WORKERS WITHOUT BORDERS

Commission(s) in charge of the Session/Workshop:

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National Report of Germany

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1. IMMIGRATION

1.1. Who needs a work permit to work in your country? Are there types of employees exempted (e.g., based on their nationality or type of work performed (business trips, etc.)?

a. EU Citizens / EEA Citizens / Swiss Citizens

Foreign nationals of the European Union (EU), the European Economic Area (EEA) and Swiss nationals are entitled to freedom of movement under Section 2 of the Freedom of Movement Act/ EU and therefore have unrestricted access to the German labour market. There is no visa or resident permit requirement for those nationals mentioned above.

All that needs to be provided is a valid passport or identity card. Just like German nationals the EU, EEA and Swiss citizens need to register their residence at the resident's registration office in the town or city in which they will live within three months of entering the country.

Nationals of Switzerland also enjoy freedom of movement within the EU but must apply for a special but purely declaratory residence permit for Swiss nationals (Section 28 of the German Residence Act).

b. Citizens of Third Party Countries

Foreign nationals other than European Union (EU), European Economic Area (EEA) and Swiss nationals (so called citizens of third countries) may reside in Germany for the purpose of taking up gainful employment if they have a residence permit which explicitly authorises them to do so. Australian, Israeli, Japanese, Canadian, South Korean, New Zealand and US citizens may obtain such a residence permit from the relevant office for foreign nationals, once they have arrived in Germany. It is important to note, however, that they may not commence their intended employment until they have the permit. All other foreign nationals on the other hand, must apply for a work visa from their local German diplomatic mission before coming to Germany.

c. Employees Exempted From Work Permit and Visa Requirement

EU, EEA and Swiss nationals do not need a visa or residence permit in order to take up employment in Germany.

Nationals of a country for which the European Community has abolished the visa requirement (e.g. USA, Australia, Canada, Isreal, Japan, New Zealand, South Korea) and whose visit does not exceed 90 days in an 180-day period and who will not take up employment in Germany do not require a visa to enter Germany. Therefore,

employees whose business trips do not exceed 90 days are exempted from the visa and residence permit requirements.

It is important to note though that during those 90 days the employee may not undertake any employment whilst in Germany. I.e. any activities should be strictly business trip related. This may include: Attend meetings, conferences and seminars; attend and conduct interviews and negotiation of deals and contracts etc.

1.2. Are there different types of work permits in your legal system? Are there work permits for highly educated/qualified employees? If so, what are the conditions and what is the procedure to be followed? Who needs to file for the application and where? Which information and documents are to be provided to the competent authorities? What is the timing? What is the duration of the work permit? Can it be renewed? Is it possible to apply for permanent status after a certain period of time under the work permit?

a. Types of Work Permits

The work permit is part of and contingent on the grant of a residence permit. To what extent a person is allowed to work will be detailed on his or her residence permit.

Basically, there are 4 types of residence permits which are compatible with a work permit:

- Residence permit (Aufenthaltserlaubnis):

  is issued for a limited period of time but can be extended;

- The EU Blue Card (Blaue Karte-EU):

  is initially issued for a four-year period and available to nationals of third countries who have a university degree or equivalent qualification with the aim of enabling them to take up employment on the basis of their qualification;

- Settlement Permit (Niederlassungserlaubnis):

  The settlement permit does not have a time limit. To obtain a settlement permit, you must, as a rule, have had a residence permit for five years and also fulfil further conditions (e.g. provide proof of financial independence, have adequate German-language skills);

- Permanent EU residence permit (Erlaubnis zum Daueraufenthalt EU)

  In addition to being entitled to work and having permanent residence status in Germany, the permanent EU residence permit also entitles the holder to mobility within the European Union by granting a right to a limited residence title in the other Member States.

b. Work Permits for Highly Educated / Qualified Employees

Foreign nationals with a recognised university degree have easier access to the German labour market under the EU Blue Card system. In order to obtain the Blue Card, they must simply provide proof of their qualifications and a concrete job offer that would provide annual gross earnings of at least 49,600 EUR (2016).

In the case of highly qualified foreign nationals with a backround in mathematics, IT, in natural sciences or technology as well as medical doctors, the EU Blue Card conditions still apply, provided they are offered the same salaries as comparable German employees and their annual gross earnings would be at least 38,688 euros (2016).

For scope, conditions, application process and validity please see answer to question 1.5. c. through f.

1.3. Is a separate residence permit required/ granted via the work permit? Please explain.

The work permit is part of the residence permit. There is no separate work permit required or granted via the residence permit.

In the course of the application process for the residence permit, the authorities in charge will contact the Federal Employment Agency in an internal administrative procedure to determine whether a work permit can be issued as part of the residence permit. The consent procedure generally takes up to three months and sometimes longer since both the Office for Foreign Nationals and the Federal Employment Agency need to give their consent.

In the course of the consent procedure, the Federal Employment Agency will conduct an employment market check. Section 39 of the Residence Act provides that a work permit may only be granted if:

- the proposed employment has no detrimental effects on the employment market, in particular to employment structures, the regions and economic branches; and
- no German employee (or European employee of equal status) is available for the tasks to be fulfilled by the foreign employee.

This test is called the "Vorrangprüfung" or "Priority Test." As long as the foreign employee does not possess exceptional qualifications or knowledge necessary to fulfill the task that no available German or European employee has, the work permit will not be granted. There are some exceptions from this priority test for specific groups of employees defined by the Employment Decree ("Beschäftigungsverordnung") (e.g., highly qualified employees, management-level employees, scientists, specialists in certain areas and nursing employees).

1.4. Who can be sanctioned in case of illegal employment in your country (e.g., the employer, the employee, the host company, etc.)? What are the sanctions (civil and/or criminal) in case of illegal employment?

In case of illegal employment sanctions can apply to the employer resp. the liable executive body, the employee and the company where the employee is illegaly employed.

a. Sanctions Employer

An employer's conduct constitutes an administrative offence if he wilfully or through negligence employs a foreign national who does not possess the required residence permit in order to perform a sustainable and profit-oriented service or work (Section 98 para. (2a) German Residence Act; Section 404 para. (2) No. 3 Social Security Code III).

The imposed fine will amount to up to 500,000 EUR (Section 98 para. (5) German Residence Act and Section 404 para. (3) Social Security Code III).

Whoever persistently repeats such administrative offences, shall be punished with a term of imprisonment of up to one year or a fine, in case of acting out of pure self-interest of up to three years or a fine (Section 11 para. (1) No. 2, para. (2) German Act Against Illicit Employment – "Schwarzarbeitsbekämpfungsgesetz").

An entrepreneur's conduct constitutes an administrative offence if he/she commissions a sub-contractor of which he knows or does out of negligence not know that he employs foreigners who do not possess the required residence permit; the imposed fine in such a case will amount to up to 500,000 Euro (Section 404 para. (1) Social Security Code III).

b. Sanctions Employee

An employee's conduct constitutes an administrative offence if he or she wilfully or through negligence undertakes gainful employment without possessing the required residence permit in order to take up gainful employment (Section 404 para. (2) No. 4 Social Security Code III).

The imposed fine will amount to up to 5,000 Euro (Section 404 para. (3) Social Security Code III).

