

**Dear Readers,**

The spring issue of our quarterly HR Perspectives - Global Mobility & Immigration focuses on the topic of facilitating visas for Belarusians under the "Poland. Business Harbour" program. We also continue to discuss Brexit-related issues, this time concentrating on the rules for short-term business trips.

Furthermore, we look at the new rules for arranging visa appointments by drawing lots, which have recently been introduced in Polish consulates in India and the UAE. It has a significant impact on all employers who plan to employ workers from these countries, since it can significantly prolong the waiting time for a visa appointment and, consequently, the entire process of obtaining a visa.

We have also prepared a memorandum on storing documents of non-national workers, confirming their right to work and stay in Poland, within the context of personal data protection requirements.

Our Global Mobility & Immigration team is ready to support you in all matters related to hiring and seconding employees.

**Have a pleasant read!**

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## Visa facilitation measures for Belarusians

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In August 2020, the government introduced the "Solidarity with Belarus" programme to make it easier for Belarusians to come to Poland and access the Polish labour market more freely. The programme introduces a special mode for issuing visas under the "Poland. Business Harbour" programme for IT specialists. One of the measures offered by the programme is a visa fee waiver for Belarusian citizens applying for Polish national visas.

The "Poland. Business Harbour" programme offers Belarusian IT specialists and their families the opportunity to accelerate their Polish visa application. To qualify for the visa programme, applicants must have a technical degree or at least one year of professional experience in the IT field. Applicants who do not have the relevant education or experience may still qualify but would require an invitation from a Polish company participating in the programme.

"Poland. Business Harbour" will make it possible to shorten the waiting time before a non-national can take up employment in Poland. Under the present standard procedure, a work permit is needed before applying for a visa. Holders of "Poland. Business Harbour" visas are exempt from the work permit requirement, hence it is possible to skip this step before employing a non-national.

It is probable that holders of a "Poland. Business Harbour" visa will need a work permit in order to continue working in Poland at a later stage, closer to the visa expiry date. The current regulations do not allow for continued working in the period between the visa expiring and the issuing of another work entitlement document, such as a temporary residence permit to carry out work. Therefore, despite a non-national holding a "Poland. Business Harbour" visa, in some cases, additional formalities may be required to avoid a break in the right to perform work in the period after the visa expires and before obtaining a residence permit.

Moreover, Belarusians have been exempted from the Covid-19 restrictions on entry into Poland, but may be subject to a 10-day mandatory quarantine upon arrival, which also covers Belarusians working permanently in Poland. However, Belarusians can be exempted from quarantine on terms and conditions applicable to all nationalities.

## UK nationals on short-term business visits to Poland do not need a work permit

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Polish and UK nationals on short-term business visits to the UK or Poland, respectively, to carry out the activities specified in the Trade and Cooperation Agreement between

the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (listed below) are granted the right to enter Poland and stay for 90 days in any 6-month period without a work permit. This period applies to staying and working within the EU as a whole, not in the individual Member States. Therefore it will not be possible for a UK national to work for 90 days in each Member State consecutively (e.g. 90 days in Poland and immediately after that another 90 days in Germany, etc.), but for a total of 90 days in a 6-month period.

UK nationals on short-term business visits to Poland may carry out, in particular, the following permitted activities for 90 days in any 6-month period without a work permit:

- meetings and consultations,
- technical, scientific and statistical research and projects
- marketing research,
- training seminars,
- trade fairs and exhibitions,
- sale,
- purchase,
- provision of post-sale or post-lease services,
- commercial transactions.

To qualify for the above-mentioned exemption, people on short-term business trips to the EU must meet some additional conditions. Namely, they must not:

- (a) sell their goods or provide services to the general public;
- (b) receive remuneration from a source located in the EU; and
- (c) provide services under a contract between a legal person established outside the EU and a customer established in the EU, except as provided in the SERVIN-3 Annex (in practice, this exception applies to the provision of after-sales or post-lease services).

These measures were applied temporarily until the end of April 2021 and had to be honoured by the Polish authorities, which was confirmed by the opinion issued by of the Ministry of Development, Labour and Technology at our request. Following 30 April 2021, these measures will still be used if the Partnership Council decides to extend their temporary application, which has already happened once, or succeeds in their final implementation.

### Changes in visa appointments at Polish consulates

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The beginning of this year has brought a significant change for third-country nationals, especially from Asia, who plan to apply for a Polish national visa. In some Polish consulates, including those in India, the United Arab Emirates, Uzbekistan and the Philippines, a new way of registering for a visa appointment has been introduced - through an electronic lottery.

Previously, it was possible to register directly for a visa appointment on a specific date. The applications were handled on a "first come, first served" basis. Now, for any given period of time, a certain number of available consular appointments are set aside for visa applicants. If there are more interested persons than available appointments, for example, 50 applicants for 10 appointments, then on a set date (usually every Saturday, but it differs across consulates) the system automatically carries out an electronic draw. The winners will be informed about the time and date of their visit by e-mail. The unlucky ones will take part in the next draw. The 'first come, first served' principle no longer applies and every visa applicant has the same chance for selection. However, it is debatable whether employers trying to speed up the process of bringing a non-national employee to Poland consider this solution to be fair and reasonable.

As we found out, the number of draws in which one person may take part is not limited in any way. The applicant will be included in the draw until they are successfully selected or the reason for visa application expires, for example upon expiration of a work permit issued for a person applying for a Polish working visa. In practice, this means that for some people the procedure may take months or even years, with no guarantee of getting a visa appointment. Furthermore, a person who is drawn but cannot come to the appointment on the scheduled date will lose the appointment. It is not possible to reschedule the appointment. The only thing left then would be to take part in the appointment lottery again and count on good luck.

