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Germany – Allowances No Longer Permitted for “Boosting” Base Salaries of Assignees

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flash Alert

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Germany's Federal Employment Agency recently announced a significant change to its policies and practices with respect to labor market access for **non-European Union (EU)/European Economic Area (EEA)/Swiss** nationals.¹ To meet compliance obligations under German immigration law, as of January 1, 2016, allowances will generally not be permitted for purposes of augmenting the base salaries of international assignees to Germany. Subsequent communications² with the Federal Employment Agency revealed the likelihood of a transition period that is to be announced separately.

Why This Matters

This new administrative policy of the Federal Employment Agency (“Bundesagentur für Arbeit”) will impact international assignments to Germany. Assignees from low-wage countries, for example, India, the People's Republic of China, and Brazil often receive assignment-related allowances to boost their base salaries. These assignment-related allowances are typically per diems, transportation and housing allowances, or cost of living allowances (COLA). (For related coverage, see our GMS [Flash Alert 2015-030](#) (February 26, 2015).)

Assignments of non-EU/EEA/Swiss nationals to Germany are subject to a work authorization requirement. Thus, these assignees must obtain a visa including a work authorization or a combined residence and work permit. Both depend on “internal” approval from the Federal Employment Agency, which performs a labor market test.

In the past, the Federal Employment Agency permitted such allowances to be used to boost the assignee's foreign base salary to bring it up to a comparable salary level (comparable to the local workforce). This will not be permitted as of January 1, 2016 or, alternatively, after the transition period has passed (more on this below).

Involvement of the Federal Employment Agency in Assignments to Germany

Regularly, assignees need to obtain an entry visa first and apply afterwards for a combined residence and work permit in Germany. Only nationals of Australia, Canada, Israel, Japan, New Zealand, South Korea, and the United States may apply directly for a combined residence and work permit in-country upon arrival.

Usually, the entry visa and/or the combined residence and work permit are issued by the German diplomatic missions or the local immigration offices with the involvement of the Federal Employment Agency. The Federal Employment Agency's involvement is not required, though, for entry visas and/or combined residence and work permits of executive employees.³

If the Federal Employment Agency is involved, it will perform a labor market test. During this labor market test, the assignee's future working conditions will be compared with the working conditions of the local workforce (comparability requirement):

- having a comparable professional and educational background;
- having comparable experience; and
- working in a comparable position.

Those working conditions which must be comparable, in particular, consist of salary, entitlement for annual leave, and working hours.

Since January 1, 2015, and the implementation of the German statutory minimum wage requirement, the comparability requirement has been divided into two stages in terms of salary and the comparability requirement, which was amended with another requirement. For the first stage, the Federal Employment Agency compares the actual salary paid during the assignment with the statutory minimum wage requirement, which is regularly EUR 8.50 (gross/per hour). For the second stage, it assesses whether the salary complies with the comparability requirement.

Consideration of Allowances

From the beginning, the German government made very clear with the draft of the *Gesetz zur Regelung eines allgemeinen Mindestlohns* ("Law Regulating a General Minimum Wage" or "MiLoG"⁴) that allowances would not be considered for attaining the minimum wage requirement.⁵

Now, the Federal Employment Agency announced that this approach will apply to the second stage of its assessment as well. Until now, the Federal Employment Agency accepted boosts of a base salary for an assignee that is insufficient, and thus not comparable to the base salary of a local workforce, by means of allowances (for example per diems during the assignment).

As per the Federal Employment Agency's e-mail above-mentioned, the only possibility for boosting the base salary in future will be temporary amendments of said salary. This temporary boost may be equivalent to the payments that would have been made as allowances in the past. A company, for example, may consolidate payments usually paid as per diems or housing allowances and grant these payments as temporary salary increases during the assignment instead of paying these as allowances to the assignee.

KPMG Note

Even though the Federal Employment Agency's e-mail was sent out by a specific unit within the Agency that handles applicants on the basis of the International Staff Exchange Program,⁶ it is likely that all units of the Federal Employment Agency will implement this new practice, because the change derives from an order from its headquarters. Therefore, assignments under the terms of Sec. 29 (5) and Sec. 26 (1) of the German Employment Regulation will likely be affected by the change in administrative policy.

KPMG Note: Transition Period

On the occasion of a follow up phone call, the Federal Employment Agency confirmed that a transition period will likely be granted, but that the actual duration of the transition period pertaining to the application of the new administrative policy is currently still under discussion. Once the headquarters of the Federal Employment Agency provides guidance, the actual transition period will be announced via e-mail by the relevant unit of the Federal Employment Agency.

Action Steps

The change in administrative policy will give rise to several “to do” steps for companies. International assignment policies should be reviewed and amended where necessary – as they are the backbone of the specific assignment agreements between the companies and the assignees, they need to provide for sufficient flexibility in terms of boosting a foreign base salary by a contractual amendment instead of through the payment of allowances. In a worst-case scenario, this may lead to broad exemption from policies for specific country combinations, for example, India-Germany, etc. or to country-specific assignment policies.

However, it will not be just applications for new entry visas and/or combined residence and work permits, which will be affected by the changed administrative policy. Even existing and valid assignment agreements may need to be amended with regard to renewals of a combined residence and work permit. According to the current situation, where no transition period is applicable, amendments, if necessary, needed to be finalized by January 1, 2016. If the amendments did not take place, the Federal Employment Agency likely ended up withholding its internal approval for a renewal of the combined residence and work permit.

KPMG Law will endeavor to issue a further report regarding the transition period and further developments on discussions with the Federal Employment Agency.

Footnotes:

- 1 A December 22, 2015 e-mail was sent by Team 008 of the Federal Employment Agency being responsible for decisions pursuant § 10 (1) of the German Employment Regulation (BeschV) for assignments under the International Staff Exchange Program.
- 2 These took place over the phone on December 28, 2015, in a conversation between representatives of KPMG Rechtsanwalts-gesellschaft mbH and the Federal Employment Agency.
- 3 Pursuant to Sec. 3 of the German Employment Regulation.
- 4 See (in English): http://www.gesetze-im-internet.de/englisch_milog/index.html .
- 5 See our GMS [Flash Alert 2015-030](#) (February 26, 2015).
- 6 Pursuant to Sec. 10 (1) of the German Employment Regulation.

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27 January 2016

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