

## 9. Germany

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Social security and the residence status of third-country nationals are closely associated within the German legal order. Entitlements under the German social security schemes are not dependent on the possession of German nationality, but are linked primarily to domestic permanent residence, stay or employment relationship in Germany.<sup>1</sup> Nevertheless, because of this connection, some posted third-country nationals and short-term migrants may be excluded from certain benefits. Entitlement to some benefits is not possible for certain third-country nationals as they cannot qualify to claim them because they do not complete legal waiting periods (pensions and unemployment).

### Box 1 Sector specific variations of social security rules

Sector specific variations are found for seasonal workers in agriculture and forestry, horticulture, hotels and restaurants, fruit and vegetable processing and sawmills (sectoral restrictions). With regard to posted workers, the meat and construction industries are in focus, but the legal framework extends to all sectors.

Table 1.9 Overview of the relationship between form of migration and entitlement to a particular social security service

Third-country-national categories	Social security categories					
	Health insurance	Pension contributions	Unemployment insurance	Basic security (social assistance)	Insurance against accidents at work	Child benefits
Posted workers	Social security agreements*	Social security agreements	Social security agreements	Social security agreements	Yes	Social security agreements
Intra-corporate transfers	Social security agreements	Social security agreements	Social security agreements	Social security agreements	Yes	Yes, under conditions
Seasonal workers	Yes	Exemption from payment if marginal employment	No	No	Yes	No
Temporary agency workers	Yes	Yes	Yes, under conditions**	Yes, under conditions	Yes	Yes, under conditions

1. Section 30(1) of the First Book of the Social Code (SGB I).

Third-country-national categories	Social security categories					
	Health insurance	Pension contributions	Unemployment insurance	Basic security (social assistance)	Insurance against accidents at work	Child benefits
High-level professionals	Yes	Yes	Yes, under conditions	Yes, under conditions	Yes	Yes, under conditions
Self-employed	Yes, choice between statutory or private insurance	Yes	Yes	Yes	Yes	Yes, under conditions

Notes:

\* If no such agreement exists, then the national conflict-of-law rules must be applied.

\*\* If regular unemployment benefits are available because of the completion of the necessary qualifying period.

Source: Author's analysis, 2022.

### Box 2 Changes during the Covid-19 pandemic

During the Covid-19 pandemic, the upper income limits of 'mini-jobbers', including seasonal workers qualifying for exemption from paying social security contributions, were increased. In addition, access to social assistance and renewal of visas/residence permits were facilitated via remote services and temporary extensions.

## Description of the German system

### 1. Overview of social security rights of short-term third-country-national migrant workers

People in employment in Germany must be registered for social insurance there. The residence status of third-country nationals may be a criterion for access to social benefits. Although there are no special laws for foreigners – except for asylum seekers – in the social security legal framework, there are some clauses for foreigners or exclusion clauses that apply to third-country nationals with certain residence entitlements.

A general prerequisite for granting (temporary) residence is a long-term secure subsistence (livelihood) on the part of the third-country national (and, if relevant, their family) (Section 5(1) No. 1 in combination with Section 2(3) of the Residence Act) (Devetzi and Walter 2020). The secure subsistence of a third-country national also requires adequate health insurance coverage (Section 2(3) of the Residence Act.) in order not to impose a financial burden on the national social security system. Employees subject to the payment of social security contributions in Germany and their family members are covered by the statutory health insurance scheme (*gesetzliche Krankenversicherung*) if their residence permit is more than 12 months (if less than 12 months, then private health insurance must be taken out) according to Section 5(1) and (11) of the Fifth Book of the Social Code (SGB V). In the event of temporary incapacity to work because illness or accident, employment status and thus also third-country nationals' entitlement to benefits is retained according to Section 2 (3) Sentence 1 No. 1 of the Residence Act. The employees are entitled to the continued payment of wages in case of illness for four weeks. As far as pension insurance is concerned, all third-country-national workers are treated on an equal footing with German nationals. The acquisition of pension rights depends solely on contributions and insurance periods (Sixth Book of the Social Code – *SGB VI*) and a waiting period of five years is required to qualify for an old age pension.

For third-country-national job seekers, special provisions may apply. If regular unemployment benefits are not available (because of non-completion of the necessary qualifying period) or no longer possible for them because their entitlement has been used up or has expired, the provisions of the social security scheme of basic security for jobseekers could apply (Second Book of the Social Code – *SGB II*). There are specific exclusions from benefits for third-country-national job seekers.<sup>2</sup> Receiving social assistance benefits according to the Second Book of the Social Code (*SGB II*) can result in the non-extension of a third-country national's residence entitlement (case-by-case decision of the competent authorities).

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2. Section 7(1) second sentence, number 2b *SGB II*. Regarding the duration and conditions of residence titles for third-country-national job seekers, see Section 20 of the Residence Act.

