

# ***Practical guidance for the German posting of workers law***

**Information and tips for day-to-day practice with the main provisions of the  
posting of workers law**

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## A. What is the posting of workers law?

### What is the point of having the posting of workers law?

Working conditions, in particular wages and social standards, vary greatly in individual EU countries. When foreign workers perform activities across borders, these differences can have consequences for the labour market and the terms of economic competition. For instance, if foreign wages are markedly lower than those in another country, the companies in the latter (the host country) suffer a competitive disadvantage. Furthermore, the foreign workers do not benefit from the better working conditions in the location where they are deployed. In addition, German employees also need to be protected against having to compete on the labour market with non-German workers who perform their work under different working conditions.

The “law on compulsory working conditions for workers posted across borders and workers regularly employed on German territory” (abbreviated to *Arbeitnehmer-Entsendegesetz* or AEntG) therefore requires non-German companies wishing to provide services in Germany to comply with certain minimum standards applicable in Germany. In so doing, the law pursues two first-line objectives – fair competition between non-German and German companies and a minimum level of occupational safety and health for all employees working in Germany.

The German posting of workers law is based on a European directive (directive 96/71/EG concerning the posting of workers in the framework of the provision of services – known as the posting of workers directive) which was adopted by the European Union 23 years ago. This directive was intended to create a legislative framework for the European single market in the area of provision of services (not in the area of freedom of movement). Germany transposed the directive into German law in 1996-1997 with the *Arbeitnehmer-Entsendegesetz*. However, in the past this law covered only selected economic areas in which large numbers of posted workers from other EU countries were active in Germany. For example, these areas included the main construction industry from the very start. With the passage of time, ever more sectors were incorporated until 2014 when the law broadly covered all sectors.

### Why was the German posting of workers law amended in 2020?

The latest amendments to the posting of workers law 2020 can be traced back to an amendment of the underlying European legislation. The European legislator had been trying to overhaul the posting of workers directive for many years, under pressure – inter alia – from the trade unions. In the first instance, the European enforcement directive of 15 May 2014 was supposed to bring about better implementation of the posting of workers directive. This did not require an amendment of the posting of workers law. Subsequently, in 2018, the European posting of workers directive was amended with the objective of enforcing the principle of “equal pay for equal work at the same workplace” in the European single market. Germany had to transpose the new requirements by 30 July 2020, which entailed a revision of the existing *Arbeitnehmer-Entsendegesetz*.

### What are the consequences of the amendments?

Further to transposition of the revised posting of workers directive, the scope of the German posting of workers law and the working conditions to be respected have been widened and/or tightened up. Thanks to the new requirements, the revised law makes work more difficult for companies and, in practical terms, raises many legal uncertainties. This manual sets out to provide information on the main provisions of the “new” *Arbeitnehmer-Entsendegesetz*.



## B. To whom does the German posting of workers law apply?

### What qualifies as a posting?

A posting within the meaning of the German posting of workers law obtains when non-German companies post their workers to Germany or release them to work as non-Germans in Germany so that they can perform an activity for the employer locally on a temporary basis. In this regard, it is not essentially about the duration of the activity in Germany. Any border crossing made in the framework of the work relationship can fall within the scope, i.e. each and every work-related or business trip. Exceptions to this broad rule are regulated in § 24 AEntG (see page 6 for further details).

Conversely, if non-German workers are appointed directly by a German company and deployed in Germany, this is not deemed to be a posting within the meaning of the law.

A posting may last as long as is necessary for performance of a particular activity. Nevertheless, it is only deemed to be temporary if it is limited in time from the outset. Accordingly, the posting must be planned for a period which can be demarcated (e.g. completion of a specific project) and the worker should return to his usual workplace in another EU country following the posting.

### Does the German posting of workers law apply only to non-German companies and non-German employees?

No, it applies to all employers and workers who are active in Germany. In order to safeguard equal conditions between non-German and German employers, non-German employers must comply with minimum standards for a posting which must also be respected by German employers in Germany.

Hence, the German posting of workers law goes beyond the scope of the posting to Germany. It covers both subject matter with a non-German reference and purely national issues.

### Does the German posting of workers law also apply to employees from third countries?

If employees are posted to Germany from a third country outside the European Union or the European Economic Area, they are similarly covered by the *Arbeitnehmer-Entsendegesetz*. In addition, further provisions apply for these constellations such as residence rules under the residence law or on the basis of intergovernmental agreements.

### Does the German posting of workers law also apply to trainees?

The *Arbeitnehmer-Entsendegesetz* does not contain any provisions on trainees. This situation is already made clear in § 1 AEntG which specifies that the objective of the law is to create and enforce appropriate minimum working conditions for workers posted across borders and who are regularly employed in Germany. Trainees are not workers within this context.

### To which sectors does the German posting of workers law apply?

Insofar as it is a question of working conditions which are regulated in law, the German posting of workers law applies without restriction for all sectors.

If the minimum working conditions are regulated in national collective agreements declared to be generally binding in accordance with the law on collective agreements or confirmed through



a statutory decree (*Rechtsverordnung*) in accordance with the posting of workers law, these conditions must be complied with only if an employer employs a worker to perform tasks which fall within the area covered by the collective agreement of the sector in question.

**Example:** Neither a collective agreement confirmed through a statutory decree in accordance with the posting of workers law nor a national collective agreement declared to be generally binding in accordance with the law on collective agreements applies for the metal-working and electrical/electronics industry. For non-German and German employers which employ workers in this sector or which assign them to be employed in this sector, only the statutory minimum working conditions apply under the posting of workers law.

The *Arbeitnehmer-Entsendegesetz* explicitly lists the following sectors whose collective agreements confirmed by statutory decree must be complied with under the German posting of workers law:

- waste sector including street cleaning and winter gritting service
- education and training services as defined in 2<sup>nd</sup> and 3<sup>rd</sup> volume of the social code
- main construction industry and ancillary sectors, e.g.: roofers, scaffolders, house painters, masons and stone sculptors
- specialist mine work in hard coal mines
- postal services
- industrial cleaning
- security services
- laundry services for commercial clients.

Furthermore, there are national collective agreements declared to be generally binding with minimum working conditions in the following sectors:

- chimney sweeping
- electrical/electronics trade
- construction industry.

