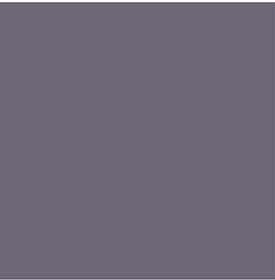


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Employees abroad

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Definitions of terms for foreign assignments

The assignment of employees abroad is occurring more and more frequently, which should be checked separately according to the area of law, such as social security, income tax and employment law. The general basis is the employment contract, therefore its wording is key.

Practical tip: Always verify the framework regarding visa and other permissions in the respective country, as the entire assignment abroad may be put at risk, if it is lacking.

Within the scope of assignments in another country, many different terms are used, which do not always mean the same thing. In order to simplify the coordination, we are defining the terms below from our perspective:

Business trip abroad

A business trip comprises a work assignment of an employee abroad, which has a maximum duration of three months.

Contract for work and services – activity abroad in fulfilment of a contract

(Service contract, business procurement contract; hereinafter, the term “contract for work and services” will be exclusively selected)

Within the scope of a contract for work and services, a domestic employer assigns its employee, who is actually employed domestically, to temporarily fulfil a contract abroad

An employment contract only exists with the domestic employer and specific requirements must be fulfilled:

- The employee is not integrated into the client’s operation.
- The decision about the nature, location, time and scope of the performance of the work lies with the employer domestically, not the client abroad.

Employment in a foreign Group company/subsidiary

With the employment in a foreign Group company or subsidiary, the employee is economically working for the foreign branch and is usually also integrated into the local business organisation. The employee receives his or her remuneration from the foreign branch or from the domestic employer, who is usually reimbursed by the foreign branch.

The employee has

- an active employment contract with the domestic employer or
- a dormant employment contract with the domestic employer and an active employment contract with the foreign branch or
- an active employment contract with the foreign branch.

As a rule, the foreign branch has the right to issue instructions.

Employment with a foreign company

If NO employment relationship or a suspended employment relationship exists with the domestic company, sole employment abroad is assumed and the employment relationship is no longer subject to the criteria of secondment.

Tax law check procedure for secondments

For the tax assessment of secondment cases, two questions are basically asked:

1. Where does the employee need to tax his or her global income, i.e. where is he or she subject to an unreserved tax obligation? Frequently, this depends on the centre of the employee’s life, but other criteria may also be relevant.
2. Which country has the taxation right for the wages? In principle, salaries may only be taxed in the country of residence. However, if the work is physically performed in a different country (i.e. in a non-residency country), the source country, also referred to as the country in which the work is performed, is also permitted to tax.

The question of whether and to what extent wages from employment carried out abroad must be taxed in Germany depends primarily on whether or not the employee maintains his or her place of residence in Germany.

Should the employee remain resident in Germany, he or she is also subject to unlimited tax liability here. The problem is that, in addition to the country of residence, the country in which the work is performed can also charge taxes (country in which the work is performed). There are three options to avoid a double tax burden:

- Exemption from income tax deduction under a double taxation treaty
- Exemption from income tax deduction according to the Foreign Work Decree
- Taxation with crediting of the wage or income tax paid abroad

Double taxation treaty

In order to avoid double taxation, the Federal Republic of Germany has concluded so-called double taxation treaties (DTT's) with numerous countries. These are generally bilateral treaties, i.e. agreements between two countries. Although the DTT's are based on uniform basic rules – there is also a model agreement of the OECD (Organisation for Economic Cooperation and Development) – the individual countries provide for numerous exceptions and special provisions. Therefore, it is recommended to obtain information from the responsible tax office concerning the rules that apply. However, for all treaties, the principle that one of the two countries will forego its right to levy taxes applies. However, the income is usually taken into account by the tax office within the framework of the progression reservation. This means that although the income itself is not taxed, it is taken into account when calculating the individual tax rate. By means of this, the tax on the remaining taxable income is increased. Most DTT's provide for the right of taxation from employment for the country in which the work is performed. In case of work abroad for only a temporary period of time (for example, less than 183 days within the calendar or tax year), the right of taxation is generally granted to the country of residence if the employer is not a resident of the country in which the work is performed and the remuneration is not economically borne by a work location in the country in which the work is performed. A list of current double taxation treaties can be found on the internet on the pages of the German Federal Ministry of Finance via the following link: bundesfinanzministerium.de.

