



Employee secondment to Malaysia (As of April 2020)

The secondment of employees abroad is becoming increasingly important in times of globalization of labour markets. Already today, many companies operate across borders and dispatch their employees. Frequently, this is the only way a shortage of skilled workers in the target country can be countered and a uniform corporate policy going beyond the borders can be realized.

A posting abroad is associated with a variety of benefits for the employee. In addition to promoting the international exchange of experience and improving personal language skills, valuable foreign experience can be gained. However, there is a large number of labour law aspects that need to be considered in preparing the assignment abroad and for the on-the-spot support, as well as special tax and social security features. This leaflet should indicate the special features and give you an initial overview of how to prepare your overseas assignment to Malaysia.

I. Basic information on sending employees abroad

An employee secondment basically means, that an employee on the instruction of his domestic employer („sending company“) works for the company abroad. Likewise, a secondment is present, if the employee is previously recruited domestically for the subsequent pursuit of an activity abroad. In contrast to that, if the employee is already employed in the destination country and carries out an activity for a home employer now, he is a local employee. An employee dispatch within the meaning of the definition would have to be denied.

An employee dispatch also requires, that the activity abroad is limited in time. This time limit may result from the type of employment, but also from an individual contract agreement. The actual duration of the posting is not limited in principle; however, it should be taken into account in the preparation that their temporal scope should at least roughly be limited. In the case of a very short posting, this is instead a mere mission to which the employer's general right of direction applies.

II. Labour Law specifics

With every posting, the adaptation of the employment contract is mandatory. Of course, the employee must give his consent in advance of posting.



1. Regulations in the employment contract

Unless the employer's general right of instruction applies and the employee's stay abroad constitutes an employee secondment it requires a revision of the employment contract. In particular, changes may occur in the following points, with the list as an orientation and not as conclusive.

- defining the new responsibility and describing the work of the employee in Malaysia;
- regulations regarding working time; in Malaysia e.g. 9:00 - 18:00 with a one-hour lunch break;
- public holidays;
- workweeks in the states of Johor, Kedah, Kelantan and Terengganu start on Sunday; weekend is on Friday and Saturday;
- leave entitlement;
- payment of wages in Malaysian Ringgit (MYR);
- additional remuneration (e.g. travel, relocation, accommodation, home travel, mobility and hardship allowances);
- work permit and visa for family members where applicable;
- provisions regarding the return of the employee;
- additional insurance;
- employer-funded pension;
- validity of the additional agreements;
- recall clause and cost distribution for early return.

2. Participation of the works council

Due to the principle of territoriality, the Betriebsverfassungsgesetz (BetrVerfG) – Worker's Council Law – is in principle only applicable to establishments located in Germany. However, since the posted employee is still assigned to the German company, the BetrVerfG also extends to the extraterritorial employee, whereby the status is determined by the duration of the assignment. This means that the workers' council must be involved both in the planned assignment as well as in the concrete selection of the employee to be sent to Malaysia and must also be involved in personnel decisions during the duration of the foreign assignment (e.g. regrouping of the sent employees).

3. End of foreign assignment

The assignment abroad ends either at the end of the individually agreed period of posting or by fulfilling the agreed purpose of the posting. These are the ordinary termination reasons for employee dispatch.

In addition, it is possible for the employer to recall the employee from abroad at any time within the scope of his right to manage. In this context, however, the recall must withstand a balance of interests in which there are weighty reasons for the recall, which outweigh the impact on the life



of the seconded employee. That is why during the preparation of the posting contract, consideration should be given to a recall clause. The employer should be authorized to recall the employee prematurely from Malaysia, subject to a reasonable time limit.

As a precautionary measure, consideration should also be given to the occurrence of unforeseeable crisis situations in the destination country. The "Arab Spring" showed that such situations can occur suddenly and with high intensity. According to the Foreign Office of Germany, in Malaysia there is a danger of terrorist attacks by Philippine rebels in the eastern country, especially in the state of Sabah on the island of Borneo¹. The principle obligation of the employer to provide a safe working environment also extends to the security of the host country in the case of a transfer abroad. This will no longer be guaranteed if the Foreign Office requests an exit, as in these cases the security of the employee is objectively no longer guaranteed.

In this context, the secondment contract should in particular make provision for leaving the country in the event of a crisis, re-employment in the parent company and a regulation regarding the employee's entitlement to remuneration. In the event of an involuntary termination due to political instability or serious natural disasters, the employer retains this right in general. If, on the other hand, the employee leaves the host country of his own accord or is even expelled, his entitlement to remuneration is generally cancelled.

In addition, the assignment can also be terminated by a termination agreement. If German law is applicable to the contract and the employment relationship is to be terminated as a whole, this can usually be done in accordance with § 311 (1) BGB. The situation is different if only the employee's assignment is to be terminated or if German law is not applicable to the assignment agreement. In these cases, it must be examined whether the mandatory requirements for this are satisfied.

4. Which law needs to be applied?

Generally, German law remains applicable to the employment contract if it can be clearly established from the individual agreement. Accordingly, the parties to the contract are also free to decide whether they declare another set of laws to be applicable. If the parties do not agree on the applicable law, the law of the country in which the employee usually carries out his work is applicable. Under certain circumstances, Malaysian labour law may also apply to contracts of employment concluded under German law.