**Tip:** Since the posting of workers law was amended in 2014 in conjunction with the law on strengthening the autonomy of collective bargaining, the law has been widened to cover all sectors which means that further sectors are not explicitly listed. Accordingly, application of the *Arbeitnehmer-Entsendegesetz* to a sector depends on whether a national collective agreement is confirmed through a statutory decree in accordance with the posting of workers law or declared to be generally binding in accordance with the law on collective agreements (or such a collective agreement terminates). The customs authority publishes up-to-date information on this point on its website [www.zoll.de](http://www.zoll.de).

### **What applies for the care sector?**

Special rules apply for the care sector (elderly care and outpatient care) in a separate section of the posting of workers law. The working conditions to be respected in this sector have been decided by a care commission and enshrined in law through a statutory decree by the Federal Labour Ministry.



## **Does the posting of workers law also apply for non-Germans working in Germany?**

Broadly yes. In the case of collectively agreed minimum working conditions, these apply only if non-Germans are employed to perform activities which fall within the scope of a collective agreement declared to be generally binding in accordance with the law on collective agreements or confirmed through a statutory decree in accordance with the posting of workers law.

## **Do exemptions apply for particular activities?**

§ 24 AEntG comprises special rules for particular activities of workers who are employed by employers established outside Germany. These relate to workers involved in initial assembly or first installation which forms part of a contract for the supply of goods, which is necessary for taking the goods supplied into use and is carried out by specialist or skilled workers from the supplying undertaking, insofar as the posting in Germany does not exceed a period of eight days within one year.

Special rules also apply for workers such as temporary agency workers who are temporarily employed in Germany by employers or temporary work agencies established outside Germany and who – without performing work or services in Germany for their employer vis-à-vis third parties –

- conduct negotiations, prepare draft contracts or conclude contracts in Germany for their employer,
- take part as visitors in trade fair events, conferences and expert meetings without performing activities in accordance with § 2a paragraph 1 point 8 of the law on combating clandestine work (undertakings which take part in the erecting and dismantling trade fairs and exhibitions),
- set up a German business unit for their employer, or
- are employed as skilled workers of an internationally active group or business with the purpose of occupational training in the German group or business unit.

In this context, employment is deemed to be temporary if workers are active in Germany for no longer than 14 days continuously and no longer than 30 days in a 12-month period.

## **C. What working conditions have to be respected?**

### **What kind of minimum standards have to be respected in a work relationship between worker and employer?**

Employers established in Germany or another country which employ people in Germany must (1) provide the working conditions which are laid down in Germany generally through legislative or administrative provisions.

Furthermore, in certain sectors, (2) the sector-specific working conditions regulated in national collective agreements declared to be generally binding or confirmed by a statutory decree in accordance with the posting of workers law must also be respected.



If the posting to Germany lasts longer than 12 months, (3) all working conditions which apply at the place of employment under regional legislative and administrative provisions and regional collective agreements declared to the generally binding must additionally apply (after 18 months at the latest) (see page 12 et seq. for further details on issues linked to long-term posting).

### **What statutory minimum standards apply for non-German employers?**

A non-German employer which employs workers in Germany must comply with the minimum legal standards applicable in Germany regulated in legislative and administrative provisions for this employment. This applies not only in the sectors listed in § 4 AEntG but in every sector.

This relates to the following cases listed in § 2 AEntG:

1. remuneration including overtime rates without the provisions on statutory retirement provision,

**for instance:** minimum pay in accordance with the law on minimum wages, wage floor in accordance with the law on temporary employment

2. minimum annual paid leave,

**for instance:** federal leave law

3. maximum working periods and minimum rest periods,

**for instance:** law on working time, law on specialist personnel, law on shop opening times

4. conditions for assigning workers, in particular through temporary work agencies,

**for instance:** law on temporary employment

5. safety, health protection and hygiene at the workplace, including requirements on accommodation made available directly or indirectly, against or without payment, for workers who are deployed by the employer away from their habitual workplace,

**for instance:** law on occupational safety and health, decree on workplaces, 7<sup>th</sup> book of the social code (SGB VII, statutory accident insurance)

6. protective measures in connection with the working and employment conditions of pregnant women and women who have recently given birth, children and young people,

**for instance:** law on maternal leave, law on protection of young workers, decree on protection against child labour



7. equal treatment between men and women as well as other non-discrimination provisions,

[for instance:](#) article 3 Basic Law, general law on equal treatment

8. increments or cost reimbursement to cover travel, accommodation and meal costs for workers who are away from their place of residence for work reasons.

[for instance:](#) § 670 Civil Code (BGB)

### **What collectively agreed conditions should be provided to workers?**

In the case of a posting of up to 12 months or an extension up to 18 months, selected working conditions of a national collective agreement declared to be generally binding or confirmed by a statutory decree in accordance with the posting of workers law may also apply to the work relationship of a posted worker. This may relate in particular to the following working conditions:

- minimum remuneration rates which may vary by type of activity, worker qualification and region, including overtime rates as well as the other remuneration components over and above the minimum wage (e.g. pay for a 13<sup>th</sup> month, hardship allowances),
- length of recuperation leave, leave remuneration or leave bonus,
- contributions to a holiday fund,
- requirements on accommodation made available for workers who are deployed by the employer away from their habitual workplace,
- increments or cost reimbursement to cover travel, accommodation and meal costs for workers who are away from their place of residence for work reasons.

**Tip:** A national collective agreement is not required only in the case of working conditions relating to the length of recuperation leave, holiday pay, additional holiday pay, collection of contributions and provision of services in connection with holiday entitlements through a common institution or accommodation requirements which, in summary, cover the complete substantive scope of the posting of workers law. Among other things, this includes collection of the holiday fund contribution in the construction industry through the federal framework collective agreement.