1.5. Did your country implement the European Blue Card Directive 2009/50/EC? If so, please explain the scope, conditions, application process and validity of the blue card?

The European Blue Card Directive 2009/50/EC has been implemented through Section 19a of the German Residence Act. Object is to ease the conditions of entry for highly qualified non-EU nationals. It constitutes a new temporary residence title.

a. Conditions and Procedure for EU Blue Card

Overseas, the foreign national will have to turn to the visa Section of the respective German embassy or consulate and apply for a visa for the purpose of employment before entering Germany. As a matter of principle, this also applies in cases in which visa-free entry would otherwise be possible (See the next paragraph for details of exceptions). It is not advisable to enter Germany with a tourist visa, as this type of visa can only be extended in the form of a residence title in exceptional cases. As a rule, it is otherwise necessary to leave and then re-enter the country. The visa for the purpose of employment entitles you to enter Germany and then to apply to the immigration authority that is competent for his/her place of residence for the EU Blue Card to be issued.

Nationals of Australia, Canada, Israel, Japan, the Republic of Korea, New Zealand and the United States of America may enter Germany on a visa-free basis and can apply to the competent immigration authority in Germany for their future place of residence for an EU Blue Card within three months of entering Germany.

However, individuals who enter the country on a visa-free basis may not as a rule work immediately after entering the country as they do not hold a visa permitting them to engage in gainful employment. This is only permitted when they have received the appropriate residence title. Since it can take several weeks for one to be issued, it is recommended to apply for a visa from the competent mission, even if no visa is required, in order to be able to take up gainful employment at a later date.

Applications for an EU Blue Card are to be made in person by the person in question to the competent German mission abroad or, if the nationals mentioned above are exempt from the visa requirement, to the competent German immigration authority.

b. Information and Documents to be Provided to the Competent Authorities

- Valid passport;
- a new biometric photo;
- University report: If necessary the valuation of the ZAB (Zentralstelle für ausländisches Bildungswesen);
- job contract or a concrete job offer;
- Form: Application for granting a residence title (Antrag auf Erteilung eines Aufenthaltstitels). A residence permit may be given only on explicit application.
- Form: Application for permission of an employment (Antrag auf Erlaubnis einer Beschäftigung). This is only necessary if the approval of the federal agency for labour is needed.

- Form: Work Place description (Stellenbeschreibung). This is only necessary if the approval of the federal agency for labor is needed.

c. Timing of Issuance, Duration and Renewal of EU Blue Card

The EU blue card application procedure takes up to three months and it is at first valid for 4 years. If the working contract covers a period of less than 4 years, meaning it is limited, the EU blue card will be valid for the time of the working contract plus 3 months.

The permit can be extended or settlement permission can be given.

d. Permanent Status After a Certain Period of Time

Owners of the EU blue card get permission to stay after 33 months if their contract is still valid. If the owner of the EU blue card can prove German language skills at a certain level, permanent resident status can be granted after just 21 months (Section 19a(6) Residence Act).

1.6. Did your country implement the European Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer? If so, please briefly describe and explain importance and impact?

The European Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer has not yet been implemented in Germany. The deadline for the transposition is 29th November 2016.

2. LABOUR AND EMPLOYMENT LAW

2.1. In your country, how is the applicable law governing the employment contract during the assignment period determined?

a. Rome I Regulation

The Rome I Regulation determines which law applies to employment relationships in cross-border employment scenarios, provided that the employment contract was concluded after the 17th of December 2009. The regulation applies to all EU member states except Denmark, which has an opt-out from implementing

regulations under the area of freedom, security and justice. Pursuant to Article 2, the Rome I Regulation is applicable when at least one EU member state is involved and there is a need to set out which law has to be used to interpret a contract, meaning if an EU employee is being assigned to another EU member state, if an EU employee is assigned to a non-EU state or if a non-EU employee is assigned to an EU member state. The Rome I Regulation has replaced the Rome Convention (Article 24 para. (1).

Articles 3 and 8 para. (1) of the Rome I Regulation establish the principle that the contracting parties can choose the law applicable to their employment relationship. The choice of law is object to certain restrictions, though. One of these restrictions is the so called "ordre public" (Article 21), which comes into effect if the application of the foreign law would be a blatant violation of the employee's home country law. Generally, the choice of law cannot rule inoperative mandatory employee protection laws. As a consequence, the chosen law shall only apply if it is as favorable as or more favorable than the employee's home country law.

Where no applicable law has been chosen, Article 8 of the Rome I Regulation governs by which law the employment relationship is determined. Hereafter, the law of the employee's usual working place is the deciding factor. The employee's usual working place does not change if he or she is posted to another country temporarily, which is the case if it is intended that he or she will be going back to work in his or her home country again at some time in the future (there is no time limit).

b. Particularities Regarding Tax Law

If an employee is working in Germany for a foreign employer there are two questions from the tax perspective:

1. Are the wages subject to tax in the employer's home country?

2. How will the tax levied in the employer's home country be taken into account for the purposes of German income tax?

If a non-German national qualifies as an employee, a tax obligation arises under Section 1 of the Income Tax Act. Natural persons with an address or usual residence in Germany are liable for income tax without limitation regardless of their nationality. This means, in the context of posting of employees in Germany, a foreign employee who retains his or her address in his or her home country is only subject to limited income tax obligations. Income arising from dependent employment in such circumstances is liable to tax if the work is carried out or realized in Germany or if a permanent establishment or business premises is maintained in Germany, irrespective of whether the employer is a foreign company.

If an employee is sent to Germany by his or her employer but he or she retains his or her usual residence in his or her home country, he or she basically remains liable to income tax in that home country. At the same time income tax also becomes due in Germany on the income arising from dependent employment.

Exceptions can arise if a double taxation agreement is in place between Germany and the home country. Such agreements seek to avoid the double taxation of income in both states. According to the provisions in such agreements, the tax laws in the country in which the employee carried out his or her work shall apply to his or her income. Accordingly, these income portions will generally be exempt from tax in the employee's home country. The portion exempt from tax is regularly considered with regard to the level of the rate of tax applicable to the portion of income liable to tax in the home country.

An important exception to this basic principle is the 183 Day Rule. This rule states that contrary to the rule contained in a double taxation agreement, the income shall not be taxed in the country in which the work was carried out, but in the home state of the employee, if:

- the employee is not resident for longer than 183 days a year in the foreign state where the employment is carried out;
- the employer who pays the wages is not resident in the state in which the work is carried out; and
- the wages are not paid by an operating establishment of the employer in the state in which the work is carried out.

The 183 days are to be calculated for each tax year or calendar year respectively. In the calculation of the relevant days it is not the duration of the employment but the physical presence of the employee that is decisive. Short presences count towards one day. The following days are included in the calculation of days present:

- days of arrival and departure;
- all days of presence prior, during and directly after the employment, e.g., Saturdays, Sundays and public holidays;
- days of presence during disruptions to employment, e.g., strikes and lockouts; and
- vacation days that are spent in the state in which the employment is carried out falling directly prior, during and directly after the employment.

An overview of the states with which double taxation agreements exist together with the texts of such agreements is available from the website of the Federal Office of Finance.

2.2. Which local employment laws of your country are determined as mandatory minimum laws/ minimum hardcore protective rules and working conditions? Please explain. Is there relevant case law?

