



GMS Flash Alert

Immigration Edition

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Germany - Increased Scrutiny from Authorities for Granting of Labor Market Access

Germany's *Bundesagentur für Arbeit* (or Federal Employment Agency, hereinafter ("FEA")) has (i) published several new forms to be completed, which require more detailed information, and (ii) increased the obligations of companies employing or hosting a non-European Union (EU)/European Economic Area (EEA)/Swiss national in Germany. Those forms also hint at a revised practice concerning if and to what extent allowances can be considered for purposes of boosting a foreign base salary to a level comparable to the local labor market.

WHY THIS MATTERS

A core principle of German immigration law for several years has been that working conditions of non-EU/EEA/Swiss nationals shall not be less favorable than those of German nationals. In the past, the FEA focused only on two working conditions in detail. The new practice means potentially increased scrutiny and more detailed examination of other working conditions.

Companies might need to amend their standard assignment and employment contracts for Germany in order to account for this, to provide more detailed information to the FEA, and to change the terms of paying allowances where international assignments are concerned.

Background

Some German residence titles¹ for the purpose of working in Germany require the FEA's internal approval. If an approval is required, the FEA will perform a labor market test pursuant to Sec. 39 AufenthG². Such a labor market test

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may encompass assessing whether the working conditions of a non-EU/EEA/Swiss national are comparable to those of a local employee and, in limited scenarios, whether privileged³, unemployed workforce is available.

One of the FEA's main objectives when a non-EU/EEA/Swiss national immigrates to Germany is to make sure that such foreigners will not work in Germany under working conditions less favorable compared to those of local employees. This is regulated in Sec. 39 (2) Sentence 1 AufenthG for all permission categories, except the ICT Card and Mobile ICT Card; for those two permission categories a more specific regulation applies, but it has nearly comparable requirements.⁴

Working conditions explicitly mentioned in this regard by Sec. 39 (2) Sentence 3 AufenthG are:

- salary;
- working hours (commonly per week); and
- "other working conditions."

For years, the FEA has been referring in its forms only to the working conditions of "salary" and "working hours" and has accordingly made requests about those.

Changes: Further Details

With effect from May 2018, the FEA has revised its main form and now requires the following information related to "other working conditions":

- entitlement to annual leave, and
- if and how overtime work is paid.

The new main forms are available online.⁵ Specific forms are to be used for internal approval procedures under the international staff exchange rule⁶ and for the so-called ICT-Card / Mobile ICT-Card.⁷

A second important change concerns employing / hosting companies in Germany having to indicate (from their end) the comparable salary of a local employee (within their company) and confirm that it is indeed comparable.

KPMG NOTE

This latter change is surprising and appears to shift responsibilities from the FEA to companies, even though any conclusion on comparability is subject to the FEA's legal examination. In other words, any legal assessment is the bailiwick of the FEA, whereas companies only are obliged to provide accurate facts. The requirement that a company confirm the comparable salary of a local comparable employee is a departure from previous practice and blurs the differentiation in responsibilities that had existed.

Finally, a third important change has to do with the FEA – in cases of assignments – not considering allowances paid mainly to boost foreign salary that are not "at free disposal and committedly paid" to the assignee. It is clear that, for example, reimbursed housing allowances based on hotel receipts, etc. will not be considered anymore. The same applies if the housing is rented by the home or host company directly or via a relocation agency.

KPMG NOTE

However, uncertainties remain whether per diems, cost of living allowances, and in-country transportation allowances will be considered. The FEA indicated in an e-mail correspondence of a general nature in response to an inquiry from KPMG Law in Germany on 24 May 2018, that the new guidelines on how to interpret Sec. 39 (2) AufenthG are currently with the Federal Ministry of Labor and Social Affairs for review, before they will be published.

KPMG NOTE: MATTERS FOR COMPANIES TO CONSIDER IN LIGHT OF CHANGES

First, companies need to establish the “comparable” nature of salary and working hours of non-EU/EEA/Swiss nationals, whose residence titles are subject to an approval from the FEA; in addition, other working conditions as now specified need to be comparable. Examples of other working conditions are entitlement to annual leave and remuneration modalities with regard to overtime work.

Second, companies need to collect internally information on the salaries of local employees and communicate that information to the FEA. In some forms (those cited in Footnotes 6 and 7), even though the responsibility for assessing what a comparable salary is lies with the FEA, companies must now provide not only salary figures of a local employee in a comparable role, but also must de facto confirm the comparability to the FEA. At first glance, this appears contradictory to the heretofore legal allocation of responsibilities. Nonetheless, not following this request could lead to a denial or at least a delay. A judicial clarification – if it came to that – could take years, which would take a financial toll on a company and might end up being an amount (and time commitment) that is disproportional to the company’s need to transfer the non-EU/EEA/Swiss national to Germany as soon as possible.

Third, companies might need to restructure their concepts of remuneration during an assignment. From the get-go, assignees shall always receive housing allowances paid out to them. Additionally, the decision on which accommodation to rent and to what extent allowance for a specific accommodation shall be used needs to be up to the assignee.

In order to mitigate further uncertainties, companies might consider paying the common and aforementioned allowances as temporary “uplift” of the assignee’s base salary without further differentiation. This could also lead to other remuneration components being considered for boosting a foreign basis salary to a comparable level, if needed.

FOOTNOTES:

1 Residence title is (according to Sec. 4 (1) AufenthG) a legal umbrella term and, for example, covers Schengen C Visas, National D Visas, Residence Permits, and EU Blue Cards.

2 Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (abbreviated as “AufenthG” in German), available online (in English) can be found by clicking [here](#).

3 This concerns, in particular, German nationals, EU, EEA, or Swiss nationals, as well as non-EU/EEA/Swiss nationals, who have been granted unrestricted labor market access for Germany.

4 This is the regulation of Sec. 39 (1) Sentence 2 AufenthG in conjunction with Sec. 10a (1) BeschV.

5 The main form can be accessed by clicking [here](#).

6 Pursuant to Sec. 18 (4) AufenthG in conjunction with Sec. 39 (2) AufenthG and Sec. 10 (1) BeschV. These forms can be accessed by clicking [here](#).

7 These forms can be accessed by clicking [here](#).

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