

Dear Readers,

It is with pleasure that we share the first issue of our quarterly newsletter *HR Perspectives - Global Mobility & Immigration*. The newsletter will be of interest to anyone who, even occasionally, deals with any aspect of cross-border mobility of workers, such as employing non-nationals in Poland, sending employees off on business trips abroad or hosting employees seconded by overseas business partners or associated entities.

Through this and subsequent newsletters we will provide you with information on important events, legislation changes and other current Global Mobility & Immigration issues, supplemented with our practical comments.

The opening issue of our first newsletter is the end of the transition period provided for in the Withdrawal Agreement and its consequences. The transition period finished on 31st December 2020 which effected a radical change of the legal status of British nationals intending to work in Poland.

Furthermore, we would like to draw your attention to the changes in the rules for posting workers to and from Poland which were introduced last year.

We also write about the topical subject of working remotely from abroad. Last but not least, we review the current rules for crossing Polish borders during the pandemic.

PCS Paruch Chruściel Schiffter | Littler Global has the largest in-house Global Mobility & Immigration team in Poland. We have gained a further competitive edge because of our partnership with Littler, the world's largest employment and labor law practice representing management, also in global mobility & immigration matters.

We advise on all matters related to the international mobility of workers, including immigration, tax and social security issues. We assist with all formalities and help optimise the costs and risks associated with moving workers abroad, including:

- posting workers within and outside the EU;
- relocations, including employment in several countries;
- creating international employment structures.

We manage the processes of legalising employment and residency of non-nationals in Poland from start to finish. We coordinate international projects on a one-stop-shop basis.

Enjoy your reading!

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Brexit vs the right of British nationals to work and reside in Poland

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At the turn of the last year the transition period related to the withdrawal of the UK from the European Union ended. Until then, British nationals were treated as EU citizens. They retained, for example, the right to stay in Poland without obtaining a work permit.

After 31st December 2020, only some UK nationals retain an unlimited right to work and reside in Poland, namely those who had had the right to stay in Poland before the end of the transitional period and will continue to reside in Poland after the end of that period (according to the guidelines issued by the European Commission, this does not imply that they have to be physically in Poland at the turn of 2020 and even a short stay in Poland before the end of 2020 would qualify). Such individuals enjoy the status of the EU-UK Withdrawal Agreement beneficiaries (“WAb”).

Crucial points:

- British nationals who had neither lived nor stayed in Poland on 31st December 2020 have lost their right to work and reside in Poland from 1st January 2021. From then on, as a rule, they will need a work permit and visa or residence permit to work and live in Poland.
- also British nationals who on 31st December 2020 resided in an EU country other than Poland (e.g. Germany) have lost their right to work and reside in Poland, unless they are “frontier workers”. This is because the retention of the right to work and reside after the end of the transition period under the Withdrawal Agreement will, in principle, extend only to the specific EU country in which the UK national (the WAb) resides.

After 1st January 2021 all British nationals who meet the prerequisites to obtain the WAb status are required to register their residence with the relevant authority to confirm they exercise their rights under the Withdrawal Agreement. The registration of residence is mandatory, but obtaining the required registration documents will only confirm, not confer, the rights under the agreement. This means that after 1st January 2021 it will, in some circumstances, be possible to legally employ a UK national with no registration documents.

Further notification duties when posting workers to Poland

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The amended Act on Posting Workers for Performance of Services came into force on 4th September 2020.

The amendment significantly extended the scope of Polish employment law regulations that foreign employers must now apply to their employees seconded to Poland (which we discussed here, among others).

Furthermore, the new regulations impose yet another administrative duty on an employer posting employees to Poland, which might be easily overlooked - the duty to notify the National Labour Inspectorate ("NLI") of any change to the information included in the submitted posting declaration. Even before 4th September 2020 it was necessary to inform the NLI about certain changes concerning an ongoing posting, but now this obligation has been significantly extended. Currently, the NLI must be informed for example about any changes to the anticipated start and end date of the secondment. Therefore, a separate declaration must be submitted to the NLI each time when:

- after submitting the original declaration of posting to the NLI, there is a change of plans and the anticipated date of the employee's arrival in Poland is delayed, even by a few days;
- in the course of the secondment it turns out that the employee has performed the required tasks earlier than expected and finishes work in Poland before the end date indicated in the original declaration to the NLI; or either
- it turns out that the work in Poland will take longer than expected and will be finished after the end date indicated in the original declaration to the NLI.

The deadline for submitting a notification of change is 7 working days from the date on which the change occurs.

The extended notification duty also applies to secondments that were in progress on 4th September 2020. Doubts have arisen as to whether the extended notification duty will also apply to changes which had happened before that date. In response to our enquiry, the Chief Labour Inspectorate confirmed that the duty to notify about any change of data covered by the declaration of posting applies only to those changes which occurred on and after 4th September 2020.

New rules for posting employees abroad

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From 30 July 2020, Polish employers posting employees from Poland to another EU country are required to fully apply to those employees remuneration rules of the host country, also those concerning, for example, mandatory allowances. It is not enough to simply provide the posted employee with the minimum wage applicable in the host country.