Employment law in Germany is made up of an abundance of individual laws. The essential legal source of employment law protecting individual employees is the Civil

Code ("Bürgerliches Gesetzbuch" or „BGB", Section 611 et seq.) based on principles of private autonomy. The provisions on individual rights are widened by numerous special provisions from other laws with the purpose of giving employees in certain areas statutory protection (e.g., health protection, labor protection, maternity protection, young workers' protection and protection for the severely disabled). The Law Relating to Employment Courts („Arbeitsgerichtsgesetz" or „ArbGG") regulates the procedural requirements in the field of employment law and contains provisions that guarantee legal protection and the independence of the employment court from employees, employers, works councils and trade unions.

Some of the most important laws are (only a short description, no comprehensive picture of the statutory provisions):

a. Working Hours Act ("Arbeitszeitgesetz" or "ArbZG")

The essential statutory provisions on working hours are contained in the Working Hours Act and in the Youth Labor Law („Jugendarbeitsschutzgesetz"or JArbSchG). Furthermore, there are special provisions for individual professional groups such as those employed in aviation, inland water transport and road transport. In the retail industry, the federal laws on shop opening and closing hours must be observed which indirectly determine working hours.

The Working Hours Act is generally applicable to all employees and apprentices. Excluded from its scope are executive employees, that is, those who can independently make decisions about the appointment and dismissals of employees or who have procuration that ist not limited internally. The act serves to protect the health and safety of employees.

The Working Hours Act protects the employee with limitations on working hours (e.g.: The hours of a working day may not exceed eight hours. Working days fined as Monday to Saturday; thus a maximum of 48 hours a week), mandatory breaks and prohibition on employment for the employee on Sundays and statutory public holidays (under certain circumstances there are exceptions for certain sectors of industry).

There are further special regulations for night workers. In certain cases the employer may deviate from the mandatory rules on working hours. This applies primarily for working in emergency situations (e.g., floods, fires, storms).

Further, certain deviations from the statutory rules may be permitted in a collective bargaining agreement or by reason of collective bargaining agreement in a works council agreement. If the employer is not bound by a collective bargaining agreement, existing provisions on collective bargaining agreements may be agreed in a works council agreement, if there is a work council, or incorporated into an individual employment contract.

For the employment of people under 18 years of age (who are minors under German law), the Youth Labor Law is applicable in place of the Working Hours Act. Under this Law, the employment of young people under the age of 15 years is

fundamentally prohibited although there are some limited exceptions to this. For youth, or those who are 15 but not yet 18, the law provides for special limitations on working times. There are stricter regulations for overtime work, employment on sundays and on statutory public holidays. The provisions oft the Youth Labor Law are not modifiable. Violation of this law poses an administrative offence. Willful conduct, wich is a health risk for the minor constitutes an offence under Section 59 para. (5), para. (6)of the Youth Labor Law.

b. Part-Time and Limited Term Employment Act ("Teilzeit- und Befristungsgesetz" or "TzBfG")

An employee who has been employed for longer than six months has a claim to part-time work under Section 8 of the Part-Time and Limited Term Employment Act, if the employer generally employs more than 15 employees. The employee can request that his or her contractual working hours be reduced. The employee must give at least three months' notice of the reduction in hours and its extent, also indicating the requested allocation of working hours. The employer must consent to the requested part-time hours and their allocation unless opposed on "operational reasons."

An operational reason exists if the reduction of hours seriously prejudices the organization, production or security of the business or if it causes unreasonable costs. If the employer wishes to refuse the reduction of working hours, this must be done within at least one month before the proposed commencement of the reduction, otherwise the reduction takes effect as requested. If the employer refuses the request within the time limits, the employee may pursue the matter in the courts.

c. Continuation of Remuneration Act ("Entgeltfortzahlungsgesetz" or "EFZG")

The continuation of remuneration in the event of illness is governed by the laws on the payment of remuneration on public holidays and in the event of illness found in the Continuation of Remuneration Act. Pursuant to Section 3 of the Act, where an employee is incapable of working as a result of illness through no fault of his or her own, the employee has a claim for continued remuneration from the employer (no payments from statutory or private health insurance) for the duration of the illness up to a maximum of six weeks.

Section 3 para. (1) (sentence 2) nos. 1 and 2 of the Act limit the claim for continued remuneration. If the repeated incapacity is due to another illness the employee has a right to a new unlimited claim under Section 3 para. (1) of the Act.

After the end of the period of continued payment of remuneration, the employee may make a claim for the payment of sickness benefit from his or her statutory health insurance fund. An entitlement for sickness benefit exists under statutory health insurance for a maximum period of 78 weeks within three years. The sickness benefit amounts to 70% of the regularly earned remuneration. Different rules may apply if the employee is subject to a private health insurance.

d. Minimum Wage Law ("Mindestlohngesetz" or "MiLoG")

The Minimum Wage Law provides a general basic wage of EUR 8.50 gross per working hour (it is not possible to restrict or exclude the minimum wage, not even by means of exclusion clauses in a collective or company agreements. Exceptions apply until December 31, 2016 for collective agreements that are generally binding or mandatory under the Posted Workers Act ("Arbeitnehmerentsendegesetz" or "AEntG"), although even these do not have to stipulate an hourly wage of EUR 8.50 gross until January 1, 2017. In works agreements it is not possible in any case to deviate from the statutory minimum wage, which forms the lowest limit for the compensation of employees in Germany. However, the gross wage paid in the calendar month is decisive. On average, the employer must have paid EUR 8.50 gross per hour to the employee for all hours worked in a month. The minimum wage applies to all employees and generally to interns, with some exceptions (e.g., Internship (up to a maximum of three months), volunteers, apprentices, people under 18 years).

The statutory minimum wage also applies to marginal employment under Section 8 of the SGB IV (so-called "450 euro jobs"), employees in the agricultural sector, seasonal workers, employees in the catering industry, pensioners, and housewives or househusbands.

In addition, the minimum wage does not apply in the first six months of an employment relationship if the employee was previously unemployed for one year or more. For newspaper delivery staff delivering exclusively periodicals to end customer (i.e., delivery staff does not deliver additional letters, goods or circulars) a minimum wage of EUR 7.23 gross in the year 2016. From 2017, newspaper delivery staff will also be paid EUR 8.50 gross.

There are special rules for calculating the statutory minimum wage (e.g. the payment has been actually and irrevocably effected at its due day. Any payments subject to reservation of voluntariness or the reservation to revoke will be excluded from the minimum wage calculation. One-time payments—such as holiday pay, Christmas bonus, or year-end bonus— are taken into account to calculate the minimum wage, assessment of commission payments is problematic,...).

Infringements of the statutory minimum wage constitute a regulatory offense that may be penalized with a fine of up to EUR 500,000. Infringements of the MiLoG penalized with a fine of at least EUR 2,500 will result in a disqualification from public service contracts of the employers mentioned in Section 98 of the GWG for a "reasonable time."

Posted Workers Act ("Arbeitnehmerentsendegesetz" or "AEntG"): The AEntG provides a legal framework for making sector-specific minimum wages obligatory for all employees of a sector regardless of whether the employer is based inside or outside of Germany. Nine sectors have minimum wages pursuant to the Posted Workers Act (e.g., cleaning service, postal delivery services...).

