

# Expatriate or Local?

Part One  
of Two

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What German Employees Must Know  
When Coming to Work in the U.S.

*By Wendi S. Lazar, Esq., with Ian M. Maywald*



**Terms of Engagement**

Most German employees who come to work in the U.S. are either transferred from a U.S. or foreign corporation on temporary assignment (“expatriates”) or are here in the U.S. seeking new employment (“locals”). In both of these situations knowing the differences between German and U.S. employment law is important. These differences are significant and working with an employment attorney to memorialize the relationship into a binding and explicit agreement is critical for job security and asset protection for these employees and their families.

The employment agreement or assignment letter generally comprises three distinct areas of the employment relationship – the Terms of Engagement – the Assignment Terms – and the Post Employment Obligations.

**Who Are the Contracting Parties?**

It is critical when entering into an expatriate agreement for both the employer and employee to fully understand who the contracting parties are and what the terms of the relationship will be. Defining the relationship early on in the process will determine many of the entitlements and obligations of the contracting parties and will give the employee an opportunity to understand what advantages and disadvantages there may be depending on the citizenship of the corporation and the expectation and duration of the employment. For instance, determining if the employee is an expatriate or a local, or what the citizenship of the employer is may render dif-

ferent tax liability to an employee and his or her family.

**At Will vs. Contract Employment**

U.S. employment law provides a far lower standard of employee protection than German employment law in regard to fundamental rights and policies. In the absence of a contract of employment for a fixed term, the employer is free to discharge employees for good or bad cause, or no cause at all, and the employee is just as free to quit, strike, or otherwise stop working.

Contrary to German law, U.S. employment law has few statutory protections. Discrimination statutes wage and hour laws, and some specific regulatory statutes (such as Sarbanes-Oxley Act and Whistleblower Laws) comprise these exceptions. Accordingly, every U.S. employment agreement should explicitly express employment protections such as notice, severance, as well as the grounds and consequences of termination if the right to these protections is to be binding on the employer and enforceable in a U.S. court.

**Non-competition Provisions and Agreements**

If an employer is concerned about competition and the employee could present a competitive threat after employment, the employee could be required to sign a non-competition agreement, which would restrict him from competing with the employer during and for a definite period after his employment ends. Non-competition provisions are often a part of an employment agreement

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**Wendi S. Lazar, Attorney at Law** of Outten & Golden LLP, an employment law firm in New York City represents employees, both in the US and abroad. She is co-head of the firm’s Executives & Professionals Practice Group and has years of experience representing expatriates and senior level executives worldwide. She regularly writes and lectures on expatriate rights and executive agreements.

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or could be included in a separate proprietary rights agreement. An employer can ask the employee to sign a non-competition agreement before the start of employment, or can surprise the employee and present him with a non-compete on the first day of employment or after the employee has been at the company for years.

Under most U.S. state laws, non-competition agreements are disfavored and the employer does not need to offer separate consideration in exchange for this type of restriction. In the U.S., continuation of employment and/or offer of employment are adequate consideration. However, in Germany, the employer must agree to pay the employee post-employment “non-compete compensation” in the amount of 50% of total compensation. While a non-compete that may be found to be enforceable in the U.S. could be found invalid in Germany, it is important to have an attorney review it before it is signed and have the attorney negotiate its terms so they are fair and equitable.

they will overrule or set aside these provisions if they were entered into under unfair bargaining conditions, or if they conflict with German statutory protections. U.S. choice of law provisions may apply to an entire agreement or be limited to one or two clauses such as non-compete restrictions, notice or termination provisions. Generally, the employer will choose the law of a jurisdiction that is most favorable to the company – not the employee.

**About the German Law Consultant**



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**Choosing Counsel**

In the U.S., most employment law firms represent either employees or employers. Therefore, it is critical to find a practitioner who represents employees and who also has an understanding of expatriate representation. While one lawyer may not be expert in all facets of this representation such as immigration, tax and international and employment, there are employment lawyers who know enough to bring in other professionals when needed and who have significant experience with foreign employees both in and outside the U.S.