Overview of standard working conditions under national collective agreements declared to be generally applicable and statutory decrees:





Sector	Minimum remuneration	Further remuneration elements	Overtime supplements	Leave duration	Leave remuneration	Leave bonus	Holiday fund	Requirements on accommodation*
Waste sector, including street cleaning and winter gritting service	yes	no	no	no	no	no	no	no
Education and training services as defined in second or third book of social code	yes	no	no	yes	yes	no	no	no
Main construction sector	yes	yes	yes	yes	yes	yes	yes	yes
Roofing trade	yes	yes	yes	yes	yes	yes	no	yes
Electrical trades	yes	no	no	no	no	no	no	no
Industrial cleaning services	yes	yes	no	yes	yes	no	no	no
Scaffolding trade	no	yes	yes	yes	yes	yes	yes	yes
House and car painting trade	yes	no	no	no	no	no	no	no
Care sector	yes	no	no	yes	no	no	no	no
Chimney cleaning	yes	no	no	no	no	no	no	no
Masonry and stone sculpture trade	yes	no	no	no	no	no	no	no

\*Requirements on worker accommodation made available by the employer to employees deployed away from their habitual workplace. Source: [www.zoll.de](http://www.zoll.de), as at November 2020

### Have there been any changes to compulsory working conditions through transposition of the revised posting of workers directive 2020?

Yes, the list of minimum working conditions to be complied with has been extended through the amendment of the posting of workers directive of 30 July 2020.

Hitherto, only application of the rules on “minimum remuneration rates including overtime rates” was binding on non-German (and German) employers.





Through the amendment to the posting of workers law, all remuneration provisions applicable to workers employed in Germany will in future apply also for posted workers. This relates to the remuneration provisions applicable under statutory provisions as well as under national collective agreements declared to be generally binding and, in the case of long-term postings, also under regional collective agreements declared to be generally binding (see explanations on page 12 et seq. in this regard). A limitation to minimum remuneration rates continues to apply for the implementation of a collective agreement through a statutory decree in accordance with the posting of workers law, albeit this can now comprise three stages instead of the earlier two.

Furthermore, the list of minimum working conditions has been expanded to include the following rules:

- rules on worker accommodation made available directly or indirectly, against or without payment, for workers who are deployed by the employer away from their habitual workplace (§ 2 paragraph 1 point 5 AEntG), as well as
- increments or cost reimbursement to cover travel, accommodation and meal costs for workers who are away from their place of residence for work reasons (§ 2 paragraph 1 point 8 AEntG).

### **What does the concept of remuneration comprise?**

In general terms, the “remuneration” that an employer has to pay comprises all elements of pay which a worker receives from the employer in exchange for work performed, in cash or in kind, in accordance with applicable statutory and administrative provisions or in accordance with a national (or regional for long-term postings) collective agreement declared to be generally binding.

This includes in particular basic pay including all remuneration elements linked to the nature of the activity, qualification and professional experience of workers and the region, insofar as this is regulated in statutory provisions, national or, in the case of long-term postings, regional collective agreements declared to be generally binding or collective agreements confirmed by statutory decree in accordance with the posting of workers law.

Also covered are increments, supplements and bonuses including overtime rates. For example, increments and supplements include payments for additional work, night work, work on Sundays and holidays, particular hardship or shift work. Among other things, bonuses include Christmas money, a 13<sup>th</sup> month or payment of a holiday allowance.

Also to be taken into account are rules on when remuneration falls due including exemptions and the associated conditions.

**Example:** A sector-specific minimum wage applies in a sector on the basis of a statutory decree in accordance with the posting of workers law as an entry-level wage for simple activities. For further activities, a national sectoral collective agreement regulates remuneration above this level and a number of supplements and increments, e.g. for shift work.



If a non-German worker is posted to this sector, the sector-specific minimum wage must be respected but not the further remuneration with increments and supplements from the national collective agreement since the latter has neither been confirmed in accordance with the posting of workers law nor declared to be generally binding in accordance with the law on collective agreements.

Not covered are miscellaneous benefits such as access to a canteen, a place in an in-house childcare facility or a place in the company car park. Also not covered are payments by third parties such as tips in the gastronomy sector.

### **Can any posting supplement be offset against the remuneration to be paid in accordance with the posting of workers law?**

A clarification provision on the possibility of offsetting posting increments has been included with the amendment to the posting of workers law of 30 July 2020.

Under this provision, posting increments which workers receive for their deployment in Germany can essentially be offset against their remuneration. The condition is that the purpose of the posting increment is allocated in return for the worker's work performance.

**Example:** For a foreign deployment, over and above the hourly rate, the employer pays a lump sum, e.g. "assembly money" (possibly eligible for offset), and in addition amounts in lieu of cost reimbursement for accommodation, meal costs, etc. (not generally eligible for offset).

Conversely, supplements paid in lieu of cost reimbursement real costs incurred as a result of the posting are not eligible for offset. If the primary purpose of the supplement is to cover the worker's costs incurred as a result of his work deployment in Germany, this cannot be offset against remuneration. Such posting costs include in particular travel, accommodation and meal costs.

**Example:** The employer pays a total amount as a posting increment. Among other things, this comprises quantified amounts with which workers are expressly intended to finance their expenditure on accommodation and/or meals. Accordingly, these amounts are earmarked for cost reimbursement and are not eligible for offset.

If it is not expressly clear from contractual agreements what purpose the increment paid for the posting is intended, it is irrefutably assumed that it is intended for reimbursement of costs related to the posting. The result of this is that the entire posting increment is ineligible for offset against the remuneration required by law. The presumption of intention does not obtain if the employer demonstrates that the purpose of the posting increment and the extent to which it serves for cost reimbursement or other purposes is clearly regulated in its working conditions.



### **What is the basis for determining overtime supplements?**

The level of overtime rates is governed by the relevant collective agreement; however, they need not be regulated in the same collective agreement declared to be generally binding or confirmed by statutory decree as the remuneration rates. Overtime and the question of whether overtime obtains should be assessed against the work contract and, where appropriate, foreign law (cf. ruling of Federal Labour Court of 19 May 2004 – 5 AZR 451/03).

### **When do rules regarding requirements on accommodation need to be respected?**

If an employer makes accommodation available because its workers have to travel in the framework of their activity, it must comply with the relevant rules for this accommodation, as contained for example in the decree on workplaces or – where applicable – statutory decrees in accordance with the posting of workers law or generally binding national collective agreements, in the following cases:

- the workers must travel to or from their habitual workplace in Germany, e.g. on business trips or because they do not live where they work, or
- the workers are sent temporarily by the employer from their habitual workplace in Germany to another workplace, e.g. because variable workplaces form part of their activity.