After 12 months of secondment to an EU country (or after 18 months if the required formalities have been completed), employers must make sure that their employees are offered all the terms and conditions of work provided for in the employment regulations of the host country.

In practice, this means that workers posted to a given country will have to be treated at least as favourably as local workers in all respects. However, each EU Member State might have implemented the Directive in a slightly different way.

In order to comply with the new rules on posting workers abroad, employers should verify, prior to the posting, the terms and conditions of employment they intend to offer their employees during their secondment. This applies particularly to the components of remuneration and their amounts and to any similar benefits (e.g. reimbursement of travel costs, provision of accommodation). It may turn out that even providing the posted employee with remuneration equal to or exceeding the market rates in the host country will not protect the posting employer from infringing on local regulations. It may happen when the remuneration structure offered to posted employees (especially the inclusion of certain components) fails to comply with local requirements.

Conditions of entry into Poland for non-nationals during the pandemic

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On 14th March 2020 special regulations related to the coronavirus outbreak came into force in Poland. These regulations include, among others, the conditions of entry into Poland for non-nationals.

Non-nationals travelling to Poland may face difficulties in three areas:

- the right of entry,
- the post-entry quarantine, and
- the ban on flights to Poland.

Each of the above is regulated by a separate legal act, which makes it very difficult to keep track of any recent changes.

The provisions on the right to enter Poland are riddled with loopholes. For example, the regulations allow non-nationals working in Poland to enter but at the same time say nothing about their spouses. The restrictions apply to arrivals from outside the European Union - Polish borders with EU countries were reopened in June. But the right to enter is not restricted to non-nationals who work in Poland. The entry is also possible for holders of the Pole's Card (Karta Polaka) or a residence permit.

EU and Polish citizens with their spouses and children, as well as pupils and students have the right to enter. In the light of the current political circumstances, the citizens of Belarus are also allowed to enter Poland, regardless of the purpose of their entry or the type of visa held.

Furthermore, the right to enter is granted to UK citizens with their spouses and children - regardless of whether or not they resided in Poland before Brexit.

The quarantine is obligatory for arrivals both from outside the European Union and from other member states. However, in the latter case the quarantine applies only to arrivals by collective transport, e.g. by plane. The obligatory quarantine may be lifted for people who have a certificate of being vaccinated against COVID-19 and for non-nationals working in Poland if they arrived from another EU country.

People who study in Poland are in the most privileged position, as they are exempted from quarantine, regardless of from where and how they arrived.

As we publish this newsletter, the ban on flights to Poland is no longer in force. However, it can be reinstated anytime (probably by way of regulation as it has been previously done since March 2020).

What should employers consider before letting their employees work remotely from abroad?

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The anti-crisis shield has given employers the right to instruct an employee to work remotely. The government is planning to regulate remote working in the Labour Code. But what if an employee wants to work from a beautiful Greek island or a bustling Chinese metropolis where they come from? As the coronavirus epidemic is in full swing, questions like these keep coming up. The simple answer would be yes, it is possible and worth contemplating, as introducing such an arrangement may enhance your employer brand.

However, there are some steps that should be taken beforehand. First of all, we recommend introducing the internal rules and regulation that will set out the basic principles for working remotely. It is of vital importance to include in such regulations an obligation to notify the employer about the employee's intent to work remotely from another country. If an employee fails to inform the employer about such intent and starts working remotely outside Poland without the employer's knowledge, it may expose the employer to significant risks.

Next, we recommend to examine what risks, obligations and costs may be associated with letting an employee work remotely from abroad, taking into account the applicable law of the country where remote work is to be performed. To this end, it will be necessary to answer the following questions:

- Is working remotely for a foreign employer from that country possible, or is it necessary for an employer to register there or establish a branch?
- Is it necessary to obtain a work permit for the employee to work in that country? Should the employee obtain any additional documents in order to enter / stay in that country?
- Which jurisdiction and law will be applicable to the employment contract? There is a risk that in the event of a conflict, the employee would bring the case to the court in the country where they perform remote work and would base their claim on that country's legislation.
- Is the employee's remuneration subject to taxation or social security contributions in that country (especially if work is performed remotely for a longer period)?

Since the laws of another country are involved, consulting with a law firm based in that country is strongly recommended. Through our immigration team and the Littler Global network, we help our clients to introduce such arrangements and manage them in a time- and cost-effective manner. We have helped many global employers to successfully implement such solutions.

But let us not forget about the domestic scene. There are some aspects of working remotely from abroad that are important from the perspective of the Polish law.

Hence, we recommend concluding an agreement with the employee on changing the place of work. It will mitigate the risk of future claims for travel allowance by an employee asserting that the stay abroad was a business trip.

It is also necessary to examine the issue of social security contributions and taxation from a domestic perspective - whether a partial exemption from contributions or tax deductions will apply, or whether they should be calculated as usual.

Finally, the employer must also bear in mind those regulations on home office that apply regardless of where the remote work is performed.