Initially, this law ensured that in certain trades foreign workers sent to Germany to work by their foreign employers would receive the same wages as German workers in the same trade.

Under this law, however, the Federal Ministry of Labor and Social Affairs may order under certain conditions that regulated wages contained in a collective bargaining agreement for a particular trade should also be guaranteed by all German employers, even when they are not bound by the collective bargaining agreements. This took place up until now in the sectors of construction industry, roofers, electricians, cleaning services, security services, special mining work in anthracite mines, laundry services for third party accounts, waste management (including street cleaning and winter services), as well as long-term-care sector.

e. Protection Against Dismissal Act ("Kündigungsschutzgesetz" or "KSchG")

If the Protection Against Dismissal Act is applicable to the employment relationship, dismissal by the employer is only valid if the dismissal is justified by compelling operational reasons or by personal or behavioral reasons concerning the employee within the meaning of the Protection Against Dismissal Act. The Protection Against Dismissal Act is applicable if the employee has been employed for more than six months and there are more than ten employees regulary employed in the employer's business.

If the employer is a foreign company, only the employees employed in Germany are counted irrespective of how many employees the employer has abroad. If the Protection Against Dismissal Act is not applicable, there is no requirement for a ground of dismissal.

In cases of mass dismissals, the employer must serve a notice of mass dismissals on the competent Employment Agency („Agentur für Arbeit") before the first dismissal or notice is served, otherwise the dismissals will be invalid. Such mass dismissal notification requires further preparatory involvement of a works council if such exists.

During the first six months of an employment relationship, the Protection Against Dismissal Act does not apply. During this six-months period, known as the "waiting period," the employer may terminate the relationship using the ordinary notice period (Section 622 BGB) without having a reason for dismissal.

The parties may agree to a probationary period of up to six months in the employment contract and may shorten the notice period for the duration of the probationary period to two weeks. An extension to the probationary period is potentially risky.

Pursuant to Section 15 of the Protection Against Dismissal Act, there is a special protection against dismissal for works council members. During the tenure only an extraordinary termination for important reason is possible. The legislator wanted to prevent, that out of concern for his workplace, no employee initiated the election of

a works council, organized such a choice or select themselves as work council member.

Furthermore, there are certain special protection rights for certain target groups:

f. Social Security Code ("Sozialgesetzbuch IX" or "SGB IX")

If the employee is recognized as a **severely disabled person** or as being in an equivalent position and the duration of the employment relationship has already exceeded six months, pursuant to Section 85 SGB IX the employer is required to apply for and receive the consent of the responsible Authority („Integrationsamt") prior to giving notice to the employee.

The Authority has to check whether and to what extent the dismissal has been caused by the particular afflictions of the severely disabled person. Because this particular protection against dismissal operates alongside all further limitations on dismissal, an examination of the remaining requirements of dismissal is not carried out by the Authority.

In cases of operational dismissal, it is the commercial decision of the employer (to be proven to the Authority) to make positions redundant that must be accepted by the Authority. The Authority checks where further employment of the employee is possible with reasonable retraining and further training where applicable. If consent to the dismissal is granted the employer must give notice within one month of the decision of the Authority.

g. Maternity Protection Act ("Mutterschutzgesetz" or "MuSchG")

The dismissal of a woman during **pregnancy** and up to four months after the birth of the child is impermissible under Section 9 of the Maternity Protection Act if the employer was aware of the pregnancy or birth at the time of the dismissal. The responsible authorities in each respective German ferderal state may permit dismissals in exceptional circumstances that are not connected with the position of the woman during the pregnancy or her position four months after childbirth. Such a dismissal may only be given once the consent of the Authority has been given. The reason for the dismissal must be included in the notice of dismissal.

The statutory maternity leave has the task of protecting the (expectant) mother and her child against risks, overwork and damage to health in the workplace, financial losses and job loss during pregnancy and for some time after birth.

h. Federal Law on Parental Allowance and Parental Leave ("Bundeselterngeld- und Elternzeitgesetz" or "BEEG")

The dismissal of an employee during parental leave is impermissible under Section 18 para. (1) of the Federal Law on Parental Allowance and Parental Leave. This applies

from the point in time of the application, maximum however eight weeks before the beginning of the parental leave and during the parental leave. The responsible authorities in each respective German federal state may permit dismissals in exceptional circumstances (e.g., closure of a company or criminal breach of obligations by the employee). Such a dismissal may only be given once the consent of the Authority has been given.

i. Transfer of Undertakings, TUPE Regulations, Section 613a BGB

Section 613 a BGB governs the transfer of undertakings (including employment and labor agreements) when a business is sold.

If a company operates as a limited company or stock company and is sold as part of a share deal, the contracts of employment and any applicable collective agreements remain unaffected by the sale.

If a company is sold or transferred, in whole or in part, as part of an asset deal, and the purchaser continues with the business or part thereof as an entity, then a transfer of undertaking occurs.

If the business or part thereof is continued without preserving its identity, the purpose of the business is changed, the assets of the business are incorporated into another business, or the purchased business is discontinued, there is no transfer of undertaking.

In the event that the purchase of assets constitutes a transfer of undertaking, the employment relationships of the employees of the seller of the business will be automatically transferred to the purchaser of the business. The purchaser then assumes the rights and obligations under the employment relationships as the new employer and the labor agreements remain unchanged.

The purchaser of the business is liable without limitation from the date of the transfer of undertaking for all future and also residual claims arising from the employment relationships. The previous employer is jointly liable with the purchaser for obligations that arose under the employment relationship prior to the transfer of undertaking and that: (1) have already become due at the time of the transfer; or (2) will become due one year after the transfer (to the extent that these obligations become due after the transfer of undertaking, the liability of the previous employer is apportioned accordingly). Companies must, therefore, be very careful when purchasing a business or a part thereof and carefully review the obligations they will be assuming under the employment contracts (e.g., pension obligations). Advice of counsel and due diligence is strongly recommended.

If there is a works council within the company and the entire business is transferred to a purchaser, works council agreements shall continue with the new employer unchanged. Otherwise, the provisions of a works council agreement become part of the individual employment contract and continue as such pursuant to Section 613a para. (1) of the Civil Code and cannot be changed unilaterally to the disadvantage of the employee within one year after the date of the transfer unless a works council

agreement is no longer valid (due to its termination, for example). In all cases the purchaser must comply with the applicable statutory provisions (e.g., Protection Against Dismissal Act).

If the previous employer is bound by a collective bargaining agreement by virtue of its membership of an employers' association but the purchaser of the business is not bound by such collective bargaining agreement because it is not a member of the employers' association, then the provisions of the collective bargaining agreement become part of the individual employment contract and the provisions continue as such. The provision in the collective bargaining agreement cannot be changed unilaterally to the disadvantage of the employee within one year after the date of the transfer unless the collective bargaining agreement is no longer valid or runs out (due to its termination, for example) or if the purchaser of the business and the employee agree to the application of another relevant collective bargaining agreement. An early unilateral change (if permissible according to the above standards) or a change disadvantageous to the employee after one year is only possible if the applicable statutory provisions are adhered to (e.g., the Protection Against Dismissal Act).

A dismissal due to the transfer of undertaking is impermissible; however, the right to dismissal on other grounds remains unaffected.

