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Employment of foreign doctors

Case groups and their legal evaluation:

PerMany foreign doctors who assist with patient care in German hospitals or outpatient faci-lities are not aware of the legal classification of their respective activities and the conse-quences. Is it job shadowing, an internship, or regular employment?
This leaflet is designed to facilitate dealing with various situations and providing supporting arguments for the foreign doctors themselves, as well as the employee representatives on site.

Case studies:

1. Doctors who complete postgraduate training and aim for the german medical specialist examination („Guest doctors“)

It is standard practice for foreign doctors, particularly those from third-party countries, to come to Germany to undergo their training in medical specialties. They often receive financial aid („grants“) in various amounts from their home countries. The background is mostly bilateral agreements between hospital operators and their home country or country agreement. The doctors work either with a limited licence to practice (“Berufserlaubnis”, under the Recognition Act up to a maximum of 2 years, especially in preparation for the assessment test in the absence of equivalence of training) or with full licence to practice (“Approbation”, if there is equivalence of training).

Group 1: Foreign doctors who receive a „grant“ directly from their home country and therefore should not receive collective bargaining remuneration from the perspective of the employer/operators of the hospital. Often, the employee/personnel council is not informed of the application or appointment. The employment contract - if there is one - only includes a note about the grant in the compensation agreement. Social security contributions and payroll taxes are therefore not deducted. Often, even in other working conditions, there are differences from regularly employed colleagues, for example, participation in on-call services is not provided, etc.

Legal Review:
At the beginning of their employment, the foreign doctors are not only in an (administrative) postgraduate training relationship, but also in an employment relationship, which means that they are subject to social insurance and payroll tax. For the individual legal areas, this results in:

- Right of postgraduate training: The training regulations of the Medical Chambers regulate that postgraduate training is provided within the framework of an appropriately remunerated medical occupation (see § 4 para. 1 S. 3 M-WBO) and thus corres-pond to the remuneration of comparable German employees. In the hospital sector, this means the relevant union rate. If this requirement is not met, the doctor will not be permitted to take the specialist examination in many chambers.
- Employment law: The employment relationship and the relevant collective agreement or § 612 BGB („usual remuneration") result in a right to collective fair pay.
- Social security and tax law: Social contributions and payroll taxes must be paid on the owed (rate) salary.

Group 2: Foreign doctors whose recruitment/employment at the hospitals follow the recom-mendations of the DKG and have the wage „refinanced" by the home country. The DKG is in favour of the solution of reimbursing the full wage costs (gross remuneration plus emplo-yer's social insurance) from the home country, paying the net amount to the foreign doctor, and deducting wage tax and social insurance contributions. The alternative solution of the DKG provides for the re-transfer of the net salary to the home country so that it can be paid from there to the foreign doctor.

Legal Review:
In principle, payment of the work salary by third parties is permissible. At least in hospitals, which - regardless of their legal status - are mainly in the public sector, the criteria for allocating (postgraduate training) positions as a result of Article 33 para. 2 of the Basic Law are only „suitability, capability, and professional performance" of the applicant, but not economic reasons (such as refinancing wage costs).

2. Doctors who are employed for a limites period to expand their knowledge and abilities (distinction between employees - job shadowers - interns) - applicability of the minimum wage law

Foreign doctors are also often employed in hospitals for several weeks/months, without this being explicitly linked with the objective of Board recognition. Different case groups can be distinguished here (a non-exhaustive example):

Group 1: Hospitals employ foreign doctors without specialist medical recognition, mostly from third-party countries, within the framework of a several-month „job shadowing" or „internship" (the name varies). As with a probationary period, it is to be clarified whether the shadower/intern is suitable as a candidate for postgraduate training at the respective hospital. The doctor has a contract for the relevant period, but does not receive compensation. Officially, he/she only accompanies everyday clinical practice, but - at least according to the contract - is not medically active.

Group 2: Doctors from third-party countries do an internship during the period in which they are waiting (due to lack of equivalence of their training) to take their assessment test and/or language test (or „job shadowing") of at least three months' duration.

Group 3: The purpose of the job shadowing/internship/activity is to enable the foreign (spe-cialist) doctor to expand his/her skills and knowledge in clinical practice (see and learn certain methods of operation/techniques/research processes, deepen existing knowledge, etc.).