### **What applies for cross-border worker assignment?**

A new paragraph in § 2 AEntG clarifies the application of minimum working conditions regulated in statutory or administrative provisions also to worker assignment. They apply not only if a temporary work agency established outside Germany assigns workers across borders to a business established in Germany but also if such a temporary work agency assigns temporary workers to a foreign undertaking and the latter deploys the temporary workers in Germany.

For **example**, this covers the following cases:

- a temporary work agency established in Poland assigns workers to a business in Germany
- an Austrian temporary work agency assigns temporary workers to a business in Austria, the Austrian assignee undertaking performs a work contract in Germany using the temporary workers

### **What applies in cases where a worker is posted to Germany for longer than twelve months?**

With the revision of the posting of workers law, the working conditions which are obligatory for work relationships of posted workers are now explicitly regulated if these workers are posted to Germany for longer than twelve months. In this case, all working conditions which are laid down in Germany in statutory and administrative provisions and in generally binding collective agreements are applicable.



Thus, unlike with short-term postings, application is not limited to generally binding collective agreements but also encompasses generally binding regional collective agreements.

If the posting started before the amendments to the posting of workers law entered into force, the prescribed working conditions have to be applied at the earliest from the date of entry into force, i.e. starting from 30 July 2020.

**Example:** Employee A is posted by a Portuguese undertaking to Hessen for 13 months. In the first twelve months or at the latest after 18 months of the activity, only the general working conditions (law, national collective agreement under statutory decree or declared to be generally binding) have to be respected. After twelve months or at the latest after 18 months, the additional regional working conditions become applicable. It is therefore important to verify whether there is a generally binding collective agreement applicable to the work relationship in this region.

**Practical tip:** The customs authority has published an overview of the collective agreements declared to be binding at [www.zoll.de](http://www.zoll.de).

### **Are individual provisions exempt for long-term postings?**

Yes, rules which relate to the continued existence of the contractual relationship as such are not applicable to the work relationship. This refers in particular the provisions of the Civil Code (BGB) on conclusion of contracts, the requirements on time limits regarding work relationships in accordance with the law on part-time work and time limits and the provisions on notice periods in accordance with the law on wrongful dismissal. Furthermore, the provisions on occupational retirement provision (law on occupational pensions) are not applicable.

### **Can the twelve-month posting period be extended?**

A prolongation of the posting period by six months is possible. If the employer submits a notification to the customs administration authorities – the General Directorate of Customs is competent – prior to the end of a twelve-month employment period in Germany, the latter will extend this period to 18 months. If the employer fails to submit a notification, all the listed working conditions apply automatically after twelve months.

### **In what form must the notification be submitted?**

The notification must be submitted in the text form set out in § 126b BGB. This means that a handwritten signature is no necessary. A notification in electronic form is also possible (e.g. by e-mail). In this way, the provision on form seeks to take into account that the service provider is established outside Germany and thus allows a notification to be submitted using modern means of communication.



**Practical tip:** The notification must be submitted to the customs administration authority. A special e-mail address has been put in place for this purpose. It is advisable to send the notification to the following e-mail address: [mitteilung.langzeitentsendung@zoll.de](mailto:mitteilung.langzeitentsendung@zoll.de).

### What content must the notification have?

The notification must be written in German and contain the following information:

- (1) Family name, forename and date of birth of the worker,
- (2) Place of employment in Germany, in the case of construction services the construction site,
- (3) Reasons for exceeding the twelve-month employment period in Germany, and
- (4) the probable employment period in Germany that is assumed at the time of the notification.

**Practical tip:** As and when necessary, several notifications can also be submitted simultaneously in one e-mail in accordance with § 13b Abs. 2 AEntG.

### Does the employer receive a confirmation of the extension?

No, the competent customs authority only confirms receipt of the notification. If the message received meets all the requirements of content, the period is automatically extended to 18 months. No decision is required in this regard.

**Tip:** As competent authority, the General Directorate of Customs merely takes delivery of notifications in accordance with § 1 AEntGMeldStellV (decree on determination of competent authority for AEntG). Whether all requirements of § 13b paragraph 2 AEntG are met lies entirely within the responsibility of the employer.

### How is the duration of the posting calculated?

Calculation of the relevant duration of employment is oriented on the various constellations of cases. § 13c AEntG distinguishes between employment periods in Germany in the framework of service and work provision, in the framework of an activity within a corporate group and in the framework of a worker assignment. Moreover, there is also a rule for cases which do not fit into any of these constellations.

1. **Posting in the framework of service/work contracts:** If a worker is employed in Germany in the framework of service or work contracts, all periods in which he is employed in Germany in the framework of these contracts count for calculation of the duration of employment in Germany.
2. **Posting within a corporate group:** If the worker is employed in Germany in a German business of the employer or in an undertaking which is associated with the employer in accordance with § 15 Aktiengesetz (law on shareholdings), all periods when he is employed in the business in Germany or in the undertaking in Germany are taken into account for calculation of the duration of employment in Germany.



3. **Posting in the framework of temporary work:** If the employer established outside Germany as provider assigns a temporary worker to a hiring firm in Germany, all periods in which the worker is employed in Germany in the framework of the assignment contract are taken into account for calculation of the duration of employment in Germany. If a hiring firm established outside Germany employs a temporary worker in Germany, the hiring firm is in a different situation. Here, the duration of employment is identified as the duration of the provision of services or work in Germany by the temporary worker. Hence, all periods in which a temporary worker is employed in Germany in the framework of the contract is taken into account for calculation of the duration of employment.
4. **General posting:** If the worker is employed in Germany and the posting does not fall into one of the three constellations set out above, all periods in which he is employed without interruption in Germany are taken into account for calculation of the duration of employment in Germany.

#### **Does a temporary interruption have an impact on the calculation?**

An interruption to the activities of the (temporary) worker in Germany does not qualify as a termination of the employment in Germany for calculation of the duration of employment. Periods in which the main duties are paused or in which the employment takes place outside Germany, are not taken into account for calculation of the duration of employment.

Once a pause in employment comes to an end, the employment period resumes and is added to the periods prior to the pause. Hence, interruptions on the basis of official holidays, weekends, work-free days in the case of part-time work relationships, sickness days or leave, etc., are generally added to the calculation. This provision does not apply to the fourth constellation set out above.