To determine whether a transfer of undertaking exists, an overall evaluation of all the circumstances will be considered, including:

- the nature of the business;
- the transfer or nontransfer of material assets;
- the value of the assets;
- the transfer or nontransfer of employees;
- the transfer or nontransfer of customers;
- the similarities of activities before and after the transfer and where applicable; and
- the duration of the interruption in business.

Under Section 613a para. (5) of the Civil Code the previous and new owners of the business have an extensive obligation to provide information to the employees who are affected by the transfer of undertaking. They must inform the employees in writing of:

- the timing or planned timing of the transfer;
- the reason for transfer;
- the legal, economic and social consequences of the transfer for the employee; and
- the measures to be carried out in relation to the employee.

An employee has a right of written objection to the transfer of his or her employment relationship to the new owner of the business, and must do so within one month of receipt of notification. The objection can be made to either the previous owner or the new owner. If the employee timely exercises his or her right to object in the correct form, the employment relationship remains with his or her previous employer. However, the employer often no longer has any employment opportunities for the employee and is entitled to serve an ordinary notice of dismissal for operational reasons.

For corporate transformations (i.e., mergers, divisions, asset transfers and form changes), the German Company Transformation Act ("Umwandlungsgesetz or UmwG") provides several additional regulations.

j. Work Safety

The technical work protection is used to prevent occupational hazards through applied technology for health and lives of employees.

Technical work protection includes e.g., safety of dangerous installation, protection against harmful effects, humanly adequate structuring of work and organization of workplace safety.

Important laws and regulations for technical work protection are e.g.:

- Working Conditions Act („ Arbeitsschutzgesetz");
- Industrial Safety Act and industrial safety ordinance („Arbeitssicherheitsgesetz or ArbSichG and Betriebssicherheitsverordnung");
- Workplace Ordinance („Arbeitsstättenverordnung or ArbStättV");
- Workstation regulations („Bildschirmarbeitsverordnung");
- Ordinance on Hazardous Substances („Gefahrstoffverordnung");
- Product Safety Act („Geräte- und Produktsicherheitsgesetz").

In addition to laws and ordinances, there are other important regulations, which must be observed (e.g., accident prevention regulations of the professional associations (Berufsgenossenschaften), DIN-standards (Deutsches Institut für Normierung), VDE-regulations (Verband Deutscher Elektrotechniker) and similar technical standards.

Compliance with the standards is monitored by the labor inspectorates (Gewerbeaufsichtsämter), as well as by the professional associations (Berufsgenossenschaften).

2.3. Does your country foresee specific rules on the 'lease of personnel'? Is there a principle prohibition of 'lease of personnel'? Please explain and provide examples. What are the sanctions and penalties? Is there a possibility to reduce the risk? Please explain. Is there relevant case law dealing with this matter?

The commercial lease of personnel is regulated in the Temporary Employment Act ("Arbeitnehmerüberlassungsgesetz"). In recent years the Temporary Employment Act was consistently subject to substantial changes. While 15 years ago temporary employment was still a flexible instrument for the reduction of the unemployment data, temporary employment came more and more under criticism within the last years. In November 2015 the government published the latest draft for a reformation of the Temporary Employment Act. Since temporary employment came more and more into the focus of the public over the past years, in the meantime an extensive legislation exists in the field of "temporary employment". Beside disputes on the compliance of the provisions of the Temporary Employment Act (a.), the courts often deal with the delimitation of real temporary employment from other contract forms (b.). Also the situation of the temporary employees in a company and their rights after a transfer to a permanent employment keep the courts occupied.

a. Regulations of the Temporary Employment Act

Technically the Temporary Employment Act includes a preventive ban with permit reservation. Employers who – as lessors – wish to commercially lease out employees to third parties ("hirer") for work require a permit (1). Besides the permission lessors and hirers have to comply with several other regulations. For example the lease of personnel is allowed only as a temporary lease of personnel (2). Further the temporary employees have to be treated equally to the hirer's permanent staff, in particular they have to be paid equally (3). Exceptions can be made on the basis of collective bargaining agreements.

(1) Permission

The competent authority for granting the permission is the Federal Employment Agency. The permission will be refused if:

- the applicant is not trustworthy or reliable: an applicant is not trustworthy and reliable if he has in the past violated regulations on social security contributions, regulations on work safety or regulations on recruiting employees abroad. Therefore, the applicant has to give information about previous convictions in the application form.
- the applicant is according to the current organisation of his establishment not able to fulfil his duties as employer;
- the applicant violates the principle of equal pay (see below).

If an employer applies for the permission for the first time the permission will only be granted limited in time for one year. If the time limit will be extended for three years in a row the permission can be granted unlimited. The permission can be revoked or withdrawn if a ground for denying the approval is given.

Leasing personnel without permission shall be punished with a fine up to EUR 30.000,00. The monetary fine can be imposed on both lessor and hirer. The contracts between lessor and hirer as well as the contracts between lessor and employee are legally void. Another – for the hirer's side much more deterrent – sanction is that a lease of personnel without permission leads to an employment relationship directly between hirer and employee.

(2) Temporary Lease of Personnel

The lease of employees shall only be temporary. In the current version of the Temporary Employment Act the term "temporary" is not defined and there is no special sanction if the employee is leased permanently. However, the Federal Labour Court decided that a permanent lease of employees does not result in a conclusion of an employment contract with the hirer[1].

In former times there was a strict time limit for the lease of personnel with a maximum of 24 months. The time limit and even the criteria "temporary" were removed in the course of chancellor Schröder's reforms called "Agenda 2010" in order to turn the lease of personnel into a flexible instrument to preserve and create jobs.

The German parliament plans a reform of the Temporary Employment Act. The draft for the reformed act foresees a maximum time limit for the lease of personnel of 18 months. A longer period of a lease of personal shall according to the draft lead to an employment relationship between the hirer and the employee.

(3) Equal Pay

To avoid that temporary employees are treated like second-class employees, the Temporary Employment Act states that the temporary employees have to be treated equally to the hirer's permanent staff. Besides equal payment this means that they can make use of social services offered by the hirer, like a canteen or a workers' shuttle service.

Lease agreements under which the essential working conditions for the temporary employee during the period of the lease to a hirer are worse than those prevailing for a comparable permanent staff member in particular with respect to remuneration shall be invalid. Nevertheless, the lessor is obliged to pay the usual remuneration of a comparable employee of the hirer. In addition, infringements against the principle of equal-pay are punished by a fine.

[1] German Federal Labour Court, Decision of April 29, 2015, File no 9 AZR 883/13.

Employers can make an exception from this rule of equal pay in case of the existence of a collective bargaining agreement stating lower wages for temporary workers. The exception does not apply to employees that have been employed with the hirer for six months before the lease of the employee. This exception from the exception is the so-called revolving door effect (Drehtüreffekt). There was a time when German enterprises had the good idea of terminating the employment relationship with their employees and lease them back from a lessor for lower wages. This is not possible anymore with the revolving door clause.

