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U.K. Employees in Europe after Brexit? Be Smart and be Prepared!

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Employers in the European Union may be able to continue to employ U.K. nationals after Brexit, but they need to consider the legal and tax implications now.

Brexit may cause major problems for British citizens working in Europe, as well as for their employers. Free movement of workers is at risk. However, employers in the European Union ("EU") may be able to continue to employ U.K. nationals after Brexit if they make use of the possibilities provided for by local law.

I. Consequences of Brexit for Employees in Europe

At this stage it is unclear what the actual consequences of Brexit will be for British employees within Europe. Until the U.K. leaves the EU, free movement of workers will continue. After Brexit, the status of British employees depends on the relationship agreed with the remaining EU Member States.

In this article we provide a brief look at the current routes when hiring a non-European/non-European Economic Area national ("non-EU/EEA") employee to work in the Netherlands, France and Germany. These include becoming a recognized sponsor and employing highly skilled migrants (the Netherlands), the introduction request to the Prefecture (France) or requesting a permit for qualified and highly skilled workers (Germany). Such methods also allow employers that employ British nationals to be prepared when necessary.

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A. The Netherlands

1. GVVA

In order to legally reside in the Netherlands for more than 90 days as a non-EU/EEA worker, one requires a residence permit. Our assumption is that British citizens are likely to fall under the same legal regime as all other non-EU/EEA workers after Brexit. Non-EU/EEA nationals in principle may only work in the Netherlands if a work permit is obtained. Practice shows that it is advisable to combine the two requirements and apply for the so-called *Gecombineerde vergunning voor verblijf en arbeid* ("GVVA"), which basically is a combination of a residence permit and work permit.

To successfully apply for the GVVA, the employer in the Netherlands that wishes to employ the non-EU/EEA national must, amongst other requirements, substantiate that the position that will be filled by the non-EU/EEA individual *cannot* be fulfilled by a Dutch or European employee. Practice shows that it is difficult to obtain a work permit due to this high threshold.

2. Highly Skilled Migrant

Fortunately there is a possibility that allows non-EU/EEA nationals to work in the Netherlands. In the

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event that the employer becomes (i) a recognized sponsor (*erkend referent*) of the Dutch Immigration and Naturalization Service ("IND") (*Immigratie en Naturalisatie Dienst*), and (ii) the employee earns more than the wage requirement (which is currently 4,240 euros gross per month excluding eight percent holiday pay for employees who are 30 years or older), the employee is regarded as a highly skilled migrant and therefore allowed to work in the Netherlands without a work permit/without a GVVA being required.

3. How to Become a Recognized Sponsor

In order to become a recognized sponsor, the employer must apply for sponsorship at the IND. The main conditions are that:

- the employer is registered at the Dutch Chamber of Commerce;
- the employer has a Dutch bank account and withholding tax number;
- the employer is not bankrupt or in suspension of payment; and
- the employer, its directors and the persons involved in the organization are trustworthy (for example, no previous penalties or convictions).

The fee for becoming a recognized sponsor currently amounts to 5,183 euros. Once the employer has been acknowledged as a recognized sponsor, the employer is allowed to request residence cards for other highly skilled migrants, without having to pay the fee for recognized sponsorship again. Also, as a recognized sponsor the procedural times for applications of permits are substantially shorter compared to those applicable to employers that are not a recognized sponsor.

B. France

1. The Work Permit

Non-EU/EEA nationals (including non-EU/EEA nationals allowed to reside in France) in principle may only work in France if a work permit is obtained. Nevertheless, the residence permits marked in particular, "employee", "temporary worker", "seasonal worker", "employee on assignment", "European blue card", "cultural and artistic profession", "scientific researcher" and "private and family life" can give the authorization to work.