It is also extremely important for employees to seek legal advice before signing any employment documents even when they trust their employer and the document appears to reflect the employment relationship. Most likely, that document was prepared by a U.S. lawyer representing only the company’s interest. ■

**Which Law Applies and Which Court Do I Sue In?**

Specific provisions in a contract will determine which state or country’s law will be applied in a dispute and which court will take jurisdiction in interpreting and enforcing the employment agreement. These issues can be very important to an expatriate if the dispute happens after they have returned to their home country. Defending or bringing a claim in the U.S. under U.S. law could be a hardship for an employee in Germany and may not be most favorable in terms of post termination protections.

While German labor courts recognize foreign choice of law and jurisdictional provisions

# Part Two of Two Terms of Assignment

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**I**t is important for German employees considering employment in the U.S. to have a fairly negotiated contract of employment (expatriate or secondment agreement) prior to their relocation. However, since most U.S. companies shy away from these agreements and prefer at-will employment to any contract guaranteeing employment and severance, often the employee is offered only an assignment policy to refer to or a letter outlining the terms of the expatriation.

Knowing the differences between working and living in Germany versus the U.S., and what is essential for the company to provide an employee during the assignment, can prevent hardship and disappointment later on. A U.S. lawyer, skilled in representing expatriates, can negotiate assignment terms prior to employment and make sure they are memorialized in a letter signed by both parties.

Also, once an expatriate is employed in the U.S. or even before she arrives, the company will present her with its human resources policy in a handbook or code of conduct. Often, an employee will be asked to sign for the receipt of this policy, and violating it can subject an employee to disciplinary procedures including suspension or, worse, termination. Notably, U.S. workplace policies vary greatly from German codes of conduct and should be read carefully.

The following is a list of the 10 most important things to negotiate when coming to the U.S. to work.

**Immigration Issues**

A German employee planning to work in the U.S. will most likely need to attain employment authorization before coming to the U.S. Usually, the employer will hire a U.S. immigration lawyer and pay any legal and processing fees to file a petition with the U.S. government for an employee to work abroad on a non-immigrant temporary work visa and for the employee's family if needed. The types of applicable visas include H, L, O, P, or Q visas that vary depending on the expatriate's position and level of education.

**Tax Equalization**

Generally, every expatriate agreement should provide that the employer pays for tax advice and tax equalization during and after U.S. employment. This ensures that the German expatriate is made financially "whole" while working in the U.S, preventing any additional tax liability and providing her with tax assistance in order to comply with both German and U.S. tax laws.

R. Scott Jones of Goldstein Jones LLP, an international tax lawyer in New York, advises that a German employee working in the U.S. is generally subject to federal and applicable state income taxes on compensation for services performed in the U.S. Any German employee will be subject to U.S. taxes, even if the individual is not a resident for U.S. tax purposes, unless she is exempt under the U.S./Germany Income Tax Treaty as

a qualifying short-term visitor for less than 184 days in the calendar year. Jones further advises that a German employee who is assigned to the U.S. on a temporary basis remains a resident of Germany for tax purposes. If the German tax residence is "broken" and the expatriate working in the U.S.

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meets the definition of a U.S. tax resident, the individual becomes subject to income taxation in the U.S. on a worldwide basis.

**Social Security**

Under the U.S./German Social Security Totalization Agreement, expatriates working in the U.S. may participate in both German and U.S. social security systems. In those instances, the amounts paid over time from both German and U.S. social security systems are adjusted, and they “totalize” each system’s benefits to better approximate full benefits.

Under this treaty, German expatriates are exempt from paying social security taxes in the U.S., provided the individual remains a German employee and is sent to the U.S. for a period of five years or less. Further, the expatriate remains insured with the German pension insurance system. A certificate of coverage issued by Germany serves as proof of exemption from Social Security taxes on the same earnings in the U.S. Therefore, it is imperative that the expatriate understand and the U.S. employer agree to limit the period of expatriation if the German employee is unwilling to sacrifice the German social security and pension benefits.

**Benefits**

German expatriates coming to the U.S. can choose to keep their German benefits and send reimbursement forms to Germany or they can negotiate with the employer to be covered by a U.S. plan. Depending on whether the expatriate uses statutory or a pri-

vately owned insurance plan in Germany, the employee will take different actions with regard to keeping her German insurance effective while she is covered by a U.S. plan. If the expatriate has private insurance, she can pay a minimal fee and keep her status in the private insurance (“freeze” the status). However, she can always go back to the statutory insurance.