The exception for a lower wage based on a collective bargaining agreement has also caused several important case law in Germany regarding the quality of an organisation as a trade union. Seeking to fulfil the criteria for the exception of equal pay some employers or employers' associations made collective bargaining agreements with an alleged trade union, the CGZP – Christian trade unions for temporary employment and temporary employment companies. The Federal Labour Court has decided that this specific group cannot be classified as a trade union since its level of organisation was too low. The court decided that the alleged trade union had too little members within the temporary workers' sector[2]. The consequence of this decision was, that the collective bargaining agreements signed by the CGZP were invalid and therefore the lower wages resulting from this collective bargaining agreement were against the law, too. The difference between the low wage and the usual remuneration had subsequently to be settled (incl. subsequent payment of social security contributions).

b. Delimitation of Real Temporary Employment From Other Contract Forms

Another hot topic in this context is the difference between an illegal hidden lease of personnel and service contracts that are fulfilled with own employees of the contractor. Of course it is usual business that enterprises give work to subcontractors or outsource certain services, but since there have been many black sheep abusing the form of a service contract to avoid the strict rules of the Temporary Employment Act, this is a topic that was in the centre of attention of the public interest for a long time. Consequence of a hidden lease of personnel is, that there is a lease of personnel without permission, which leads to an employment relationship between the client and the subcontractor's employees (see above).

A service contract is deemed as a hidden (and therefore illegal) lease of personnel, if the employees of the subcontractor are integrated in the organisation of the client and are treated like the client's own employees, which means they are bound by instructions of the client and not by the subcontractor who is their actual employer.

[2] German Federal Labour Court, decision of December 14, 2010, file number 1 ABR 19/10

The following criteria are arguments for a hidden, illegal lease of personnel[3]:

- The client or his permanent staff give instructions to the subcontractor's employees directly;
- The client's permanent staff and the subcontractor's employees work together hand in hand;
- The client provides the subcontractor's employees with work equipment;
- The contract object is not a definable service, but the subcontractor's employees work on demand permanently;
- The contract between client and subcontractor does not foresee any clauses on liability, insurance or acceptance.

Decisive is, the actual situation during the execution of the contract and not the wording of the written contract.[4] Paper doesn't blush.

Regarding this matter there is loads of case law in Germany. It is not only in the focus of public interest but also of the social security authorities, which makes it a real hot topic.

At the moment employers working with subcontractors can avoid the risk, if the subcontractor applies for a permission preventively. The new draft for the reformed act (see above) eliminates this possibility.

c. Status of the Temporary Workers

Some other issues lead to extensive case law in connection with lease of personnel.

(1) Lease of Personnel and Works Constitution

Temporary employees may vote for the works council in the hirer's establishment if they are working in the establishment for more than three months (Section 7 Works Constitution Act), but they cannot be elected in the hirer's works council (Section 8 Works Constitution Act).

Section 9 of the Works Constitution Act states of how many members a works council exists. The number of members is calculated in proportion to the numbers of employees in the establishment. According to a new decision of the Federal German Labour Court the temporary employees are also considered when calculating this number of employees in the establishment according to Section 9 Works Constitution Act.[5]

There are some other statutory thresholds in the Works Constitution Act relating to the numbers of employees in the establishment like the threshold for the mandatory

[3] German Federal Labour Court, decision of January 18, 2012, file no. 7 AZR 723/10; Regional Labour Court Stuttgart, decision of August 1, 2013, file no. 2 Sa 6/13.

[4] German Federal Labour Court, decision of September 25, 2013, file no. 10 AZR 282/12.

[5] German Federal Labour Court, decision of March 13, 2013, file no. 7 ABR 69/11.

social plan and reconciliation agreements according to Section 111 Works Constitution Act. When calculating this number temporary workers are also considered[6].

Recruiting a temporary worker leads to a co-determination right of the hirer's works council according to Section 99 Works Constitution Act.

According to Section 14 Temporary Workers Act the temporary employees belong to the domain of the lessor's works council. Nevertheless they may also ask the works council of the hirer for assistance.

(2) Lease of Personnel and Protection Against Unfair Dismissal

The harsh and feared German protection against unfair dismissal does only apply for establishments with ten or more employees and after an employment period of more than 6 months.

Calculating this number of employees temporary workers that are usually working in the establishment are considered as well.[7]

The period of time as a temporary worker is not considered when calculating the 6-months-period.

2.4. If you were asked by one of your clients to draft an assignment letter (secondment agreement between the original employer in the home country and the employee), which clauses would you include? What should the assignment letter cover? Is this foreseen by a specific law or based on case law? Please explain.

An assignment from Germany to another country may generally be handled under two different contractual scenarios. Two different terms for assignments under German law are used to distinguish both scenarios: secondment (ger. "Entsendung") and relocation (ger. "Versetzung"). The choice of the contractual scenario will often depend from the legal requirements for obtaining a residence/work permit in the host country. On the other hand, social security and tax considerations may be the reasons to choose one scenario or the other.

a. Secondment (ger. "Entsendung")

Under this scenario, the original German employment contract with the home employer remains in force. Particularities and details of the assignment to the host country are addressed in an additional secondment/assignment agreement which is

[6] German Federal Labour Court, decision of October 18, 2011, file no. 1 AZR 335/10.

[7] German Federal Labour Court, decision of January 24, 2013, file no. 2 AZR 140/12.

limited in time for the duration of the secondment. Technically, the secondment agreement is a temporary alteration of the original employment contract. The expatriate remains subject to the directions of the home employer. Generally, German employment law remains applicable under international private law according to Article 8 para. (2) of the Rome I Regulation as the employee's usual working place remains in Germany due to the temporary nature of the secondment (please see above question 2.1 lit. a). Usually, the parties will explicitly agree on the applicability of German law in such a scenario.

b. Relocation (ger. "Versetzung")

Alternatively, the original German employment contract with the home employer may be suspended for the duration of the intended relocation and remains dormant. The expatriate would be relocated to the host country and would conclude a local employment contract with the host employer subject to host country law. Particularities and details of the assignment to the host country are addressed in a separate relocation/assignment agreement which only contains the remaining duties and obligations of the home employer during the assignment. The relocation/assignment agreement between expatriate and home employer will in most cases be subject to German law.

c. Typical Clauses for Secondment/Relocation Agreements

Regardless of the applicable law, the essential contractual details of the assignment abroad have to be laid down in writing and handed out to the employee according to Section 2 para. (2) of the German Act on Proof of Substantial Conditions for Employment Relationships ("Nachweisgesetz"). These are:

- Term of assignment abroad;
- Currency of salary;
- Additional salary and/or social benefits (if agreed);
- Agreed conditions of return to home country.

In both assignment scenarios it is recommended to agree on clauses particular to the secondment/relocation in addition to the basic clauses of the applicable employment contract, may it be the still fully applicable – not suspended – home employment contract or the newly concluded host country employment contract.

Immigration requirements: The validity of the assignment letter and/or the additional local employment contract should be made subject to the issuance of a respective residence and/or work permit, if required.

Additional allowances/benefits: In most cases, the employee will receive an additional benefit package whose intention is to compensate the employee for certain disadvantages and/or expenses in connection with the assignment abroad. Typical benefit packages may include

- School fees;
- Language courses;
- Membership in social clubs depending on local conventions;
- Cultural training;
- Clothing allowance;
- Moving expenses;
- Housing allowance;
- Additional insurances;
- Expenses for family visits;
- Expenses for return trips home in case of emergencies.

Salary adjustment: Some assignment letters/agreements include a clause to adjust the salary in case of changes of the exchange rate of the foreign currency.

Seniority credit: Typically, the assignment letter/agreement will include a clause that the term of the assignment will count for the seniority with the home employer.