**Example:** Worker A is active in Germany for a project from 1 January 2021 to 31 July 2021. He returns to his home country for the months of August and September. Since it has not proved possible to complete the project as planned, he will become active in Germany once more from 1 October 2021. The period from January to July 2021 is added to the period from October 2021.

#### **How does immediate deployment following on from an earlier employment impact in the first three constellations?**

In this case, the periods of the two employments are added together. In this regard, it is irrelevant whether the follow-on employment unfolds in the same constellation or whether various constellations combine. An employment in Germany immediately following on from an earlier employment obtains in particular if there is no employment in another Member State between the two periods of employment in Germany.



**Tip:** An employment in Germany immediately following on from an earlier employment obtains in particular if there is no employment in another Member State between the two periods of employment in Germany. Whether or not a very brief employment in another Member State is sufficient here is still open to interpretation and has not been conclusively determined.

### **Are employment periods added together if a worker replaces another worker?**

If the employer or assignee undertaking replaces individual (temporary) workers employed in Germany with other workers who perform the same activity at the same location, the completed employment duration is added to the employment duration of the replaced worker in question. Periods are also added together if there is a time gap between the two deployments.

In this context, “same activity” is understood to be where a worker takes on broadly the same tasks as the previous worker and if these tasks

- are performed in the framework of the same service or work contracts,
- in the case of an activity in a business or associated undertaking of the employer, are performed in the same business or the same undertaking in Germany, or
- are performed by a temporary worker with the same assignee undertaking established in Germany.

The worker performs the same activity at the same location if he

- is active at the same address or in the immediate vicinity of the same address as the previous worker, or
- is active in the framework of the same service or work contracts at other addresses specified for these service or work contracts.

**Example:** If a worker was deployed at a workplace for an initial period of ten months and was then replaced for nine months, a period of 19 months is added to the account of a third worker who is subsequently deployed at the same workplace when his employment duration is calculated.

### **Do posting periods prior to 30 July 2020 have to be taken into account?**

The periods prior to entry into force of the new AEntG on 30 July 2020 count towards calculation of the employment duration.





However, if the employment started before 30 July 2020, the notification of extension of the posting to 18 months is deemed to have been submitted in accordance with transition provision § 25 paragraph 2 AEntG. According to the law's explanatory memorandum, this has the consequence that the prescribed working conditions apply only after an employment duration of 18 months for long-term postings which started before 30 July 2020. This is intended to take into account the fact that employers were unable to submit such a notification ahead of entry into force of the amended law.

**Tip:** It is unclear whether this legal fiction will occur in all cases where a posting started before 30 July 2020 or only where the twelve-month period had already been exceeded on that date. For instance, if the posting started on 1 June 2020, i.e. just one month prior to entry into force of the amended law, the employer would undoubtedly still have had sufficient time to submit the extension notification. In such a case, despite the legal fiction, the notification should have been submitted at the latest by the end of the 11<sup>th</sup> month of the posting in order to leave a safety margin.

## D. What other obligations must employers respect?

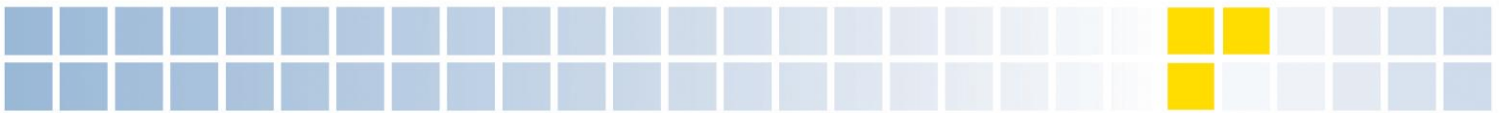
### Do I need to notify a posting?

Insofar as collectively agreed minimum working conditions of a sector covered by the posting of workers law regarding minimum remuneration rates and other elements of remuneration, leave, holiday fund contributions or requirements on accommodation are applicable to the work relationship, employers established outside Germany which want to employ workers in Germany are required to present written notice in German to the competent customs administration authority prior to the start of any work or service provision.

In addition, a reassurance must be added to the message that the obligations of the posting of workers law will be complied with. The reassurance of compliance with working conditions refers not only to those conditions which are actually verified by the customs administration authority.

**Tip:** Further details can be found in the decree on determination of competent authority in accordance with § 18 paragraph 6 AEntG as well as the decree on notification requirements in accordance with the law on minimum wages, the posting of workers law and the law on worker assignment. For example, the latter comprises rules for mobile activities.

**Practical tip:** The employer should notify workers posted to Germany online via the minimum wage notification portal ([www.meldeportal-mindestlohn.de](http://www.meldeportal-mindestlohn.de)). This also applies for assignee undertakings which deploy workers in Germany assigned by a temporary work agency established outside Germany. It is only possible to submit a notification or worker deployment plan on this notification portal following confirmation (clicking a "check box") of a standard reassurance.



## **Does the employer need to document its worker's working hours?**

Broadly, yes. German and non-German employers must record start, finish and duration of the actual daily working time of workers employed in Germany under certain conditions. The recording obligation also applies for assignment of temporary workers.

A new element since 30 July 2020 is that this obligation also covers supplements related to hours worked. Start, finish and duration of working time which gives an entitlement to the supplement must be recorded with an indication of the supplement in question (cf. § 19 paragraph 1 AEntG).

The recording obligation obtains insofar as the collectively agreed minimum working conditions of a sector covered by the posting of worker law regarding minimum remuneration rates and other elements of remuneration, leave and holiday fund contributions are applicable to the work relationship (cf. overview on page 7).

**Practical tip:** Regarding the nature of supplements recorded under working time, it is necessary only that a clear classification can be made. The legislator does not require any information about the legal basis underlying the supplement. Accordingly, it is not necessary to give the reference of the relevant article of the collective agreement or provide a copy of the relevant provisions.

## **What is the deadline for meeting the recording obligation?**

The employer must record the necessary information at the latest by the end of the seventh calendar day following performance of the work.

## **How long must the records be held?**

Records must be held for a duration of at least two years starting from the reference point for the record-keeping.