The conditions under which self-employed persons can enter and work in Germany are laid down in Section 21 of the Residence Act. Among the necessary documents (Ponert and Tollenaere 2020) a self-employed third-country national/founder of a business must submit proof of health insurance and adequate provision for old age.<sup>3</sup> Third-country nationals holding another type of temporary residence entitlement may be permitted to pursue self-employment while retaining the aforesaid purpose of residence (Section 21(6) of the Residence Act).

## 2. Differences in social security rights of different categories of short-term third-country-national migrant workers

### (i) TCN seasonal workers

The Ordinance on the Employment of Foreigners (Section 15a, *Beschäftigungsverordnung, BeschV*) sets out the conditions for granting a work permit for short-term stays of up to 90 days (within a period of 180 days) and the entry and employment of third-country nationals for a period of six months (within a 12-month period) (time restrictions) for seasonal work in agriculture and forestry, horticulture, hotels and restaurants, fruit and vegetable processing, and sawmills (sectoral restrictions) for a regular working week of at least 30 hours.<sup>4</sup> Admission of third-country nationals requires a prior bilateral agreement to be concluded by the Federal Employment Agency (FEA – *Bundesagentur für Arbeit*) and the ministry of labour or other appropriate institution of the country of origin. Currently, the Federal Employment Agency can issue work permits to nationals of certain states without the need for approval by a visa office. This currently applies to nationals of Georgia and of the Republic of Moldova, who are allowed to work as seasonal workers in Germany without a visa. No special regulations under German social security law apply in principle to third-country-national seasonal workers, who should not be employed under less favourable conditions than comparable domestic workers or equivalent employees. There are some exceptions regarding social security contributions, however. Workers in marginal employment, including short-term employment, according to the provisions of the Fourth Book of the Social Code (*SGB IV*, Section 8(1) number 2), are not subject to compulsory social insurance (pension, health,<sup>5</sup> care, unemployment<sup>6</sup>), but only to occupational accident insurance.

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3. Section 21(3) of the Residence Act. With several countries (Australia, Bosnia-Herzegovina, Brazil, Chile, India, Israel, Japan, Canada and Quebec, Kosovo, Morocco, North Macedonia, Montenegro, Republic of Korea, Serbia and Tunisia) there are social security agreements that facilitate the provision of proof for paid social security contributions to be taken into consideration for this requirement.

4. Section 15a(1)lit.1 of the Ordinance on the Employment of Foreigners, in combination with the provisions of the Act on Working Time (*Arbeitszeitgesetz*).

5. Section 7 of the Fifth Book of the Social Code – SGB V.

6. Section 27(2) of the Third Book of the Social Code – SGB III.

**(ii) TCN posted workers**

If the employment is in Germany, the principle of *lex loci laboris* applies. Exceptions to this principle are regulated by Section 5 of the Fourth Book of the Social Code (SGB IV) when an employee who is employed abroad is posted to Germany. The posting must be limited in time because of the nature of the employment or contractually in advance. The German legal provisions on compulsory social insurance do not apply in the case of a posting. The employee does not have to be registered in Germany for statutory health, care, pension, unemployment and accident insurance. A special provision applies regarding coverage against occupational accidents. Section 16(2) of the Seventh Book of the Social Code (SGB VII) provides that 'the accident prevention regulations of an accident insurance institution also apply to entrepreneurs and employees of foreign companies that carry out an activity in Germany without belonging to an accident insurance institution' (Kohte 2015). Therefore, posted workers are covered by the statutory insurance against accidents at work.

**(iii) Third-country-national temporary agency workers**

Temporary agency work by third-country nationals is subject to legal restrictions. It is possible if the third-country national receives an EU blue card without the necessity of approval by the Federal Employment Agency. In this case the grounds of refusal of the residence/work permit as provided for by law (Section 40(1) of the Residence Act in combination with Section 4(1) of the Residence Act) are not applicable. It is, however, necessary that the third-country national be employed under a German employment relationship and their annual income is above the legal threshold for EU blue card holders.

**3. Conditions for obtaining different social security rights**

Third-country-national short-term migrants with a German employment contract (high skilled workers, researchers) can obtain the relevant social security rights (health care, pension, unemployment, social assistance) if their residence status is appropriate for the purposes of the allowed economic activity. If their residence permit is issued for another type of activity (for example, self-employment) or based on another provision of the Residence Act, they may lose their entitlements. For old age pensions, the qualifying waiting period is five years (Section 50(1) first sentence of the *SGB VI*). For unemployment benefits, the qualifying period is 12 months within a period of 24 months (Section 142 of the *SGB III*). For the calculation of this period, insurance periods in the country of origin may be taken into consideration if a relevant bilateral social security agreement of Germany with the country of origin exists. For insurance of third-country nationals for a period that is less than those mentioned above, they cannot qualify for any benefits. In addition, all third-country nationals who hold a residence entitlement allowing them to pursue economic activity of at least six months are entitled to family

benefits.<sup>7</sup> In case of an earlier termination of the employment relationship than envisaged, the employer and the employee are obliged to inform the competent migration authority within a certain deadline. This declaration to the authorities does not constitute an evaluation of the legal validity of the termination. The given deadline serves to allow the migration authorities to examine whether the residence entitlement will be shortened.