Working abroad decree

Should there be no DTT, a tax exemption under the Working Abroad Decree may be considered under certain circumstances. Work abroad for a German company in connection with the following is deemed to represent eligible activities under this decree:

- the planning, construction, installation, putting into operation, extension, repair, modernisation, supervision or maintenance of factories, structures, large-scale fixed machinery or similar equipment,
- the installation, erection or repair of other economic assets,
- the operation of the equipment until it is handed over to the client,
- the exploration or extraction of mineral resources,
- the provision of advice to foreign clients or organisations in connection with the projects referred to above,
- German public development assistance within the framework of technical or financial co-operation.

The applicability of the decree is subject to additional requirements:

- The work must be carried out for at least three months in a country with which no DTT is in place.
- The remuneration is paid by a private employer (special regulations exist for public sector employees).
- The remuneration is stated separately in the wage account. The annual income tax equalisation is not performed by the employer.

The progression reservation is also taken into account in the Working Abroad Decree. The employer or the employee applies for the application of the Decree at the tax office responsible for the company. The employer uses the exemption notice issued by the tax office as proof for the wage documents.

Tax structuring options / keyword hypotax

In principle, with a tax obligation abroad, the resulting differences between the countries can be compensated using contractual structures. Depending on the objective, a distinction is made between:

- **Tax protection:** The employer agrees to be responsible for the additional tax, which is incurred abroad. However, the employee would then pocket any lower tax.

Example: Domestic income EUR 100,000, 40 % tax rate, employee receives EUR 60,000 net.
100,000, 50 % tax rate, employee receives EUR 50,000 net.

Compensation commitment for the difference of EUR 10,000 net, i.e. in this case, a net extrapolation would take place, so that the employee is not put in a worse position due to the higher tax charge in the secondment country.

- **Tax equalization:** The tax level should have no influence on the assignment abroad. For the employee, everything remains "the same". Therefore, the employer would e.g. charge the lower tax to the employee in a country, which is more favourable for taxation.

Example: Foreign income EUR 100,000, 30 % tax rate, employee received EUR 70,000 net and the employer would cancel the tax benefit for him or her and only pay EUR 60,000 net.

How the employer decides will depend on how attractive the foreign assignment is. Therefore, these issues must be very precisely contractually regulated.

Social security check procedure for secondments

For employment abroad, the question arises of the continuation of the social security obligation in Germany, which should frequently continue to exist. This is enabled with an appropriate contract structure, because social security actually has to be paid where the service has been rendered. The basic principle for social security is the territorial principle.

Secondment and continuation of the social security obligation

The social security obligation under German law only exists during the employment abroad for a secondment, which fulfils ALL of the following criteria:

- The employee works abroad at the instigation of his or her domestic employer.
- The activity abroad is temporary by contract or due to the nature of the activity, right at the outset.
- The employee continues to remain integrated into the domestic operation.

The secondment ends with the return of the employee to the domestic country. A short-term return, e.g. for visits or leave, does not terminate the secondment, provided that the interruption period does not last longer than two months.

Regarding a secondment to countries, with which a social security treaty exists, the continued validity of the German social security law is regulated differently and arises from the respective social security treaties:

	Health Insurance	Pension Insurance	Unemployment Insurance	Accident Insurance	Applicability of German legal regulations
Albania	○	●	○	○	24 months
Australia		●	○		48 months
Bosnia-Herzegovina	●	●	○	●	Unlimited
Brazil		●	○	●	24 months
Chile		●	○		36 months
China (People's Republic)		●	●		48 months
India		●	○		48 months
Israel	●	●		●	Unlimited
Japan		●	○		60 months
Canada		●	○		60 months
Korea		●	○		24 months
Kosovo	●	●	○	●	Unlimited
Morocco	●	●	○	●	36 months
Republic of Moldova	○	●	○	●	24 months
Montenegro	●	●	○	●	Unlimited
North Macedonia	●	●	○	●	24 months
Philippines		●	○		48 months
Quebec		●	○	●	60 months
Serbia	●	●	○	●	Unlimited
Turkey	●	●	○	●	Unlimited
Tunisia	●	●		●	12 months
Uruguay	○	●	○	○	24 months
USA		●			60 months

- Material scope of applicability of the treaty
- Should the German legal provisions apply to the class or classes of insurance covered by the material scope of applicability of the treaty (●), these also apply to the classes of insurance marked here.

Exception agreements are possible.