## **In what form should working time be documented?**

The posting of workers law does not contain rules as to what form the records should take. Die Nevertheless, actual working time should be recorded in written or electronic form (e.g. through electronic time records) as a data set or document in order to comply with the record-keeping obligation.

Hence, records can be kept in hand-written or machine form, or using a data processing software package. It must be possible to assign proof of working time to individual workers.

Special requirements apply for recording working time in the case of exclusively mobile activity, e.g. in accordance with the decree on adaptation of the obligation to record working time under the law on minimum wages and the posting of workers law. A record of the duration of daily working time is sufficient here.



**Tip:** Employers can also delegate the record-keeping obligation to the workers to a certain extent. For example, if workers document their working time themselves by hand on timesheets, the employer does not need to sign these every day. Nevertheless, it must ensure in this case that the daily working time is in reality also correctly and completely recorded. It is therefore advisable to verify this at least through random tests, e.g. when the timesheet is subsequently collected, recorded or processed for calculation of remuneration.

### **What documentation must I hold?**

In accordance with § 19 paragraph 2 AEntG, the employer is obliged to hold all documentation required for verification of compliance with obligations under the posting of workers law in Germany, in the German language, covering the entire duration of the work or service provision, but not for longer than two years.

Requisite documentation under the posting of workers law includes in particular:

- the work contract or documents from which the essential substance of the employment relationship can be garnered,
- proofs of working time which must differentiate by employment locations where regionally different pay levels are involved,
- payslips and proofs of wage payments.

If employment location and record-keeping location are different, documentation should also be made available at the location of employment, e.g. at the construction site in the case of construction services, at the request of the customs authority.

### **What happens in the case of flexible working time?**

Insofar as there is flexible working time regulated through working time accounts, further documentation must be maintained. For instance, this might entail:

- written agreement on flexible working time,
- equalisation account for each worker,
- where relevant, separate records of working hours by region (where working time rules differ by region),
- proof of safeguards regarding the equalisation account.



## E. Is an employer or assignee liable for compliance with the posting of workers law?

### Is an employer liable vis-à-vis its workers for payment of the minimum wage?

Yes, such liability arises from § 14 and § 8 AEntG in conjunction with the minimum wage specified in the sectoral collective agreement. Where no sectoral collective agreement applies, the liability relates at least to the statutory minimum wage (the law on minimum wages refers to § 14 AEntG).

### Is every assignee liable within the meaning of § 14 AEntG?

No. Liability is limited by the case law on subcontractor liability. The purpose of the provision is to motivate the contractor to ensure that its subcontractor complies with compulsory working conditions in accordance with the posting of workers law. Accordingly, not every contractor which assigns a task to another contractor will fall within the scope of § 14 AEntG. Rather, liability accrues only to the party which has undertaken to perform the service or work and does not carry out the contract in question using its own workers but has recourse to one or more subcontractors in order to meet its obligation. It is therefore possible to refer to **main** contractor liability (which is sometimes also synonymous with **general** contractor liability or **subcontractor** liability).

For example, classical construction principals do not bear liability. They do not assign tasks to subcontractors which meet their own performance obligations.

#### Further examples:

A cleaning undertaking regularly cleans a hospital. Cleaning also comprises disposal of medical wastes. If the cleaning undertaking has recourse to a specialist from the waste management sector for this purpose, it may in some cases also be liable for this subcontractor's compliance with obligations under the posting of workers law.

A professional association organises the annual member assembly. Catering with service personnel is booked for the food. In accordance with the posting of workers law, a generally binding national collective agreement is applicable for remuneration of the catering personnel. The association is has liable for any infringements of the posting of workers law by the catering undertaking since it has not engaged itself vis-à-vis its members with regard to its own provision of the work and services (catering).

### Is a business also liable for subcontractors deployed?

In accordance with § 14 AEntG, a contractor which assigns the provision of work or services to another contractor is liable for the obligations of this second contractor or any subcontractor it deploys with regard to non-payment of the sectoral minimum wage or payment of contributions to a common institution of the parties to the collective agreement in accordance with § 8 AEntG such as a guarantee waiving the defence of failure to pursue remedies.



This means that a worker of a subcontractor also has a claim against the contractor with regard to payment of the minimum wage. Hence, any worker affected can appeal not only to his own employer but also to the employer's contractor. Alongside this, the common institution (e.g. SOKA-BAU social funds) can also take legal action against the contractor for contributions in accordance with § 8 AEntG (e.g. holiday fund contributions).

#### **Is main contractor liability also applicable for worker assignment?**

Yes, broadly speaking, main contractor liability also applies in the case where a subcontractor uses the service of a temporary work agency.

#### **Does the minimum wage demand of a worker employed by a subcontractor against the main contractor move up to the level of the Federal Labour Agency (Bundesagentur für Arbeit)?**

No, The Federal Labour Court has rejected this. Accordingly, the Federal Labour Agency has no claim against the main contractor for reimbursement of insolvency money it has paid out to workers of a subcontractor which has become insolvent (cf. rulings of the Federal Labour Court of 8 December 2010 – 5 AZR 111/10, 5 AZR 95/10, 5 AZR 814/09, 5 AZR 263/10).

#### **How far does liability for the minimum wage extend?**

The minimum remuneration covered extends only to the amount to be paid out to the worker after collection of taxes and contributions to social insurance and for work promotion or equivalent expenditures on social protection (net remuneration).

If the worker is subject to non-German law, the taxes and payments into non-German social insurance funds as a result must be taken into account but not notional contributions to German social insurance.

#### **Can I eliminate contractor liability?**

Liability for the undischarged minimum wage cannot be eliminated. This is known as chain liability and is independent of fault. In other words, the employer's liability extends to the entire subcontractor chain.

For undischarged contributions to the common institution (e.g. holiday fund contributions in the construction industry), liability can be minimised in individual cases through presentation of a clearance certificate or recourse to a pre-qualified business.



### **Can I reduce contractor liability?**

The choice of the subcontractor undertaking should be carefully validated before the contract is concluded. Furthermore, it can be ensured through the content of the subcontracting contract that contractual inspection and supervision rights (e.g. through presentation of wage accounts) are agreed. Consideration could also be given to the contractor having an (extraordinary) termination right as well as contractual penalties for the case where the minimum wage has not been paid to workers. Similarly, a possible alternative could be discharge agreements in which the subcontractor promises to discharge the contractor in the event of a claim arising under subcontractor liability.