#### 4. Portability of benefits between the host country and the country of origin

The provisions regarding payment of pensions abroad are found in Part 5 of the Sixth Book of the Social Code (SGB VI, Sections 110–114). Regulations of supranational and intergovernmental law must be given precedence (EU, EEA, bilateral agreements) according to Section 30 of the First Book of the Social Code (SGB I). Germany has concluded bilateral social security agreements with countries outside the EEA, specifically with Albania, Australia (including an agreement on posted workers), Bosnia and Herzegovina, Brazil, Chile, China (only on posted workers), India, Israel, Japan, Canada and Quebec, South Korea, Kosovo, Morocco, Moldova, North Macedonia, Montenegro, Philippines, Serbia, Turkey, Tunisia, Ukraine, Uruguay and the United States.<sup>8</sup> These bilateral social security agreements (*Sozialversicherungsabkommen*) regulate which of the national legal systems at issue are to be applied in the individual case (interstate conflict of laws). If the relevant law cannot be derived from a bilateral agreement because Germany has not concluded an agreement with the state in question at all or the agreement does not regulate the relevant issues, national conflict-of-law rules must be applied (Sections 3–5 of the Fourth Book of the Social Code – SGB IV) (Schlegel 2021).

#### 5. Social security rights of short-term third-country-national migrant workers during the Covid-19 pandemic

During the Covid-19 pandemic, relevant measures for third-country-national short-term migrants included facilitated access to social assistance (access to various social security benefits was simplified or temporarily extended) and facilitation of the extension of visas/residence entitlements without having to attend in person during the pandemic. Marginal part-time employees ('mini-jobbers') who were not fully covered by the social security and tax system were not eligible for short-time work benefits. Social Protection Package I adopted in March 2020 increased the allowed number of days per year for seasonal work without paying social security contributions,<sup>9</sup> temporarily extending the time limits for

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7. Section 62(2) of the Act on Income Tax (*Einkommensteuergesetz – EstG*).

8. See website of the Federal Ministry of Labour and Social Affairs: <https://www.bmas.de/DE/Europa-und-die-Welt/International/Sozialversicherungsabkommen/sozialversicherungsabkommen.html>.

9. Before the Covid-19 pandemic three months or 70 days were allowed, whereas now the period of work was extended to five months or 115 days per year.

short-term employment. Moreover, ‘mini-jobbers’<sup>10</sup> were permitted to exceed the initial upper income limit (€450) during the pandemic and still be exempt from paying social security contributions.

As far as the self-employed (who could be also third-country nationals) were concerned, a type of labour compensation was introduced for a limited period (six weeks, similar to sickness benefit) by the Federal Infection Protection Act.<sup>11</sup> Emergency measures to cover their running costs (Bridging Aid Packages I, II and III) were also adopted. Most of these measures do not secure the livelihoods of these persons, however, which jeopardises their entitlement to residence permits conditional upon income thresholds.

## 6. Overview of enforcement and monitoring

The monitoring of working conditions and protection of seasonal workers’ rights is performed mainly by the Customs Administration (Zoll) and more specifically by the Financial Investigation Office for Clandestine Employment (*Finanzkontrolle Schwarzarbeit*). The Customs Administration monitors compliance with an employer’s obligations under the Act on Mandatory Working Conditions for Workers Posted across Borders and for Workers Regularly Employed in Germany (*Arbeitnehmer-Entsendegesetz – AEntG*).<sup>12</sup> Health and safety at work and hygiene rules are subject to the control of the Federal states (*Länder*).<sup>13</sup> Practical implementation issues have been reported in particular for posted workers in the meat and construction industries (Kohte 2015; Kohte and Rabe-Rosendahl 2020). There are civil society initiatives to assist mobile workers to enforce their rights. The German Trade Union Confederation (DGB) has set up advice centres under the ‘Fair Mobility’ programme, which is supported by state funding (Kohte 2021).<sup>14</sup> Whether insurance is compulsory in Germany is decided and monitored by the collection agencies (health insurance funds – for accident insurance, by the accident insurance institutions).

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10. A ‘mini-job’ is a job in which one earns on average no more than €520 per month as of 01/10/2022.
  11. Section 56 Infektionsschutzgesetz - IfSG, issued on 20 July 2000, Federal Law Gazette I, p. 1045. This regulation applies only to administrative measures provided for in this Act (excluding general social security provisions).
  12. Sections 16–23.
  13. Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work (*Arbeitsschutzgesetz, ArbSchG*).
  14. Section 23a of the Act on Mandatory Working Conditions for Workers Posted Across Borders and for Workers Regularly Employed in Germany.