Legal assessment:

The following criteria can be used to define a distinction between job shadowing or an internship and employment:

Job shadowing:

A legal definition of the concept of „shadowing“ in medicine is not yet availab-le, but it can be used as jurisprudence. According to this, shadowing is a “purely observatio-nal activity by as yet unapproved participants, who only perform some medical activities in the interest of learning and is usually for a few days or weeks“.
This definition is consistent with that of the general language use: Work shadowing means „observing a jobholder at work with the aim of learning how to exercise that function“ (On-pulson Wirtschaftslexikon) or the „recommendations for further medical education“ by the German Medical Association (as of 24/04/2015): „Shadowing is for acquiring, deepening, and improving knowledge and skills... work shadowers participate at no cost in whole or in part with the daily work of their shadowing site“.
For the definition of this „work shadowing“, it is therefore important that the shadower pri-marily observes and does not work in the sense of medically treating the patient.

Legal consequence:

A compensation claim is not possible, not even on the minimum wage pursuant to § 22 Mi-LoG (this is also below in „Internship“). The doctor is usually given a job shadowing contract.
The DKG has also dealt with the issue and recommends to the hospitals, due to the as yet lacking jurisprudence on the minimum wage law (MiLoG), that minimum wage should be paid including in the case of work shadowing (see circular from the DKG No. 032/2015 a.a.O.).

Internship:

Since the minimum wage law only came into force on 1/01/2015, there is no ju-risprudence to clarify whether it is an internship in an individual case which creates the right to minimum wage according to § 22 para. 1 MiLoG in conjunction with § 26 Bundesbildungsgesetz (BBiG) and very little literature.
According to the new legal definition, an intern is „anyone who... undergoes a certain occupational activity for a limited period of time to acquire practical knowledge and experience in order to prepare for professional activity, without it being vocational training as defined by the Vocational Training Act or comparable practical training.“
The following demarcation criteria between internship and job shadowing or employment relationship can be used:

- Interns are subject to the employer‘s right of action. For this reason, interns are not shadowers, who „do not undertake any kind of work, but are only guests in a company in order to get to know the work methods without becoming employed them-selves. In the case of the work shadowing relationship, the focus is on acquiring knowledge and skills through observation and explanations. They are subject only to domiciliary rights, but not to the management right of the business owner.“ (Ri-chert/Nimmerjahn, comment for the MiLoG 2015, § 22 Rdnr.34)
- In contrast to „real“ employment, the education purpose of an internship, i.e. learning the necessary professional skills, knowledge, capabilities, and experience, and not the performance of work, is the priority (see Picker/ Sausmikat, „Minimum wage as an exception?“, NZA 17/2014, 942)
- Paid employment and not the acceptance of an internship (and, more importantly, work shadowing) also applies if the respective medical activity is indispensable for the respective patient as well as for continuing to provide medical care, and the foreign doctor is employed for his/her already acquired abilities instead of a (post-graduate training) doctor (BAG of 27/10/1960 - 5 AZR 427/59).

Legal consequence:

From the affirmation of a - voluntary - internship according to the above criteria, a minimum wage is generally applied. However, there must be a limited licence to practice medicine (Berufserlaubnis) at the least.

Exceptions:

Not subject to minimum wage are (voluntary) internships within the framework of certain preparatory courses, which are, for example, for preparing for an assessment test.
These occupational phases in the context of measures of active employment promotion un-der SGB III are measures which focus on integration in the training and labour market. Mea-sures under the Third Social Code are those in which either the customer of BA is assigned an education provider or attend a course at an educational institution whose funding was assured by the BA by the education vouchers. The legislature considered it unnecessary to include these professional phases in the catalogue of § 22 para. 1 sentence 2.

In this context, the statutory minimum wage has no effect in the case of grants for continu-ing vocational training pursuant to §§ 81 ff SGB III. Persons who complete an in-company learning phase as part of a continuing vocational training course pursuant to § 180 SGB III are not covered by the scope of this Act, pursuant to § 22 MiLoG.
The prerequisite for funding is that the institution (or provider of the measure) is authorised pursuant to § 176 SGB III and the measure has been approved pursuant to §§ 179, 180 SGB III. Specifically, this means that a measure carrier (such as the VIA Institute) can devise a measure that can consist of the imparting of theoretical knowledge and occupational-practical phases, and which is approved by a specialist body. These occupational phases are not subject to the obligation to pay the minimum wage.

The same applies in the case of measures for activation and vocational integration pursuant to § 45 SGB III. Here too, the applicable statutory minimum wage has no effect on the mea-sure or measures implemented by or with an employer. They do not constitute an employ-ment relationship and are not carried out in the same way as an internship.

Paid employment: In all cases where there is no shadowing nor internship, an employment relationship with the corresponding legal consequences must be given in the affirmative. [1]

1 Details taken from: Marburger Bund (2017): guidelines for the employment of foreign doctors