

The A1 certificate and requirements for last-minute and short-term business travel

A discussion regarding the Federal Ministry for Employment and Social Welfare's statement from June 2019

By Dr. Julia Schweitzer and Janine Weber

It was just at the beginning of 2019 that the topic “applying for A1 certificates” made waves in the media – even though employers had been legally obliged to report cross-border work activities in the European inner market to the competent institutions since the regulation came into effect in 2010 (EC 883/2004). Until now, this duty had been simply ignored by many employers due to scant controls and the often prohibitively large administrative effort on the part of businesses. The media response was thus even greater when the electronic application and acceleration procedure became mandatory in Germany on January 1, 2019. A paper application was only possible in justified individual cases until June 30, 2019. These innovations have been accompanied by increased controls and the levying of fines.

A short time later, a press release by the European Commission on March 20, 2019, caused an uproar. In that press release, it was announced that the European



The risks and disadvantages of not carrying an A1 certificate in individual EU States, the EEA and Switzerland are too great.

© BirgitKorber/iStock/Getty Images Plus

Parliament, the Council and the European Commission had at least temporarily agreed that the A1 certificate of coverage

requirement for business travel to another EU country would be abolished in the future. Reality set in a few days

later, however, after the European Council was unable to come to an agreement on the abolishment of the A1 certificate in its meeting on March 29, 2019.

Interest in this topic has not flagged even now. Most recently, the statement by the Federal Ministry of Employment and Social Welfare in June 2019 breathed fresh air into this topic by noting that, under the applicable law, an A1 certificate is not mandatory in every case of last-minute or short-term work in a foreign country, thus Member States have discretionary power. Can employers now breathe a sigh of relief? Does this mean the end of the A1 certificate for last-minute and short-term cross-border work in other EU and EEA countries and in Switzerland? The following is a discussion of precisely this question.

What does the A1 certificate mean in practical terms?

To avoid creating a double duty to contribute to social security when per- →

sonnel is assigned work in a foreign country, for posted workers permanently based in Germany, the law of the European Communities provides that under certain conditions, only the German legal provisions must be applied. An A1 certificate then verifies that contributions are being paid in Germany.

Does the A1 requirement apply no matter how brief the foreign business travel, such as for a day visit or a project meeting?

There is a lot of uncertainty surrounding this in practice, particularly in light of the fact that the EU regulation (EC) 883/2004 does not define any lower thresholds below which the requirement to apply for and carry an A1 certificate can be waived.

The statement by the Federal Ministry of Employment and Social Welfare from June 2019

In its statement from June 2019, the Federal Ministry of Employment and Social Welfare notes “that, under the applicable law, an A1 certificate is not mandatory in every case of last-minute or short-term work in a foreign country and that Member States thus have discretionary power.” Although an A1 certificate must generally be applied for in advance

at the competent institution, it can also be applied for after the fact. In the case of irregular business trips that are planned at the last minute and/or last only a short period, as well as in the case of other very short assignment periods of up to one week, it can be expedient to refrain from applying for an A1 certificate.

According to information provided by the Federal Ministry of Employment and Social Welfare itself, the statement from June 2019 is merely an offer of information that is meant to make it easier for interested parties to understand the difficult legal situation, thus the statement only represents an interpretation of EU law regarding the carrying of A1 certificates during last-minute and short-term business trips of up to one week (Regulation [EC] 883/2004 and Regulation [EC] 987/2009). In any event, a binding effect for practitioners regarding the interpretation of EU law by other Member States cannot be derived from the statement.

On what legal principles is the statement by the Federal Ministry of Employment and Social Welfare based, and can the

application for an A1 certificate be waived on the basis of the statement?

