

GMS Flash Alert

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Germany - New Salary Criteria in Effect from 1 January 2017

With effect as of 1 January 2017, the salary criteria for EU Blue Cards issued by German authorities have increased. The new criteria also apply to EU Blue Card-based entry visas (national visas). For shortage occupations, the new criterion is EUR 39,624 (in 2016: 38,688) and for all other occupations it is EUR 50,800 (in 2016: 49,600).¹ Additionally, the general minimum wage requirement arising under the terms of MiLoG (the statutory minimum wage rule) for all work performed in Germany increased from EUR 8.50 to EUR 8.84 (gross/hour).

WHY THIS MATTERS

Comparable to many other countries, salary criteria for EU Blue Cards are revised annually. All applications related to a start date of 1 January 2017 or later for EU Blue Cards or EU Blue Card-based entry visas (national visas), have to comply with the new salary criteria. Additionally, pending applications have to meet the new salary criteria if the decision on an application is made after 1 January 2017.

Companies intending to hire (non-privileged) third-country nationals² have to take the new salary criteria into account when offering employment contracts to candidates. It may be required that a company has to amend an existing offer if the decision on the application has not been made before 1 January 2017, and the offered salary does not comply any longer with the new salary criteria.

Please note that already-issued entry visas (national visas) and EU Blue Cards are not affected by the new salary criteria, so the related employment contracts do not need to be amended. An amendment may be necessary in case the salary guaranteed with the employment contract was sufficient for the entry visa application, but is not sufficient for the final EU Blue Card application that is to be filed later than 1 January 2017.

The German Act on a general minimum wage ("MiLoG")³ became effective as of 1 January 2015, and regulated for the first time in Germany a general minimum wage that is set at EUR 8.50 (gross/hour), though with effect as of 1 January 2017, the German administration increased the minimum wage per executive regulation⁴ to EUR 8.84.

Changes to EU Blue Card Salary Criteria

The EU Blue Card is an important type of combined residence and work permit under German immigration law. All foreigners except nationals of Australia, Canada, Japan, Israel, New Zealand, South Korea, and the United States are entry-visa required for employment-related stays in Germany. Visas are regularly issued with a validity of 90 days. However, the entry visas are mainly issued under the same requirements as final EU Blue Cards.⁵

Those requirements are:

- Work in Germany related to a local employment contract;
- Be in possession of a German (or equivalent foreign) university degree;
- Earn a salary that complies with the salary criteria.

In terms of salary, German immigration law differentiates between shortage occupations and other occupations. For example, engineers and IT specialists are considered as shortage occupations.⁶ The salary criteria stipulated by the EU Blue Card regulation are a mandatory requirement.

As a fundamental principle under German law, the authorities have to apply the latest laws when issuing a permit. If the laws change between filing the application and the decision to issue a permit, the latest laws have to be considered. For example, an EU Blue Card-based entry visa (national visa) was issued in December 2016 and the applicant's salary met the erstwhile salary criterion. Upon arrival in January 2017, the applicant applies for the final EU Blue Card. Regarding this application, his salary must meet the salary criterion with effect as of 1 January 2017.

Other Types of Residence/Work Permit

Nevertheless, the EU Blue Card is not the only type of combined residence and work permit for third-country nationals locally employed in Germany. Another type of permit for highly-skilled specialists exists and, additionally, nationals of the seven countries listed above can apply for a combined residence and work permit even without being highly-skilled. For these types of permits, definite salary criteria do not exist. Amongst other requirements, the salary must be equal to the salary of local workers with a comparable professional background and working in a comparable position.

Increased General Minimum Wage Requirement under MiLoG

For the first-time, the statutory minimum wage affects all individuals working in Germany regardless of their nationality. Additionally, the location of their employing entity is not taken into account; so even foreign companies located abroad and assigning employees to Germany are legally required to pay the statutory minimum wage during an assignment.

Since the end of 2014, the Federal Employment Agency ("FEA") has been requiring companies to pay allowances for the entire assignment period indicated in the application. Temporary project workers who are travelling back and forth between their home country and Germany must receive their full allowances during the entire assignment period. Otherwise, one of the main requirements for a German entry visa or long-term combined residence and work permit of a non-European Union (EU)/non-European Economic Area (EEA)/non-Swiss national will not be attained, which might lead to the rejection of the application. In particular, this has relevance for entry visas as well as residence and work permits for assignments that have no clearly defined salary criteria like the EU Blue Card, which is a specific type of residence and work permit for non-EU/EEA/Swiss nationals working in Germany based on a local employment contract.