**Tip:** Furthermore, there is also the possibility, e.g. in the construction industry's social funds, of using an "early warning system". Here, the main contractor can be authorised by the subcontractor to seek out information from the social fund and thus learn from experience whether its subcontractor is participating in the social fund process in an orderly fashion.

## **F. What are the legal consequences if the requirements of the law are not respected?**

### **What are the consequences of infringements against the posting of workers law?**

§ 23 AEntG comprises a comprehensive list of fines (up to 500,000 Euro) for infringements against the posting of workers law. In addition to a monetary fine, a charge on profits can be levied with no upper limit.

There may also be consequences under competition law, since infringements against the posting of workers law which lead to a fine of more than 200 Euro are recorded in the Central Business Register. This enables public contractors to find information about the existence of reasons for exclusion. In addition, in the case of an infringement against § 23 AEntG which has led to a monetary fine of at least 2,500 Euro, applicants for public contracts can be excluded from the tendering process for a proportionate period of time.

### **Are infringements also punishable under criminal law?**

Yes. In the case of withheld or misappropriated work remuneration (cf. § 266a StGB – criminal code), an employer which deliberately withholds social insurance contributions from the collection agencies is liable for criminal punishment:

- worker contributions: it is a criminal offence not to pay due worker contributions to the collection agency;
- employer contributions: it is a criminal offence to provide the collection agency with incorrect or incomplete information about material facts linked to social insurance or, contrary to obligations, to leave the collection agency in ignorance of material facts linked to social insurance and in so doing to withhold contributions to social insurance.



These crimes can be punished with a prison sentence of up to ten years or with a monetary fine.

## G. Who monitors compliance with the law?

### Who is responsible for compliance with the posting of workers law?

The Clandestine Work Financial Control unit (FKS) is competent for monitoring compliance with an employer's obligations in accordance with § 8 AEntG, insofar as it refers to working conditions in accordance with § 5 first sentence points 1 – 4 AEntG. FKS is an operational unit of the German customs administration which is active across Germany in 41 main customs offices at 113 locations.

### Which minimum working conditions in accordance with the posting of workers law does the customs authority monitor?

Working conditions which are regulated in a national collective agreement declared to be generally binding or a statutory decree in accordance with the posting of workers law are monitored. In this regard, the points to be monitored are:

- minimum remuneration rates which may differ by the nature of the activity, worker qualification and regions, including overtime rates, whereby differentiation by nature of activity and qualification can cover a total of up to three stages,
- further elements of remuneration,
- length of recuperation leave, holiday pay or additional holiday pay,
- collection of contributions and provision of benefits in connection with holiday entitlements through a common institution of the social partners, as well as
- requirements on accommodation made available directly or indirectly, against or without payment, for workers who are deployed by the employer away from their habitual workplace.

Increments or cost reimbursement to cover travel, accommodation and meal costs for workers who are away from their place of residence for work reasons are not monitored on the initiative of the customs authority but only through civil law procedures. However, a direct monitoring competence can arise from the relevance of increments for the level of social insurance contributions (§ 266a StGB). The same applies for compliance with working conditions in the case of long-term postings.





### **Does the customs authority cooperate with other authorities?**

The customs administration authorities are supported in their monitoring inter alia by social insurance agencies and common institutions of the social partners within the meaning of § 4 paragraph 2 TVG. Investigations can be combined with other controls by the said agencies.

### **Does the customs authority need to have suspicions before starting an investigation?**

No, customs controls can be carried out independent of any suspicion.

### **Can the customs authority require presentation of identity papers during its investigations?**

The obligation to carry proof of social insurance coverage expired on 31 December 2006. Instead, persons active in the performance of services or work in the following economic areas are required to carry their identity card, passport, passport replacement or identity card replacement and to present it to the customs authority: construction industry, hospitality sector, passenger conveyance sector, haulage, transport and associated logistics sector, fairground personnel, forestry, industrial cleaning, undertakings which take part in the erecting and dismantling trade fairs and exhibitions, meat-processing sector, prostitution and in the watchman and security guard sector guard (cf. § 2a law on combating clandestine work).

**Digression on A1 certificate:** Since regulation (EC) 883/2004 entered into force in 2010, employers (and workers) are required by law to notify all cross-border activity within the EU/EEA and Switzerland to the competent social insurance bodies. The competent social insurance body then issues a so-called A1 certificate.

The A1 certificate is the proof that the worker is subject to the social security provisions of a foreign EU State. Under social insurance law, there is no distinction between a posting and a business trip. This means that an A1 certificate is necessary from the first day of any cross-border activity, however short. There is no minimum time limit for business trips or postings. This document, too, can be monitored by the customs authority and must therefore be carried by the worker.

### **Does the employer need to notify the presentation obligation in these cases?**

Yes, in the listed economic areas, the employer must explain to every worker the obligation to carry the certificate in provable form and in writing, retain this proof for the duration of service or work performance and present it in the event of an investigation. If a person does not carry the papers, a monetary fine of up to 5,000 Euro can be expected. If the employer cannot provide proof of explanation, a fine of up to 1,000 Euro can be imposed.



**Is the customs authority allowed to enter business premises for the purpose of verifying conditions under the posting of workers law?**

Officials of the customs authorities and supporting agencies are empowered to enter business premises and sites of the employer, the contractor of services or works, the assignee undertaking as well as of self-employed workers during the working hours of the persons active there or during business hours for the purpose of verification. Residential premises are excluded.

**Is the customs authority allowed to question persons who are active on the business premises or on the site as part of the verification process?**

Yes, FKS is empowered to seek information from these people about their employment relationships as well as their personal details. This also applies for persons who are active for the performance of service or work contracts with third parties. If employer or contractor of services or works or assignee undertaking refuse to cooperate, a monetary fine of up to 30,000 Euro can be imposed.