Nevertheless, there are limits to the choice of law, for example the minimum protection provisions of German labour law are indispensable, e.g. in the event of termination. Additionally, Malaysian law may also have an effect on the contract in some cases.

¹ https://www.auswaertiges-amt.de/de/aussenpolitik/laender/malaysianode/malaysiasicherheit/223616#content_0
(last visited on 20th April 2020)



III. Tax Features

There may also be the question of whether the income of the seconded employee is subject to tax in Germany or Malaysia.

1. Determination of the Place of Residence

In principle, according to § 1 EstG, natural persons are subject to unlimited tax liability in Germany if they have a residence or permanent establishment in Germany. It must therefore be considered whether or not the employee retains his or her residence in Germany. It can be assumed that the apartment will be retained even if the apartment is sublet to a third party, provided that the sublease does not exceed a period of 6 months. Therefore, the actual possibility of using the apartment is more important. If this is still the case although the employee is in Malaysia, the tax liability is still in Germany. If the seconded employee has a spouse from whom he/she is not permanently separated, his/her place of residence is in principle still where his/her spouse lives.

2. Double Taxation Treaties

According to the "world income principle", both domestic and foreign income is taxable in Germany. In addition, in the case of activity abroad, the country of destination is also entitled to income tax. In order to avoid double taxation, which is now conceivable, Germany has concluded double taxation agreements with a large number of countries, including Malaysia.² According to the regulations on employee income contained in these agreements, the right of taxation is generally assigned to the state in which the employee carries out his or her work. At the same time, the corresponding income is regularly exempted from income tax in Germany under the exemption method. It is important to consider, however, that the corresponding income is taxed at the rate at which the domestic income is taxed (e.g. investment income or income from rental/leasing).

3. Special Regulations

However, it must be borne in mind that if the employee is in Malaysia for more than 60 days and has a work permit, he is liable to pay tax in Malaysia. In this case, the employer (local company in Malaysia) is obliged to register the employee for tax purposes and to pay the monthly income tax; this also applies to short-term secondments. Whether a double taxation agreement applies is decided by the Malaysian tax office after a thorough examination of the respective case.

In any case, the person concerned must first (also) pay income tax in Malaysia. For the first 182 days, the person concerned is considered a non-resident taxpayer and pays the full tax rate without any deductions.

² A list of countries with whom Germany has entered into a double taxation treaty can be found here: http://www.bundesfinanzministerium.de/Web/DE/Themen/Steuern/Internationales_Steuerrrecht/Staatenbezogene_Informationen/staatenbezogene_info.html (last visited on 20th April 2020).



IV. Social Security Features

A crucial point with regard to a secondment to Malaysia is the employee's social insurance. This is all the more important as Germany and Malaysia have not concluded a joint social security agreement.³ Such agreements basically ensure that the employee is not assigned to the foreign social security system but to the German one. From the point of view of the social insurance holder, this ensures that the same or at least similar benefits of the German social insurance can be claimed. Due to the lack of an agreement, a secondment to Malaysia thus constitutes a "secondment to a foreign country without a contract".

1. Coverage

In the case of a temporary posting that does not exceed a certain duration, the employee remains subject to social security contributions in Germany (called "Ausstrahlung" – coverage – see § 4 SGB IV). If, on the other hand, the employment relationship exists with a foreign subsidiary or there is a permanent employment activity, the employee is exclusively liable to pay contributions to the foreign social security system and entitled to benefits. The basic prerequisites for compulsory social security in Germany are the existence of an employment relationship in Germany and a temporary posting of an employee abroad (see definition under I.).

2. Compulsory Insurance Upon Application

If the employee is not subject to the German social security obligation despite the above-mentioned possibility of coverage, the following possibilities exist to maintain insurance coverage in Germany.

a.) Retirement

If the stay abroad is limited in time, the employer can take out a so-called compulsory insurance for his employee § 4 SGB VI. For this purpose, he must submit an application to the Federal Insurance Institution for Employees. Detailed information on pension insurance is available under the following link: www.deutsche-rentenversicherung.de

b.) Health insurance

Health insurance can also be taken out voluntarily, § 9 SGB V. Comprehensive coverage is usually only guaranteed by private health insurance abroad. This is the only way to close any gaps in insurance coverage and to provide additional services that may be appropriate abroad, such as repatriation to Germany. This applies to both statutory and, under certain circumstances, private insurance holders. This should definitely be clarified with the health insurance company beforehand.

³ A list of countries with whom Germany has entered into a double social insurance treaty can be found here: https://www.deutsche-rentenversicherung.de/DRV/DE/Rente/Ausland/Sozialversicherungsabkommen/sozialversicherungsabkommen_detailseite.html (last visited on 20th April 2020)



c.) Long-Term Care Insurance

Pursuant to § 26 SGB XI, continued insurance in social long-term care insurance is only granted upon application. This must be submitted within one month of leaving the compulsory insurance.

d.) Accident/unemployment insurance

In this respect, voluntary insurance in the statutory insurance is not possible. However, some professional associations offer foreign accident insurance cover in this context.

3. Double Insurance

In the case of a secondment to Malaysia, the lack of social security contributions can lead to double insurance for the seconded employee. Therefore, every aspect of social security should be checked before a secondment.

Disclaimer: The information presented here is intended to provide a general overview of employee posting to Malaysia. MGCC accepts no liability for losses incurred as a result of the action or inaction of a person as a result of the information presented in this overview. The information presented here does not replace legal advice.