At the moment, the lottery system is used only in some of the Polish consulates. However, it appears to be gaining in popularity, since in recent months a growing number of consulates decided to switch to this new system.

## **Recruitment and employment of non-nationals vs. employee record and personal data protection**

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Employers who recruit and employ non-nationals are challenged not only by the issues of legalising their employment and stay but also by obligations arising from the personal data protection regulations. Although the Polish Labour Code sets out what employee personal data can be requested by the employer in the recruitment and employment process, the legislator has not provided for any special provisions concerning non-national candidates and employees. However, in the event of employing a non-national who illegally stays in Poland or if their employment is illegal, it is the employer who will face potential consequences. Furthermore, the employer is obliged to store documents confirming the non-nationals' right to stay and work in Poland.

Therefore, it is reasonable and recommended to require the third-country candidates and employees to provide the following documents:

- 1) at the recruitment stage:
  - a) a valid document confirming the candidate's right to stay in Poland, such as an ID card for EU citizens, a passport for non-nationals covered by the visa-free movement, a visa or residence permit and residence card, a residence card for an EU citizen's family member, etc.;
  - b) a valid document confirming the candidate's right to work in Poland without a work permit, such as a document from a Polish higher-educational institution confirming their current student status, a diploma confirming the completion of full-time studies in Poland, a permanent residence permit and a residence card, a residence card for an EU citizen's family member, etc., if the non-national has any of such documents;
- 2) during employment:
  - a) each time a residency document is changed - an updated document;
  - b) a valid document confirming the right to work in Poland, such as a document confirming the exemption from the obligation to obtain a work permit, a declaration on entrusting work to a non-national, a work permit, a residence and work permit.

The above-mentioned documents should be kept throughout the entire period of employing a third-country national and at least one year following their employment termination. After that period the illegal employment of third-country nationals is no longer punishable.

In the case of EU citizens, it is sufficient for the candidate to provide an ID card confirming their citizenship. EU citizens have the right to reside and work in Poland on the same terms and conditions as Polish citizens.

It is not clear, however, where the said documents should be kept. They are not directly designated as part of the employee record (including personal files) and fall into a different retention period. Bearing that in mind, these documents should be kept outside personal files. On the other hand, however, these documents are directly connected with employment, which suggests they should be kept in personal files (e.g. in part A). We believe that both solutions are acceptable and should not be questioned in case of an audit. Most of the documents kept by employers are copies of the original documents, only a declaration on entrusting work and a work permit are issued to the employer, and therefore, the originals should be kept in the files.

The basis for the non-nationals' personal data processing for the purposes mentioned above is the legal requirement binding on the employer to employ non-nationals legally and to store documents related thereto as well as the employer's legitimate interest to confirm the legality of non-nationals employment in the event of an inspection. Should you have any questions or doubts in this respect, we encourage you to contact our Data Protection and Immigration Departments.

## Facilitation measures for US contractor employees

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In the second half of last year, the Enhanced Defense Cooperation Agreement between Poland and the US ("EDCA") replaced the Status of Forces Agreement ("SOFA") previously in force. Apart from issues directly concerning cooperation of the armed forces, the EDCA establishes specific entry, stay and work rules for civilian personnel, family members, US contractors and US contractor employees in Poland. They are much more liberal than the general rules for non-nationals and, in practice, will significantly facilitate the organisation of US personnel secondments to military bases located on the Polish territory.

The SOFA has already exempted such employees from obtaining work permits, and residence permits for them and their family members were issued faster and through a simplified procedure. Currently, however, the facilitation measures go even further. Under the EDCA:

- 1) the above-mentioned categories of persons do not need a work permit and can enter Poland without a visa, and their passports are not stamped at the border (from an immigration perspective their stay in Poland is treated as if they stayed within the territory of the US); they only need the following documents issued by the relevant US authorities: an identification card, a certificate or letter of authorization confirming their status, and a valid passport;
- 2) during their stay in Poland, these persons are not subject to the provisions concerning registration and control of foreigners, as long as they retain their status. It applies to, inter alia, the obligation to obtain a residence permit, registration obligations, vehicle registration, etc;
- 3) these persons can only be subject to their EDCA status control - in the event of control during their stay on the territory of Poland, they should present the documents referred to in clause 1) above.

However, persons who use the EDCA facilitation measures do not acquire any right to permanent residence in the territory of the Republic of Poland.

The templates of identification documents confirming the EDCA status have not been officially released yet. Therefore, prior to organising the secondment of such employees to Poland, it should be confirmed that the employees' documents are sufficient for this purpose. If in doubt, our experienced immigration team is always on hand to help review such documents.

Individuals with a valid passport and EDCA status may come to Poland and work here for the US Armed Forces or for employers who are the US Armed Forces contractors without any further formalities other than submitting a declaration of posting to the National Labour Inspectorate by the employer. They can obtain a Polish residence permit under general rules and conditions if they so wish.

The lack of obligation to obtain a visa or other document legalizing their stay in Poland also applies to their family members. However, within the meaning of the EDCA, family members are only spouses or children of the armed forces members or civilian personnel, but not of US contractor employees. Therefore, family members of such employees may come to Poland under the generally applicable rules. If they are US citizens, they may enter Poland for stays of up to 90 days under the visa waiver program and apply for a temporary residence permit during this period. If they are not entitled to a visa waiver, they should obtain a visa before travelling to Poland.