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**Germany – Risk of
Inspections Related to
Foreign Employees at
Client Sites**

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flash Alert

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The German customs authorities ("Zollaemter") have been increasing inspections at employment sites, according to recent observations and experiences.¹ The subject of these inspections are, generally speaking, foreign employees posted to client sites and performing activities related to their contracts for work and materials.

Why This Matters

While inspections by the custom authorities are nothing unusual – and up to now, they typically have to do with illegal employment – the current inspections appear to be outside the scope of what we have typically seen, affecting specialists posted to Germany such as engineers and staff with technical expertise (under arrangements known as "Werklieferungsvertrag").

Up to this point, the inspections have been limited to certain postings which are characterized by a direct transfer to the client without the involvement of a local entity. In many situations, the foreign employing company is obliged to establish adequate working conditions in accordance with Germany's immigration and labor laws. As such, multinationals based outside of Germany and contracted by a German client for work and materials in Germany should be aware of this requirement. They should also be aware of more aggressive government inspections and take the time to evaluate the appropriateness of their employees and the contracts they are working under and take steps to foster compliance. Failure to do so carries reputational, business, and financial risks.

Background

Employees who are not European Union (EU)/European Economic Area (EEA) or Swiss nationals generally require a work authorization for performing "productive" work in Germany. For foreign employees fulfilling their employers' contractual obligations, there is a simplified application and vetting process. Instead of applying for a standard work authorization, the activities of the employee must be notified to the Federal Employment Agency ("Bundesagentur für Arbeit"). In such cases, foreign nationals not requiring a visa for short-term stays in the Schengen Area² can work in Germany without any other type of authorization, but need to be issued with an "acknowledging document" from the Federal Employment Agency. "Visa required" nationals can perform these work activities on the basis of a Schengen business visa (type C) in addition to the acknowledging document from the Federal Employment Agency.³

¹ KPMG Rechtsanwaltsgesellschaft mbH has been informed of, and observed, such inspections at its clients' work sites.

² See Annex II of EU Regulation No. 539/2001 ("EU Visa Regulation") at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02001R0539-20140109&from=DE>.

³ See Annex I of EU Regulation No. 539/2001 ("EU Visa Regulation").

Such an exemption from the work authorization applies provided that those individuals posted to Germany by their employers that are based abroad, perform the following activities for up to three months within a period of 12 months:

- Set up and install IT machinery, systems, and programs ordered from the employer for commercial purposes, to provide instruction on their use, and to maintain or repair such items; or
- Disassemble used systems for the purpose of reassembling them in the employer's country.

The Federal Employment Agency maintains a so-called "fax-back" process for notifications. Once the notification form is sent to the Agency, the acknowledgement is confirmed within one to three business days by a fax back. Each employee is obliged to carry a print-out of the acknowledging fax with him or her in addition to having a general obligation of carrying his or her original passport. Only after the acknowledgement is confirmed are the individuals allowed to start working.

Once the notification has been confirmed, German customs authorities are internally informed about employees who are posted to Germany temporarily on the basis of contracts for work and materials (again, an arrangement known as "Werklieferungsvertrag").⁴ The transmittal of this internal information can be considered a significant trigger for subsequent controls by the customs officers.

Obligations of the Foreign Employer, the Employee, and the Receiving Client

At any rate, the deploying foreign company is required to ensure adequate working conditions according to German standards as required by law, for example, in terms of working hours, safety, and entitlement for annual leave⁵. This applies also to the statutory minimum wage requirements that became effective as of January 1, 2015.⁶ The hosting client for the employees is not legally obliged to ensure these standards, but the employer is de facto depending on the cooperation of the hosting client, for example, in terms of ensuring work safety.

In addition to the acknowledgement of the Federal Employment Agency, adherence to these standards may be subject to inspection by customs officers. Customs officers are entitled to demand access to work sites where posted employees are present, including client work sites.⁷

KPMG Note: Action Steps

Companies utilizing the notification process as described above should consider only posting their employees to their clients' sites when they have completed the above-mentioned procedures and have received the acknowledging fax from the Federal Employment Agency. Further, they may wish to consider informing their employees of the obligation to carry a print-out of the acknowledging fax with them in addition to their original passports. Additionally, companies should inform their contractual

⁴ See No. 2.19.002 of the Administrative Guidelines for the Federal Employment Agency ("Durchfuehrungsanweisung zur Beschaeftigungsverordnung"), available online via the Agency's central Web site.

⁵ See for details: Sec. 2 of the German Law on Posting of Workers ("Arbeitnehmer-Entsendegesetz"), http://www.gesetze-im-internet.de/aentg_2009/.

⁶ For prior coverage, see [Flash Alert 2015-007](#), January 21, 2015.

⁷ In accordance with Sec. 17 of the German Law on Posting Workers in conjunction with Sec. 5 (I) and Sec. 3 (I), (II) of the German Law on Prevention of Black Labor ("Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschaeftigung"), see under: http://www.gesetze-im-internet.de/schwarzarbg_2004/.

KPMG Note: Action Steps (cont'd)

partners which foreign employees will be working on their site and make them aware of the risk of possible inspections by the customs authorities. Contractual partners as well as other third parties can be compelled to allow inspections on their sites. Foreign companies may wish to arrange for a representative in Germany who will be available to attend inspections, if necessary.

Finally, companies should be aware of their obligations to provide adequate working conditions for their employees during their posting to Germany. Germany's immigration and labor laws do not exclude foreign companies from such obligations just because of their foreign place of business nor because of the short duration of the employee's postings.

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We Invite You to Watch a GMS Practice Video!

Understanding What the Affordable Care Act Means for Expatriates and Their Health Care Plans

Many multinational employers – for profit and non-profit, small and large, domestic and international, across all sectors – as well as health care providers are grappling with how to effectively implement and comply with the various rules under the Patient Protection and Affordable Care Act enacted in the United States in 2010. In the global mobility context, such employers also need to take into account employees on international assignments inbound to or outbound from the United States.

It's not unusual for some employers to be unaware of the "mandates" – the requirement to offer certain health care coverage (called "employer shared responsibility"), as well as the requirement for individuals to obtain coverage (called "individual shared responsibility") – that can apply to foreign nationals in the United States and U.S. assignees working overseas.

We are sharing the below-noted GMS videos (a two-part series) with you to help shed some light on the general rules under each type of mandate, with a focus on how each mandate may apply in connection with globally mobile employees.

Please see:

[**Understanding What the Affordable Care Act Means for Expatriates and Their Health Care Plans \(Part 1\)**](#) -- (app. 5-1/2 minutes).

[**Understanding What the Affordable Care Act Means for Expatriates and Their Health Care Plans \(Part 2\)**](#) -- (app. 8-1/2 minutes).

If you have any questions or concerns regarding matters raised in this video, please feel free to contact your usual KPMG professional.

The information contained in this newsletter was submitted by the KPMG International member firm in Germany. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

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