**Vacation**

In Germany the statutory number of vacation days is significantly higher than in the U.S., and expatriates should negotiate to keep the same vacation days while abroad. In terms of holidays, the employee will have to follow the U.S. holiday schedule and negotiate some personal days to return home for important German holidays not celebrated in the U.S. In this regard, periods of home leave as well as emergency leave and reimbursement for emergency travel costs should be provided by the U.S. employer.

**Cost of living adjustment (“COLA”)**

Usually, the employer will provide expatriates with additional compensation to help offset cost differentials for living in the U.S., if any. This extra compensation is determined using the employee’s base salary, and using changes due to fluctuations in cost differentials between Germany and the U.S. and fluctuations in the exchange rate. COLA is usually paid once the employee moves into permanent housing and is discontinued when she moves out of that housing at the end

of the assignment. COLA allowances typically end if an employee changes from expatriate status to local status.

**Moving**

The employee and her family should request a relocation allowance for additional expenses incurred on account of the move from Germany to the U.S. At times, the employee may be expected to repay the relocation allowance if her assignment ends earlier than anticipated. This is an important point to negotiate in an employment agreement or assignment letter, depending on the cause for the termination of employment. Similarly, employees are customarily reimbursed for shipment costs to cover personal belongings, but policies vary, and some may contain unreasonable limits on the amount that will be reimbursed.

**Leave**

Generally, the employee and her family will be eligible for one or two home leaves per year to travel back to Germany to visit family and/or friends. Some employers recommend that, if possible, these trips be combined with business trips to Germany. Usually, non-working days during home leave are counted as vacation. The employee and her family are reimbursed for actual and reasonable transportation costs in accordance with the employer’s travel policy.

**Reassignment/Repatriation**

It is highly recommended that any expatriate assignment letter or agreement contain full reimbursement of moving

expenses for relocating the German expatriate back to Germany after his assignment ends. The employer should make an employee "whole" by paying all relocation and repatriation expenses even if the employment is terminated.

**Children**

The employer will often pay for private education in the U.S., particularly if the expatriate has school-age children who need language assistance. The difference between the German and U.S. school system is vast. While the quality of public education in Germany is fairly high, in the U.S. the quality of the public schools varies from district to district. The expatriate should make sure that her attorney negotiates this essential point into her agreement or offer letter and that a specific school or dollar amount is allocated for private or international school.

**Codes of Conduct**

Once an employee arrives in the U.S. and begins work, the company will usually hand the new employee a handbook or code of conduct. U.S. companies often expect their employees to abide by these codes, a practice that is still unknown to the vast majority of employees in Germany. Typically, codes of conduct contain workplace policies or rules regarding such issues as social conduct, discrimination, privacy and fraternization among employees in and outside the workplace. They often include guidelines concerning bans on smoking and the use of alcohol

and drugs in the workplace. In various companies there are very specific rules concerning a company's confidential and proprietary information. Finally, the codes usually contain a provision imposing a duty to report employee misconduct.

Although many of these codes contain rules that are foreign and in many ways repugnant to German employees (and would violate post-Holocaust privacy statutes in Germany), they should be taken seriously, as a violation of these rules can lead to termination of employment.

In addition, in the U.S., employees do not have a right to privacy in the workplace, and while there are laws in place for protecting medical records, there are few laws preventing other kinds of data collection, workplace monitoring or email monitoring. In fact, an expatriate moving to the U.S. should be aware that she may need to provide the company with extensive personal information for a background check and to take a drug test, and she should assume that her work email may be monitored.

**Conclusion**

Working in the U.S. can be a positive and rewarding experience for the internationally mobile employee. However, winding up in the U.S. without a job and no contractual protections that would otherwise guarantee rent, tuition, medical care and relocation may be the alternative reality if these matters are not negotiated in

advance of employment. With few statutory protections in the U.S. under federal, state and local law, an expatriate can be in a compromised situation with little relief. Seeking legal counsel early in the process can alleviate the stress of moving and relocating and insure that the expatriate experience is a good one for the employee as well as for the whole family. ■

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