For the duration of the continued validity of German social security law, the German insurance remains in place in all branches of social security (pension insurance/health insurance/unemployment insurance/care insurance). The maximum duration of the applicability of German law arises from the various social security treaties/EU regulations. If the time limit is predicted to be exceeded, a social security obligation already occurs in the country of the activity from the time when the social security obligation in Germany ends.

Example:

An employee is initially seconded to France for 12 months (e.g. from 1 January–31 December). On 15 December, he or she arranges an extension of the secondment with his or her employer for a further 18 months. Therefore, the social security obligation occurs in France from 15 December, the end of the social security obligation in Germany is on 15 December, as on this day, it is already established that the maximum duration for a secondment is exceeded.

No social security obligation under German law

No social security obligation exists under German law, if no case of secondment exists. The social security obligation in Germany ends in all branches, as soon as the employment abroad starts.

Please note: If the social security obligation ends domestically, the social security obligation shall only apply in the country of employment, provided that such an obligation exists. Particularly for health insurance, it must be ensured, in any case, that sufficient insurance protection is available for the employee and his or her relatives if applicable.

If the insurance obligation in the statutory health insurance scheme ends due to the employee's employment abroad, the insurance protection shall also lapse for his or her insured family members. However, the link with the German pension, unemployment, health and care insurance scheme can be fully or partially maintained due to various options. In this case, the link with the German social security scheme exists **ALONGSIDE** an insurance obligation in the foreign country of employment.

Statutory pension insurance scheme

After the termination of the insurance obligation, the option is available for

- voluntary insurance
- compulsory insurance upon application

Basically, the employee is slightly better protected by the compulsory insurance upon application, but is less flexible.

Unemployment insurance

In the unemployment insurance scheme, the option of establishing a compulsorily insured status upon application is available, if employees take up and perform employment with a minimum scope of 15 hours per week in a country outside of a Member State of the European Union, a Contracting State of the European Economic Area or Switzerland.

Health and care insurance

The statutory health and care insurance may be continued as voluntary insurance or as entitlement insurance.

Application notice periods and limited group of persons

The compulsory and voluntary insurance do not need to be started immediately and at the same time as taking up the activity abroad, however an application notice period of three months must be observed from the start of the requirements (initiation of activity abroad, suspension of the German employment relation-ship). Another requirement is that the employee is a German or EU citizen.

Notes

The continuation of the social security obligation in Germany for work in Europe/the EEA and consequently the exemption from the social security obligation abroad must be certified upon secondment. For employees who are seconded to a Member State of the EU/EEA or to Switzerland, an application must be filled out for the issuance of the A1 certificate. This must be submitted electronically via a certified wage program or via SV-Net.

If the seconded employee is not a member of the statutory health insurance, but is privately insured, the certificate will be issued by the responsible pension insurance scheme or the DVKA.

For employees who are seconded to other countries (outside of the EU/EEA or Switzerland), an application must be filed with the responsible collection body (health insurance company) for the establishment of a secondment and consequently, the validity of German social security law.

Up-to-date information concerning the special case of Great Britain (UK) can be found in the blog birgittenmoser.de

Despite the continued existence of the German social security obligation, the seconded employee is generally also subject to the social security system of the host country. Under certain circumstances, it may be the case that social security contributions must be paid in two countries in connection with the employment. In order to avoid this, a number of social security treaties have been concluded, which prescribe standardised regulations within the framework of supranational and intergovernmental law.

The regulations under intergovernmental law can only be applied if

- the seconding company usually carries out business activities in Germany (other significant activities than purely administrative work)
- and the secondment is for a time limited period in advance either due to the unique nature of the employment (for example projects) or under a contract.

Regulations (EC) 883/04 and 987/09 apply to the following countries:

- | | | | |
|------------|-----------------|---------------|------------------|
| - Belgium | - Great Britain | - Norway | - Slovenia |
| - Bulgaria | - Ireland | - Austria | - Spain |
| - Denmark | - Iceland | - Poland | - Czech Republic |
| - Germany | - Italy | - Portugal | - Latvia |
| - Estonia | - Croatia | - Romania | - Liechtenstein |
| - Finland | - Luxembourg | - Sweden | - Lithuania |
| - France | - Malta | - Switzerland | - Hungary |
| - Greece | - Netherlands | - Slovakia | - Greek Cyprus |

The provisions of the EU regulations apply to:

- Unemployment insurance
- Health insurance
- Care insurance
- Pension insurance
- Accident insurance