The Federal Ministry of Employment and Social Welfare uses the following aspects of European law to undergird its assumption that an A1 certificate is not supposed to be mandatory for last-minute and short-term work in foreign countries:

- Article 15 (1) Regulation (EC) 987/2009: Employers of persons who perform their work in another Member State inform the competent institution of the sending Member State “*whenever possible* in advance.”
- Practical Guideline of the Administrative Commission, item 11, page 17: “[A] business that sends an employee to another Member State must contact the competent institution in the sending Member State. This should take place *wherever possible* prior to the assignment.”
- ECJ, judgment from March 30, 2000 – C-178/97, margin number 53: “Moreover, when issuing the E 101 certificate pursuant to Article 11a, the competent institution of a Member State does no more than state that the self-employed person concerned remains subject to the legislation of

that Member State throughout a given period in the course of which he carries out a work assignment in the territory of another Member State. Although it should preferably be made before the beginning of the period concerned, such a statement may also be made during that period or indeed after its expiry.”

According to this, the competent institution may issue the certificate after the fact and retroactively without defining a time limit. The Federal Ministry of Employment and Social Welfare draws the conclusion from this: one cannot speak of a “duty to carry” the A1 certificate, at least not on the basis of European law. According to the statement by the Federal Ministry of Employment and Social Welfare, such a duty is hardly reconcilable with the EU rights of freedom of services and freedom of movement for employees.

However, the Federal Ministry of Employment and Social Welfare explicitly notes the risks that may be associated with failure to apply for an A1 certificate or applying for it after the fact.

Some EU Member States have tightened their national regulations to combat social dumping and black work and →

therefore demand the application for an A1 certificate prior to the start of seconded activities. Stiff fines are threatened in the event of a violation. This currently pertains, above all, to Austria and France. The decisive factor is always the individual national rules, which can differ from country to country. In order to avoid the risk of having to pay fines, a review of the appropriate national regulations – which is associated with a large administrative effort – should be conducted before each cross-border activity. Moreover, as long as there is a duty to apply for the A1 certificate under the national laws of the state of destination, the Federal Ministry of Employment and Social Welfare does not recommend refraining from applying for the A1 certificate in advance.

If required by a monitoring body in another Member State, it may still be possible in individual cases to document the existence of a posting by applying for an A1 certificate after the fact, but the administrative effort remains the same as for an application made in advance.

Furthermore, the Federal Ministry of Employment and Social Welfare notes that applying for an A1 certificate can be advantageous in light of this: In certain countries (particularly Italy and Switzerland), in the event of a work accident,

special non-monetary assistance can only be claimed under the statutory accident insurance if an A1 certificate is submitted in addition to the European health insurance card.

Conclusion

The question of whether the end of the A1 certificate for last-minute and short-term cross-border activities has been heralded by the statement from the Federal Ministry of Employment and Social Welfare must be answered, unfortunately, with a clear “no.” Although the Federal Ministry of Employment and Social Welfare establishes in its statement that, in its opinion, no legal duty to carry an A1 certificate exists on the basis of European law, the risks and disadvantages of not carrying an A1 certificate in individual EU States, the EEA and Switzerland are too great. First, the statement by the Federal Ministry of Employment and Social Welfare only offers a helpful interpretation of EU law and puts forth arguments against the mandatory carrying of an A1 certificate under EU law. This statement is not binding for other EU or EEA Member States and Switzerland, who could interpret EU law to mean that there is a duty to carry an A1 certificate, even if carrying one is not mandatory under the national law of the

country of destination. Secondly, taking stock of which Member States require an A1 certificate prior to the start of the cross-border work is hardly possible, and then only with great administrative effort. In any event, businesses must precisely calculate whether the failure to apply for A1 certificates is worth the risk of fines and other disadvantages, or if it is preferable to accept a significant administrative effort.

The hope that the A1 “bureaucratic monster” can be abolished must not, however, be given up. In answer to a query, the Federal Ministry of Employment and Social Welfare stated that the Commission’s press release mentioned at the beginning of this article is only an

interim finding regarding the “trialogue” between the European Parliament, the European Commission and the European Council on the topic of the A1 certificate. The triologue has not yet been concluded. How negotiations progress and whether more business-friendly solutions will be found remains to be seen. ←



Dr. Julia Schweitzer

Rechtsanwältin, Associate Partner
JUSTEM Rechtsanwälte
Frankfurt am Main

j.schweitzer@justem.de



Janine Weber

Rechtsanwältin, Associate
JUSTEM Rechtsanwälte
Frankfurt am Main

j.weber@justem.de