Return clause: It is recommended to include a clause which describes which (minimum) position or level the employee will have upon his return to its home employer and that his/her experiences abroad will have to be taken into consideration.

Termination of assignment: An assignment letter/agreement should include a clause that and under which conditions the assignment may be terminated by the (home) employer prior to its scheduled term. Possible reasons may be economic ones, but also conduct related or personal reasons.

Social security / taxes: Reference should be made in the assignment letter/agreement to any common understanding of the parties regarding the applicable social security and tax scheme. The agreement may include the employer's obligation to bear related consultancy fees of the employee.

Local particularities: Depending on local particularities, other issues may be addressed in the assignment letter/agreement. An assignment letter to Mexico may include a clause according to which the employer is obliged to continued remuneration payments in case of kidnapping but – in contrast – not to payments of ransom or rescue costs.

2.5. Please explain the applicable and most relevant rules of your country in case the employer wishes (1) to early terminate the assignment and (2) to terminate the employment relationship (e.g., is there a right to return? Should the assignment allowances be included in the calculation of the notice indemnity? Etc.). Is there relevant case law?

a. Early Termination of the Assignment

Generally, the employer's right to give directions under the existing employment contract will not comprise the unilateral right to assign the employee to another country, unless the parties would have explicitly agreed on such unilateral assignment right in the employment contract. Accordingly, the employer's right to unilaterally terminate the assignment needs a contractual basis. A respective clause should be included in the assignment letter/agreement.

Contractual agreements between employer and employee are subject to the German statutory rules on General Terms and Conditions, in particular Section 307 of the German Civil Code ("Bürgerliches Gesetzbuch" – BGB). According to Section 307 para. (1) BGB, provisions in General Terms and Conditions are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. Such unreasonable disadvantage may also arise from the provision not being clear and comprehensible.

Any clause to unilaterally terminate the assignment prior to the scheduled date of termination must thus be reasonable and must not disadvantage the employee immoderately. In practice this means that the reasons for a respective unilateral termination would have to be mentioned in the clause. Such reasons can include:

- Termination of the employer's commitment abroad as such ahead of schedule;
- Compelling operational need to assign tasks for the employee in the home country;
- Imminent danger for the employee due to political disturbances, natural disasters or terrorist attacks (limited to the duration of the respective crisis);
- Severe breaches of duty by the employee;
- Severe breaches of behavioral requirements in the host country.

A reasonable notice period would have to be respected (and agreed). The clause will have to include the employer's obligation to fairly balance the interests of the employer on one side and the employee on the other (equitable discretion).

b. Termination of the Employment Relationship

The termination of an employment relationship with the host country (in case of a "relocation") will be subject to the respective country's law. The termination of the employment relationship with the home employer during the assignment is subject to the general German statutory rules regarding the termination of employment

contracts (see question 2.2 lit. e). No statutory particularities exist. Accordingly, if the German Protection Against Dismissal Act (KSchG) applies for the employer, its restrictions apply as well to an intended termination of the assigned employee's employment relationship. If the parties would have excluded the right to ordinary termination for the term of the assignment, which is not uncommon, the employment relationship can only be terminated extraordinarily for cause.

c. Severance Calculation

There is no statutory entitlement to severance payments under German law, nor is there any statutory minimum amount which an employer has to pay. This applies also for litigation procedures. A severance payment as indemnification for the termination of an employment relationship can only be the result of a mutual consent of the parties. However, the judicial practice of the Labour Courts in Germany has resulted in a "standard formula" for severance payments if the risk to lose a respective lawsuit is more or less equal for both parties. According to this formula, the severance amounts to half a month's salary per year of seniority with the firm. Usually, only "true" remuneration will be considered as salary, i.e. mere payments as reimbursement of expenses are not part of the employee's salary due to their different legal nature. The formula will have to be modified if the age of the employee is above 50 or if the risk of one party is significantly higher than that of the other. In practice, the standard formula only serves as a basis for negotiations. At the end, any severance payment must be the result of a mutual consent as there is no possibility to force the other party to accept a particular severance amount.

3. SOCIAL SECURITY

3.1. Provide a short overview of the level of social security charges in your country. What are the employer social security contributions? What are the employee social security contributions? Is there a cap/ maximum? Please briefly explain.

a. Overview of the Level of Social Security in Germany

The statutory German social security system provides for a wide-ranging social protection for employees in particular and guarantees the social security of the society.

The statutory German social security system is based on five branches: health insurance, long-term care insurance, retirement pension insurance, unemployment insurance and accident insurance. With exception of the latter, which the employers finance themselves, the employees and the employers basically share the costs of the contributions to the statutory social security system.

Employees are subject to all branches of the statutory German social security system.

b. Applicability of German Social Security Law

As a general rule, employees whose regular place of work is in Germany are subject to the statutory German social security system, Section 1 of the German Social Code Vol. VI ("Sozialgesetzbuch" or "SGB VI").

c. Exemption According to EU Legislation

Employees who are subject to the social security system of an EU Member State and are assigned to another Member State remain with this status if the respective requirements of Regulation (EC) No 883/2004 on the coordination of social security systems are met. According to Article 12 para. (1) of the Regulation,

> *"A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person. "*

Accordingly, the following conditions have to be fulfilled if an EU-national aims to not being subject to the German but to the social security system of another EU Member State:

- The employee's regular working place must have been the other EU Member State prior to the assignment to Germany.
- The assignment cannot last longer than 24 months. A prolongation beyond 24 months is not possible.
- The limitation in time for a maximum of 24 months must already exist at the beginning of the activity in Germany. The employment agreement between the employee and employer in the other EU Member State must continue to exist.
- An immediate link to employer in the other EU Member State must remain for the entire duration of the assignment, as the employee has to be assigned to perform work "on that employer's behalf", Article 12 para. (1) of the Regulation (EC) No 883/2004. The mere legal continuance of the employment relationship does not suffice. Accordingly, the mere abeyance of the employment with the parent company and the conclusion of a new agreement with a German subsidiary will not as such fulfill the requirement of an "immediate link" to the parent company. Additional indications have to exist, such as:
    - Continuance of salary payments by the parent company
    - The contractual right to give directions to the employee remains (as well) with the parent company, i.e. the employee's reporting line remains to the entity of the other EU Member State.

- The employee fulfills a specific task for the parent company, which is limited in time.

  The more indications for an immediate link exist, the better arguments can be brought forward to the applicability of Art 12 para. (1) of the Regulation. If the employee is paid by the German entity and only is subject to the German entity's directions, the required "immediate link" to the entity of the other EU Member State would most likely not exist.

- The employee must not been assigned to Germany to replace another person.

The fulfillment of these conditions can be certified by a **certificate of coverage (A1)** issued by the competent social security authority of the other EU Member State, Article 19 para. (2) of Regulation (EC) No 987/2009. According to the case law of the European Court of Justice, such certificate is binding for the other Member States (ECJ "Fitzwilliam Technical Services", C-202/97).

d. Exemptions According to Social Security Agreements

Employees who are subject to the social security system of a non-EU Member State may remain subject to the social security system of their country of origin according to an existing social security agreement between Germany and the country of origin. For an overview of social security agreements Germany has signed see below question 3.2.

e. Social Security Contributions

The statutory health insurance contribution rate is 14.6 % of the employee's assessable income up to the applicable income threshold for the contribution assessment *(Beitragsbemessungsgrenze)*. Once this income threshold is reached, the contributions do not raise any longer. Since the contributions are shared equally the employer and the employee have to contribute 7.3% each. The actual income threshold (which raises from year to year) is an income of 50,850 € gross per year.