The application for the work permit is in principle submitted by the employer in France who wishes to employ the non-EU/EEA national. If the non-EU/EEA national resides in France, the application must be sent to the local administration, the "Prefecture," for the non-EU/EEA national's place of residence. If the non-EU/EEA national does not reside in France, the application must be sent, if the employer is located in France, to the Prefecture for the non-EU/EEA national's workplace or the private individual employer's place of residence.

2. The Introduction Request

If a French employer wishes to hire a non-EU/EEA national who does not reside in France, they will have to comply with a specific procedure called "the introduction request". This specific work permit application concerns employees who currently reside abroad but who meet the job requirements. Employers can apply for the work permit provided that they are able to provide evidence of their failed search for an applicant already present on the French labor market, unless the law states otherwise.

3. The Evaluation of the Application

In order to grant or refuse a work permit, the "Prefecture" takes into account in particular:

- the employment situation within the profession and within the geographic area concerned by the application (unless otherwise stated and in particular if the planned job is among a list of occupations established by the Employment and Immigration Ministers or in the event of apprenticeship contract);
- whether the qualification, experience, and diploma match the job description;
- the compliance with French labor law and social security law;
- the working conditions and salary offered; and
- if the non-EU/EEA national resides abroad, the measures taken to ensure the accommodation of the individual.

4. The Decision

The decision is issued by the Prefecture within two months after submitting the complete application, and is sent to the employer and the non-EU/EEA national. No response from the administration will be considered as a refusal. Nevertheless, the reasons for refusing the permit must be given. An appeal can be filed.

These procedures are long and complex. Consequently, employers who would like to employ non-EU/EEA nationals should prepare their applications well in advance.

C. Germany

To legally reside in Germany as a non-EU/EEA national for longer than 90 days one has to obtain a residence permit (*Aufenthaltstitel*). Unless (i) the U.K. does not even remain a member of the EEA (so-called Norway Scenario), and (ii) no bilateral agreement between the U.K. and the EU on the issue of freedom of movement is concluded (so-called Swiss Scenario), British citizens are likely to fall under the same legal regime as all other non-EU/EEA workers after Brexit.

In this case, a residence permit has to be applied for with the local German immigration authorities. This residence permit will also show whether or not one is allowed to be employed in Germany (*Aufenthaltstitel zur Ausübung einer Erwerbstätigkeit*).

Such working permits can be issued by the relevant immigration authorities if the following preconditions are met.

1. In General

First of all, the applicant always has to account for a specific job offer. Only if an applicant has a concrete prospect to be employed in Germany will the work permit be issued.

Second, the federal employment agency (*Bundesagentur für Arbeit* ("BA")) has to agree to the issuing of the work permit. In general the BA will do so if the three following preconditions are fulfilled:

- the position that will be filled by the non-EU/EEA individual cannot be filled by a German or European employee;
- no negative effects on the German employment market are to be expected through the issuing of the work permit; and
- the non-EU/EEA individual will not be employed on less favorable conditions than comparable German workers.

Depending on the individual's qualifications, the preconditions that have to be fulfilled in order for the BA to consent to the work permit can be either augmented or relaxed and —in some cases—the BÁs consent is no longer necessary at all.

2. Non-Qualified Workers

Non-EU/EEA workers that do not have a qualified graduation (at least two years of apprenticeship or education) can obtain the BÁs consent only if—in addition to the restrictions mentioned above—the BA is allowed by law to give their consent for the specific occupational group in which the applicant wishes to be employed in Germany. Currently this is possible only for au pairs, carnival employees, seasonal workers and household aides; so the possibilities here are limited.

3. Qualified Workers

For non-EU/EEA workers that do have a qualified graduation it is much easier to work in Germany:

- if they obtained their qualified graduation in Germany then for these individuals a work permit will be issued without involving the BA as long as their position is related to their field of graduation;
- if they graduated in a foreign state then it must be proven that their qualification is equal to a comparable German one and that no negative effects are to be expected on the German employment market.

These restrictions are still easier to fulfil than those mentioned above, especially since it is no longer necessary to prove that no other German or European worker could fulfil the relevant position.