**Can the customs authority consult documents as part of its investigations?**

The customs authority is empowered to consult documents carried by persons on the premises or on the site and from which it can be assumed that the extent, nature or duration of their employment relationships or their actual or apparent activities can be ascertained or deduced. This also covers consultation of work contracts, transcripts in accordance with § 2 of the law on proofs and other business documentation which provide information directly or indirectly about compliance with the working conditions in accordance with § 8 AEntG. This also applies for persons who are active for the performance of service or work contracts with third parties. If employer or contractor of services or works or assignee undertaking refuse to cooperate, a monetary fine of up to 30,000 Euro can be imposed.

**Does FKS have the right to enter accommodation which has to be provided on the basis of a collective agreement?**

Yes, the authorities have the right to enter accommodation provided by the employer for workers at any time of day or night in the case of urgent danger to public security and order. Since the right of entry encroaches into article 13 Basic Law (inviolability of residence), an urgent danger to public security and order must obtain. Such a danger can exist in the case of particularly inhumane accommodation conditions, e.g. if workers are accommodated in dilapidated residential premises or in unacceptable mass accommodation ("dormitories").



### **Does FKS verify working time records and notifications of non-German employers to the customs authority?**

Yes, the customs authority verifies these documents. If they are not made available, a monetary fine of up to 30,000 Euro threatens.

### **H. Where can I find further information?**

You will find detailed information on important working conditions and on the procedure for posting of workers on the customs administration's homepage (English version also available)

→ [www.zoll.de](http://www.zoll.de) (> Businesses > Fachthemen > Arbeit)

Official notifications of applications for, adoption and termination of declarations rendering collective agreements generally binding

→ [www.bundesanzeiger.de](http://www.bundesanzeiger.de)

Bavaria's portal for international trade provides extensive information on posting of workers in almost all EU countries as well as non-EU countries Norway and Switzerland

→ <https://international.bihk.de/>

The European Commission's online offer provides comprehensive information in all EU languages on the theme of working in Europe and posting workers to another EU country. In addition, there are links to the relevant authorities which are competent for notification obligations and monitoring of applicable provisions in European countries under the points "National liaison offices and authorities" / "Work and retirement" / "Working in another country" / "Posting of workers"

→ <https://ec.europa.eu/social>

The European Commission has collated information on all Member States which have already transposed the directive on its Eur-Lex website

→ [National transposition measures](#)



## I. Digression: DGB “fair mobility” project

### How long has the DGB project existed?

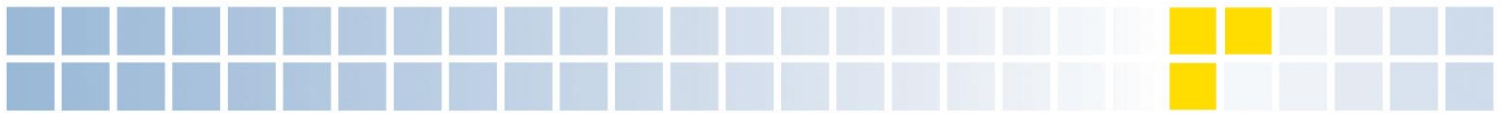
The “fair mobility” project, which is sponsored by the German Trade Union Confederation (DGB) and the Federal Ministry of Labour and Social Affairs (BMAS), has been in existence since 2011. Among other things, the project has established nine counselling points across Germany to which workers posted to Germany can turn with their questions linked to labour and social law, in their own language. They are provided with support by DGB in this regard. The counselling points are located in Berlin, Frankfurt am Main, Dortmund, Kiel, München, Mannheim, Nürnberg, Oldenburg and Stuttgart.

### What is regulated in the posting of workers law in this respect?

The new § 23a AEntG was created with transposition of the posting of workers directive into national law. This provision makes an annual amount available from the federal budget for the “fair mobility” project. From 2021, the financial envelope for the year is up to 3.996 million Euro.

### What points need to be considered in relation to the project?

Independent of the level of the budget, it is questionable that central government should be financing trade unions directly from tax revenues in order to enable them to provide these counselling services for posted workers. It is important to observe how this project evolves. However, we would like to draw your attention to this project in case you or a non-German contractor are confronted with it. What it offers is a trade union view of the situation with a high probability that the most worker-friendly interpretation will always be identified in the case of unclear legal issues.



## Annex | Checklist

### Remuneration in accordance with the posting of workers law

#### 1. Statutory provisions

- Is the statutory minimum wage in accordance with the law on minimum wages respected?
- for temporary work: Is the minimum pay threshold in accordance with the law on worker assignment respected?

#### 2. Collectively agreed provisions

- Does a **minimum wage decree** in accordance with the posting of workers law apply for the sector in which the relevant worker is active?
  - Minimum remuneration rates with differentiation by nature of activity and qualification (up to three stages)
  - Overtime rates

[Overview of sectoral minimum wages](#) on [www.zoll.de](http://www.zoll.de) > Businesses > Basisinformationen > Arbeit > Häufig gesucht

- Does a national collective agreement on remuneration declared to be generally binding in accordance with the law on collective agreements apply for the sector in which the relevant worker is active?
  - basic remuneration under the remuneration group in question (differentiation by nature of activity, qualification and professional experience)
  - Overtime rates
  - additional remuneration elements such as increments, supplements and bonuses
  - provisions on when remuneration falls due

[Overview of working conditions under collective agreements and statutory decrees](#) on [www.zoll.de](http://www.zoll.de) > Businesses > Basisinformationen > Arbeit > Häufig gesucht

[Overview of further elements of remuneration](#) on [www.zoll.de](http://www.zoll.de) > Businesses > Fachthemen > Arbeit > Mindestarbeitsbedingungen > Weitere, über den Mindestlohn hinausgehende Entlohnungsbestandteile

#### 3. In the case of long-term posting: in addition, regional collectively agreed provisions

- Does a national collective agreement on remuneration declared to be generally binding in accordance with the law on collective agreements apply for the sector in which the relevant worker is active?
  - basic remuneration under the remuneration group in question (differentiation by nature of activity, qualification and professional experience)
  - Overtime rates
  - Additional remuneration elements such as increments, supplements and bonuses
  - Provisions on when remuneration fall due

[Overview of generally binding regional collective agreements](#) on [www.zoll.de](http://www.zoll.de) > Businesses > Fachthemen > Arbeit > Arbeitsbedingungen bei Langzeitarbeit > Einzuhaltende Tarifverträge