful intent) that there is personal liability or agency liability. Nav's employees neither understood nor clearly should have understood that the EU Social Security Regulation had been misinterpreted in Norway. There is therefore no basis within the Damages Act for compensation from Nav for non-economic loss resulting from this misinterpretation.

Certain compensation claims have also been rejected because the person raising the claim has not been affected by the misinterpretation of Regulation 883/2004, Article 21.

Some claims have been only partly approved or rejected because the injured person has claimed losses that have not been sufficiently documented or otherwise substantiated in a way in which the conditions set out in Section 2-1 of the Damages Act have been met. Causation between Nav's error and the alleged financial losses suffered by the injured person has also not been sufficiently substantiated in certain cases.

Enclosed are three examples of decisions from Nav.

- d. Clarify whether the independent commission has finalised its review in any cases. If the answer to this is affirmative, please explain the results and provide sample decisions.**

Currently, the independent appeals committee has received ten cases from Nav for processing. The committee has made a decision in one case. The appeals committee's decision dated 18 October 2020 is enclosed.

- e. If some of the individuals affected are no longer alive, would the monetary claim/ right to compensation be inheritable?**

In the event of a repeal of an wrongful suspension, rejection or reduction in a benefit, the underlying decision will be capitalised and will be considered a monetary claim that can be inherited. When considering the duration of and continued entitlement to benefits, the cases will be investigated in accordance with the duty to investigate pursuant to Section 17 of the Public Administration Act. Nav's guidelines stipulate that the duty to investigate must be weighed against the parties' ability to safeguard their own interests. Considering that in these cases the parties do not have the ability to safeguard their own interests, and the fact that the situation has occurred on the basis of an wrongful application of Section 11-3 of the National Insurance Act on the part of Nav, Nav has an extensive duty to investigate in this case.

Heirs shall not enter as parties to the case as such, but shall have a legal interest in claims after a decision has been made.

Nav has an overview of authorised persons for deceased persons' estates and will contact the authorised person for the deceased person's estate to request a certificate of probate.

If Nav is unable to identify the heirs/authorised person, the money will be recognised in the appropriation account for unclaimed payment. The money will remain in this account for three years pending contact from any heirs/authorised persons.

6. With reference to the possibility of reopening criminal cases, the Norwegian Government is kindly requested to:

- a. Explain the conditions which must be fulfilled for the Office of the Director of Public Prosecutions to request the reopening of a criminal case.**

It follows from the Criminal Procedure Act § 389 first paragraph that a case that has been decided by a final judgement, at the request of a party, may be reopened when the conditions in the Criminal Procedure Act §§ 390-393 are present. According to the Criminal Procedure Act § 391 no. 3, reopening may be required when there is a new circumstance that seems suitable to lead to acquittal or rejection or to the application of a milder criminal rule or significantly milder sanction. The Criminal Procedure Act § 392 allows for reopening "when special circumstances make it doubtful whether the judgement is correct and weighty considerations indicate that the issue of the accused's guilt is tried again.

b. Clarify whether the Office of the Director of Public Prosecutions has concluded that any of the identified cases did not satisfy those conditions.

The Attorney General has assessed that some of the cases that are considered to be subject to errors of application of law related to the receipt of benefits during a stay in the EU/EEA area do not meet the conditions for reopening. This is typical in cases where the convicted person has had a stay abroad both in and outside the EU/EEA area and where the social security fraud related to residence within the EU/EEA area constitutes only a small part of the total deceived amount.

It should be noted that the defendants themselves may bring their cases before The Criminal Cases Review Commission if they consider that the conditions for reopening are present and wish the Commission's assessment of this.

It will always be informed about this possibility in the prosecution's decision.

c. Explain on what grounds the favourable decisions of the Norwegian Criminal Cases Review Commission, to date, are based.

The Norwegian Criminal Cases Review Commission has so far reopened 18 cases. The decisions of reopening have been based on the Norwegian Criminal Procedure Act section 392 second paragraph, which allows reopening if special circumstances make it doubtful that the conviction is correct and weighty considerations indicate that the question of guilt of the accused person should be retried.

The Commission found that several questions regarding EEA-law, and whether Norwegian law was compatible with EEA-law, had not been considered by the courts. In light of recent statements, i.e. the interim report by the Government appointed commission of 4 March 2020 and ESA's letter to the Ministry of Labour and Social Affairs of 11 March 2020, regarding the right to export cash benefits to other EEA-countries, the Commission found that it was doubtful whether the courts' interpretation of the law was correct. It was therefore questionable whether the conditions for fraud in the Penal Code section 371 and false statement in the Penal Code section 221 were fulfilled. On this basis, the Commission found that the conditions in the Criminal Procedure Act section 392 second paragraph were met and reopened the cases.

d. Clarify whether the Norwegian Criminal Cases Review Commission has denied any requests for reopening and, if that is the case, on what grounds.

The Norwegian Criminal Cases Review Commission has so far not denied any request for reopening. The Commission is now awaiting EFTA Court's advisory opinion and the Norwegian Supreme Court's ruling before reviewing the remaining petitions for reopening.

7. The Norwegian Government is invited to explain in detail the scope and limits of the legal aid mechanisms available to individuals affected by the wrongful application of EEA law.

The special legal aid mechanism is regulated by Circular G-05/2019.

Pursuant to the special legal aid mechanism, free legal aid is granted to persons who have received a decision on suspension, refusal and/or repayment of sickness benefit, work assessment allowance or attendance allowance on the basis that the individual has temporarily resided or stayed in a country in the EEA area after 1 June 2012.

Legal aid is provided when Nav has reviewed the case and made a new decision and the person in question:

- considers appealing Nav's new decision (three times public fee rate)
- prepares a complaint to Nav Appeals body/appeal to the National social security Court (four times public fee rate)

If Nav has reversed the original decision, in whole or in part, free legal aid is granted to:

- assess a compensation claim against Nav (three times public fee rate)
- present the claim for compensation to Nav (five times public fee rate)
- prepare an appeal against Nav's compensation decision to the special appeals board, which has been appointed by the government (five times public fee rate)

Legal assistance may be obtained by any lawyer. The legal aid is provided free of charge.

Yours sincerely

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This document is signed electronically and has therefore no handwritten signature