4. Highly Skilled Workers

For highly skilled workers in some occupational groups it is even easier to obtain a work permit. For certain specific positions the approval requirement of the BA does not apply at all: such positions are general managers and executive employees with outstanding responsibility (representatives of a company) or specialist knowledge as well as scientists working at universities, visiting scientists and engineers working in the research team of a visiting scientist and teaching staff working at public educational facilities.

In conclusion it can be seen that the German system is geared to the needs and demands of the German employment market. Germany seeks to improve its economy by letting highly skilled workers in and keeping non-qualified workers out. So, the better the qualification of a non-EU/EEA individual the better the chances that they might be allowed to work in Germany.

II. Social Security and Tax

A. Social Security Benefits

Entitlement to social security benefits for employees moving between EU Member States is closely linked to free movement rights. Brexit could have significant implications for both EU/EEA citizens living in the U.K., and for U.K. citizens in the EU/EEA. Currently, if an employee works and/or lives in multiple EU/EEA countries, EU Regulation No 883/2004 prescribes the country in which the employee is covered by social security insurance. The objective of the social security regulation is to avoid situations in which an EU employee is not insured, or is insured in more than one country. If the U.K. leaves the EU, the EU Regulation will in principle no longer apply to U.K. citizens working or living abroad in EU/EEA countries. In that case, after Brexit the U.K. may seek to conclude social security conventions with all EU/EEA countries.

When the EU Regulation is not applicable and a social security convention has not been concluded, the national legislation of both countries involved will be used to determine which social security insurance schemes are applicable. In that case, there is a risk that an employee will not be (fully) insured, or insured in more than one country. Furthermore, U.K. residents will not, in principle, be able to apply for an A1/E101 certificate of coverage after Brexit. As a consequence, employers may have to withhold social security contributions even if the employee is also insured in another country. However, an employee who, pursuant to a social security convention, is insured in a country outside the EU can usually apply for a declaration of applicable legislation. In many EU/EEA

countries, such a declaration serves the same purpose as an A1/E101 certificate.

Brexit will enable the U.K. to impose restrictions on access to many social security benefits via immigration law. The entitlement to U.K. social security benefits could also be restricted by limiting access to employment in the U.K. for EU/EEA citizens. Of course, this applies vice versa to EU/EEA countries, which may impose similar restrictions and limitations on U.K. citizens.

B. Tax

Contrary to social security, the right to levy income tax on the wages of an employee who works and/or lives in multiple EU Member States is currently not regulated by the EU but in tax treaties concluded by the individual states. Since the tax treaties concluded by the U.K. will remain in force after Brexit, no impact is to be expected from an income tax perspective.

The U.K. currently has tax treaties with all EU Member States. The main rule of these OECD Model Tax Convention-based tax treaties is that income from employment is taxable in the state in which the employment activities were carried out. However, as an exception to the main rule, solely the state in which the employee lives is entitled to levy tax when the following three conditions are met:

- the employee spends less than 183 days in a certain period in the state in which the employment activities are carried out. Depending on the tax treaty, this period may be a calendar year, a consecutive period of 12 months or a tax year;
- the employee is paid by or on behalf of an employer who is not established in the state in which the employment activities are carried out;
- the employee does not have a permanent establishment in the state in which the employment activities are carried out.

These three conditions are often jointly referred to as the "183 day rule". If not all of the above-mentioned conditions are met, the main rule applies, i.e. the state in which the employment activities were carried out is entitled to levy tax. Note that sometimes, especially in cases of older tax treaties, different rules may apply. Furthermore, special rules usually apply to income derived by statutory directors, employees in government service (e.g. military or embassy personnel) and airline or seafaring employees.

III. Conclusion

Employers in the Netherlands, France and Germany who would like to prepare for the possible consequences of Brexit may very well wish to consider already taking some steps to prepare, now that the status of British employees within the EU after Brexit is insecure.

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