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Germany – New Statutory Minimum Wage Will Impact Employment of Foreign Individuals

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flash Alert

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On January 1, 2015, Germany's law on the statutory minimum wage became effective. The law implements – for the first time in Germany – a general statutory minimum wage for all occupations and it applies to all individuals actually working in Germany, including European Union (EU) and European Economic Area (EEA) nationals, as well as Swiss nationals and other third-country nationals¹. Until a possible revision (with effect as of January 1, 2017), the statutory minimum wage is EUR 8.50/working hour (gross).

Why This Matters

The new German 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. Statutory minimum wages are subject to decisions of the Federal Employment Agency (FEA) regarding labor market-access of non-EU²/non-EEA/non-Swiss nationals. If statutory minimum wages will not be paid during an assignment, the FEA will deny its internal approval for the issuance of a required residence title.³

Currently, it is not clear if and to what extent assignment-related allowances (e.g., housing, per diems, etc.) may be considered when determining whether the statutory minimum wage is legally attained. In some cases, assignees to Germany come from low-wage countries⁴ and they are paid allowances to raise their wage to a comparable level. A statement⁵ issued by the German government (*Bundesregierung*) during the law-making procedure indicates that allowances that are paid, but not tied to the performance of "additional" work, shall not be considered.

Impact on Allowances and Employee Rights to Claim Minimum Wage

Since the end of 2014, the FEA requires companies to pay allowances for the entire assignment period indicated with the application. Temporary project workers who are travelling back and forth between their home countries and Germany must receive their full allowances during the entire assignment period. Otherwise, one of the main requirements for a German residence and work permit will not be fulfilled, which might lead to the rejection of the application.

Differing terms in an employment contract and an assignment letter for the same employee that do not comply with the statutory minimum wage are considered as "non-effective" from a German legal stand-point, which means basically that the employee has the right to claim the statutory minimum salary guaranteed by law despite the apparent discrepancy in the actual agreements. In addition, it is important to note that as long as an employee is entitled to be paid according to minimum wage conditions, the employee can sue his employer in Germany – even if that employer is located abroad – if he is not paid properly under the terms of the law.

FEA Minimum Wage Amounts and Evaluation Process

Based on the legally required hourly rate of EUR 8.50, the monthly rate the FEA requires amounts to EUR 1,473 based on a 40-hour work-week.⁶ Please note that the FEA will evaluate whether a third-country national is being paid comparably to local colleagues working in the same position with a comparable professional background. Subject to the approval process, therefore, is the comparability of working conditions. The FEA will compare salaries for local hires and assignees during an assignment to Germany not only with local salary levels; the FEA will also investigate if the third-country national will receive the statutory minimum wage. Thus, the evaluation will encompass two stages:

Evaluation, if statutory minimum wage level is met	EUR 8.50/hour (gross) EUR 1,473/month (gross)
Evaluation, if salary is comparable to the salary of local colleagues	No fixed wage level, depending on an individual assessment

KPMG Note

In light of the aforementioned statement from the German government, it is currently not clear if and to what extent allowances can be utilized to boost basic salaries paid by companies with employees from low-wage countries. For the second stage of the evaluation, this has regularly been accepted by the FEA; however, the statement from the German government may prevent the FEA from considering allowances for the first stage of the evaluation, as well as the second stage.

This could, for example, affect 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;
- cost of living allowances.

KPMG Law has engaged in discussions with the FEA and, subsequently, the German Ministry of Labor and Social Affairs (*Bundesministerium fuer Arbeit und Soziales*, or "BMAS"), which has responsibility for the FEA. For the time being it is likely that the FEA will consider allowances – as in the past – in respect of the statutory minimum wage. We have been informed⁷ that the FEA has not finally decided on a revision of its approach (including the evaluation at the first stage), but it is aware of the government's statement. The internal consultation underway at BMAS will hopefully yield clarification and establish a clear decision process to be followed by the FEA.

(According to the information from the FEA, allowances will be considered as in the past for renewals, if they were also considered for the initial internal approvals.)

However, since companies are not likely to postpone assignments until answers are forthcoming from the German authorities, it is advisable, in the meantime, to consider structuring assignments on the

KPMG Note (cont'd)

basis of a temporary German employment contract in addition to the contract with the home entity in case the employee is definitely needed in Germany and a delay is not possible.

Footnotes:

1 As defined by EU law, third-country nationals are nationals of non-EU countries.

2 Exceptionally, this also applies to Croatian nationals. They are restricted in terms of labor market access at least until June 30, 2015, and 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 analogously.

3 For example, a national visa or a combined residence and work permit.

4 For example, the BRIC countries (Brazil, Russia, India and China).

5 BR-Drs. 18/1558, page 67.

6 See:

<http://www.arbeitsagentur.de/web/wcm/idc/groups/public/documents/webdatei/mdaw/mjq4/~edisp/6019022dstbai704473.pdf>, page 6.

7 KPMG Law initiated an official request with the FEA regarding the handling of future cases in respect of the statutory minimum wage in general and a first call took place on January 7, 2015. In accordance with the German Administrative Law (§ 25 Verwaltungsverfahrensgesetz) an "abstract" request can be raised to the German federal authorities for discussion. Subsequent to the call, KPMG Law submitted a broad list of possible allowances and requested legal opinions in this regard. On January 12, 2015, KPMG Law was informed by the FEA that the request had been brought to the attention of the BMAS.

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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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