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flash Alert

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Germany – Federal Employment Agency Clarifies Payments to Meet Minimum Wage Rules
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We reported in GMS [Flash Alert 2015-007](#) (January 21, 2015) on the new German statutory minimum wage requirements. In that report, we noted, some matters that required additional clarity. In particular, KPMG Law in Germany had raised with the Federal Employment Agency (FEA) an inquiry regarding the treatment of allowances paid to boost assignees' salaries and compliance with the minimum wage rules.

The FEA has now provided some clarity on this matter.¹ According to the FEA, while typical assignment-related allowances cannot serve to meet the minimum wage requirements, companies may use temporary pay raises to boost salaries as a means of complying with the statutory minimum wage rules.

Why This Matters

Now that the FEA has more specifically framed how it will treat temporary pay raises, companies have some assurance that this compensation method, that serves to boost an employee's compensation (generally), can be relied upon to satisfy the statutory minimum wage requirements for assignees. Moreover, this approach could be quite helpful when assigning employees from low-wage countries to Germany by precluding any potential rejections by the FEA concerning labor market access.

Background

The statutory minimum wage requirements are taken into account by the FEA when deciding on the labor market access of non-EU/non-EEA/non-Swiss nationals.

The stated position of Germany's federal government that assignment-related allowances should count – to a limited degree – toward the minimum wage requirements, has an important impact on international assignees in Germany from low-wage countries.

The Position of the FEA

The FEA has explained in detail that it will implement the position of the federal government in its everyday decision-making process. However, the details indicate that the position only applies to the first stage of the Agency's evaluation (i.e., if the statutory minimum wage level is met). It does not apply to the second stage of the evaluation (i.e., if the salary is comparable to the salary of local colleagues). (For further discussion of these stages, see GMS [Flash Alert 2015-007](#) (January 21, 2015).)

¹ The Federal Employment Agency responded to the KPMG Law inquiry via e-mail dated February 23, 2015.

It is important to note that the FEA has only revised its approach to the consideration of allowances in relation to the statutory minimum wage requirements. Indeed, for the evaluation of comparable working conditions, the approach heretofore to consider all types of allowances has not been revised (as long as these allowances are at the assignee's unfettered disposal).

As a general principle, allowances will only be considered as "salary," if they are paid for performance of "additional" work. This **excludes** allowances such as:

- over-time premium payments;
- quality bonuses;
- allowances for working on Sundays, public holidays, or at night;
- payments for company loyalty;
- payments during assignments in terms of per diem, travel, or housing allowances.

Only the following allowances or payments, from the FEA's point of view, may be considered:

- lump sum payments (e.g., end-of-year bonus, extra vacation payment);
- temporary pay raises when an employee is on assignment in Germany.

The latter, in particular, can afford a useful opportunity for companies with international assignees in Germany to satisfy Germany's new statutory minimum wage requirements. Companies can agree a pay raise with assignees boosting the basic salary in respect of their assignment to Germany – this can serve to satisfy the minimum wage requirement of EUR 8.50/hour or EUR 1,473/month (gross salary). The pay raise may *de facto* include payments that would have been made as allowances before. Therefore, the FEA only requires a different contractual arrangement between the parties involved in an assignment.

According to the FEA's response, these clarifications will also be included in the general guidelines published on its Web site. The FEA provides publicly their internal administrative instructions ("Durchfuehrungsanweisungen") indicating its intended handling of all regulations. This helps provide some direction and intention with respect to how the FEA will execute its decisions. KPMG Law in Germany understands that the FEA will include information on allowances in its *Durchfuehrungsanweisungen*, though not immediately.

KPMG Note

Companies assigning employees to Germany from low-wage countries must comply with the statutory minimum wage requirements for assignments. Non-EU/non-EEA/non-Swiss national assignees have to be paid at least a minimum wage during their assignments to Germany. Even though typical allowances paid to employees on assignments are not considered as salary (or wage), the FEA's clarifications provide a potential opportunity for companies to preclude rejections in respect of German labor market access. Of course, EU²/EEA/Swiss national assignees must be paid at least a minimum

² Please note there is an exemption for Croatian nationals at least until June 30, 2015 – they may require a special EU work permit. If so, the requirements for non-EU/non-EEA/non-Swiss nationals apply to the special EU work permit for Croatians.

KPMG Note (cont'd)

wage as well, but their labor market access does not depend on a decision from the FEA; infringements in their cases may lead to sanctions described in our earlier [Flash Alert 2015-007](#) (January 21, 2015) (see under "Impact on Allowances and Employee Rights to Claim Minimum Wage"). It is now acceptable that companies can agree temporary pay raises with their assignees. These agreements must have the effect of boosting payments generally to the assignee without having a specific purpose (e.g., housing allowances, per diems, etc.). Companies should consider revising their internal assignment policies accordingly and also evaluate further consequences in terms of their tax impact.

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