The statutory long-term care insurance contribution rate is 2.235 %. Generally, contributions are equally shared between employer and employees at a rate of 1.175%. However, this applies only for the state of Saxony due to historical particularities. I all other states the employers pay higher contributions of 1.675%, leaving the employees paying only the remaining 0.675%.

The statutory pension insurance contribution rate is 18.7 %. Accordingly, the employer and the employee each have to contribute 9.35% of the employee's monthly gross income. The actual income threshold of the statutory pension insurance is 74,400 € per year in western Germany and 64,800 € per year in eastern Germany.

The statutory unemployment insurance contribution rate is 3.0%, so both employer and employee have to contribute 1.5%. The income threshold is the same as for the pension insurance.

The statutory accident insurance contributions vary not only according to the income of the employees but also according to a "danger rating" of the respective employer.

3.2. In case of assignments from outside the EEA to your country or from your country to non-EEA countries, with what countries has your country signed a social security agreement?

Germany has signed social security agreements with several countries. These mainly address the acquiring of pension rights and the payment of pensions in the respective countries.

Germany has signed social security agreements with the following countries:

- Australia, entered into force as from 1.1.2003
- Bosnia-Herzegovina, entered into force as from 1.9.1969
- Brasil, entered into force as from 1.5.2013
- Chile, entered into force as from 1.1.1994
- India, signed but has not yet entered into force
- Israel, entered into force as from 1.5.1975
- Japan, entered into force as from 1.2.2000
- Canada und Quebec, entered into force as from 1.4.1988
- Kosovo, entered into force as from 1.9.1969
- Morocco, entered into force as from 1.8.1986
- Macedonia, entered into force as from 1.1.2005
- Montenegro, entered into force as from 1.9.1969
- Philippines, signed but has not yet entered into force
- Republic of Albania, signed but has not yet entered into force
- Republic of Korea, entered into force as from 1.1.2003
- Serbia, entered into force as from 1.9.1969
- Tunisia, entered into force as from 1.8.1986
- Turkey, entered into force as from 1.11.1965
- Uruguay, entered into force as from 1.2.2015
- USA, entered into force as from 1.12.1979

With the following countries Germany has signed special agreements:

- India, entered into force as from 1.10.2009
- People's republic of China, entered into force as from 4.4.2002

These agreements are so called assignment agreements. They provide that employees who are temporarily employed by their employer in another contractual state a double insurance and therefore a double contribution burden in regards of pension and unemployment insurance is prevented.

Further arrangements e.g. acquiring of pension rights and the payment of pensions, are not part of this type of agreements.

4. OTHER OBLIGATIONS AND FORMALITIES

4.1. Are there other relevant formalities and obligations in your country in case of assignments to your country (e.g., prior notification to the authorities, drafting and keeping social documents, etc.)?

In case of assignments of foreign workers the employers have to comply with several formalities and regulations in particular in the so-called sectors at-risk. On the one hand there are obligations to registration with or to inform the authorities (a.). In order to prevent fraudulent use and contraventions, the compliance with statutory working conditions and the existence of a work permit (especially in certain industrial sectors) is frequently verified. Thus the employer as well as the employee have different duties to provide documents (b.).

a. Information and registration

Foreign-domiciled employers who assign workers to Germany and hirers who hire workers from a supplier domiciled abroad, are required, pursuant to the Minimum Wage Act (Mindestlohngesetz - MiLoG), to the Posted Workers Act (Arbeitnehmer-Entsendegesetz – AEntG) and to the Temporary Workers Act (Arbeitnehmerüberlassungsgesetz - AÜG), to give notification of their employees. Furthermore they have to submit an assurance, that they will comply with the rules of the Minimum Wage Act, the Posted Workers Act and the Temporary Workers Act.

The competent authority is the customs authority.

This obligation to register does only apply for special sectors stated in the Act Against Illicit Employment (Schwarzarbeitsbekämpfungsgesetz – SchwarzArbG) and the Posted Workers Act. These are in the Act Against Illicit Employment:

- setting up and dismantling trade fairs and exhibitions,

- building industry,
- meat industry,
- forestry,
- catering and hotel business,
- industrial cleaning,
- passenger transportation industry,
- fairground and amusement sector,
- haulage, transport, and associated logistics industry;

and in Posted Workers Act:

- waste management, including street cleaning and winter road maintenance,
- training and further training services in accordance with the second or third volumes of the Social Code,
- the mainstream construction and construction-related industries,
- mail services,
- commercial cleaning services
- agriculture, forestry, and horticulture,
- care provision,
- processing and preserving of meat and production of meat products,
- security services,
- textile and clothing industry, or
- laundry services for commercial clients.

Notifications pursuant to the Minimum Wage Act are not required with regard to employees whose monthly sustained pay exceeds EUR 2,958 or whose sustained regular monthly pay exceeds a gross EUR 2,000 provided that the employer can submit evidence of such payment for the past full twelve months.

b. Keeping social documents

Employers established abroad providing technical services or labour in Germany and being subject to a customs inspection under the Control of Unreportet Employment Act are required by law to allow such inspection and to cooperate fully. The obligation to cooperate does also apply for the employees employed/engaged during the inspection.

Everyone employed/engaged during the inspection must, for example:

- provide their personal details,
- where applicable, show their contract labourer cards, and/or their EU work permits and where appropriate, any residence title they may be required to have.

In some sectors there's even an obligation of the employees to always carry their identity document, passport or the relevant substitute document with them and to present it on request to the customs authorities for inspection. This obligation applies to the following sectors:

- building industry,
- catering and hotel business,
- passenger transportation industry,
- haulage, transport, and associated logistics industry,
- fairground amusement industry,
- a forestry industry,
- industrial cleaning,
- businesses involved in setting up and dismantling trade fairs, and the
- meat industry.

Employers are obliged to inform their employees about this duty. They have to keep the notices given to the employees and have to show them on request of the customs authority.

4.2. What are the penalties and sanctions in case these formalities and obligations are not complied with? Who can be sanctioned? Is there relevant case law?

The breach of the duties of registration, information and co-operation mentioned under question 4.1 a.) and b.) may be punished by a fine up to EUR 30,000.

Furthermore there is a sanction being for the most employers much more severely and deterrent: a breach of duty can result in an exclusion from public procurement.

A violation of the duty to carry along documents of identification can also be punished by a fine towards the employee.

5. SOCIAL INSPECTION

5.1. Are cross-border assignments a priority in your country for the social inspection? Please explain.

In Germany the leading authority for social inspection is Financial control of illicit employment (Finanzkontrolle Schwarzarbeit) which is part of customs.

Other authorities which are part of Social Inspection are listed in Section 2 para. (2) of the Act Against Illicit Employment (Schwarzarbeitsbekämpfungsgesetz) e.g. social insurance agencies, fiscal authorities, federal employment agency.

Recently prosecution against illegal employment has increased. There is no special focus on employees with cross-border assignments though.

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