Diverging agreements in employment contracts or assignments contracts will have no effect. Individuals can sue their employers – even if they are located abroad – in Germany in the event that they are not paid according to Germany's minimum wage rules.

Based on the then-legally required hourly rate of EUR 8.50, the monthly rate the FEA required amounted to EUR 1,473 based on a 40-hour work week from 1 January 2015 until 31 December 2016; this has now increased to EUR 1,531.92. Additionally, the FEA will also evaluate whether a third-country national is paid comparably to local colleagues working in the same position with a comparable professional background. Thus, the evaluation will encompass two stages:

Evaluation, if statutory minimum wage level is met	EUR 8.84/hour (gross) EUR 1,531.92/month (gross)
Evaluation, if salary is comparable to the salary of local colleagues ("comparability requirement")	No fixed wage level, depending on an Individual assessment

Typical assignment-related allowances such as per diems, housing and transportation allowances paid as a lump sum, mobility bonuses, or conveyance allowances paid abstractly for different duties and responsibilities during the assignment, payments for tax equalization, and cost of living allowances, can only be taken into account for the comparability requirement, but not with regard to the minimum wage level. A work-around might be a temporary rise of the base salary offered to the employee.

KPMG NOTE

Action Steps

Regarding the local hire of non-EU/EEA/Swiss nationals based on an EU Blue Card

For companies focusing on definite salary criteria when hiring (non-privileged) third-country nationals, the annual amendments should be monitored closely. The KPMG International member firm in Germany strongly recommends the amendment of employment contracts in-line with the new salary criteria regarding pending applications as follows:

- Drafting employment contracts with a start date later than 1 January 2017, in-line with the new salary criteria;
- Amending already-existing employment contracts in-line with the new salary criteria in case of pending applications.

Otherwise, the EU Blue Card-based applications will be rejected and the preferred candidate will not be able to start working in Germany, if the applicant does not qualify for a different combined residence and work permit. Those types of permits are not subject to defined salary criteria and, thus, an approval is uncertain, especially in cases where the working conditions are not comparable with those of local workers.

Regarding the requirements arising from MiLoG

Companies need to consider the increased minimum wage level under MiLoG with effect as of 1 January 2017, as well. Often companies located in low-wage countries are regularly required to raise the basic salary for the employee on assignment. The basic salary cannot be raised by means of typical assignment-related allowances, but, rather, only by means of temporary "boosts" of the base salary itself. This boost must be considered in light of the fact that an employee

on a 40-hour work week must be paid a monthly salary of EUR 1,531.92 (gross); whereas the salary per hour must not be less than EUR 8.84 (gross).

Companies not meeting the requirements under MiLoG will come up against a denial by the authorities in terms of labor market access for non-EU/EEA/Swiss nationals; consequently, any applications for an entry visa or combined residence and work permit will not be successful.

FOOTNOTES:

1 The salary criteria are related to the gross annual salary.

2 The Blue Card regulations do not apply to EEA nationals or Swiss nationals.

3 For the text (in English translated by the German Ministry of Justice and Consumer Protection) of the [Act Regulating a General Minimum Wage \(Minimum Wage Act\)](#).

4 This administrative regulation is called "Mindestlohnangepassungsverordnung – MiLoV," published in BGBl. I 2016, page 2530.

5 See Section 6 (3) in conjunction with Sec. 19a of the German Residence Act.

6 For all shortage occupations in this regard, please the groups 21, 221, 25 of International Standard Classification of Occupations ("ISCO-08") pursuant to the referral in Sec 2 (2) Sentence 1 of the German Employment Regulation (BeschV).

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Contact us

For additional information or assistance, please contact your local GMS or People Services professional* or one of the following professional with the KPMG International member firm in Germany:

Dr. Thomas Wolf

Tel. +49 (0) 30 530 199 300
TWolf@kpmg-law.com

Dr. Sebastian Klaus

Tel. +49 (0) 69 95 11 95 090
SKlaus@kpmg-law.com

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