

/ Cross-border Posting of Employees to Germany

Focus: Obligations of the Employer

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Structure:

1. Background of the Posting / Constellation
2. Obligations of the Employer / Compliance
3. Consequences of violation of the law
4. Practical information, links, forms

/ Cross-border posting of employees to Germany – Focus: obligations of the employer

1. Background of the posting / constellation:

➤ Service contract

▷ = if the employer assigns its employees to the service contractor in order to provide the contractual services to the contractor

➤ Leasing personnel

▷ Leasing personnel: = if the employer (supplier) makes its employees available to a third party to work for such third party (= user)

▷ important: differentiation between leasing personnel and assignment of employees to provide services to a third party (the contractor) -> consequences (administrative and criminal offences, fictional employment)

▷ requirement of a license according to German provisions (Temporary Workers Act, *Arbeitnehmerüberlassungsgesetz, AÜG*) and (according to the provisions of the home state of the employer)

▷ a German license may be granted only to employers with registered office in the EU (not to non-EU employers)

▷ application at the competent Labor Agency in Germany (Düsseldorf or Kiel or Nuremberg)

▷ proceedings for the license take approx. two weeks after submitting all required documents

▷ special provisions for leasing personnel between construction firms

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2. Obligations of the Employer / Compliance: Notification

- **Notification** pursuant to the **Posted Workers Act** (*Arbeitnehmerentsendegesetz, AEntG*) :
 - employers with registered office abroad who post one or more employees to Germany to perform services in branches where collective wage agreements are applicable are required
 - to give written notification about their workers (§ 18 (1) AEntG in connection with § 1 MiLoMeldV, *Mindestlohn-Meldeverordnung*, Minimum Wage Reporting Ordinance) and
 - to submit an assurance pursuant to § 18 (2), § 8 AEntG (= obligation to grant the working conditions to the posted employees pursuant to the relevant German provisions)
 - branches (AEntG): construction and construction-related industries, mail services, building cleaning services, waste management, incl. street cleaning and winter road maintenance, care provision, processing and preserving of meat and production of meat products, security services, training and further training services in accordance with the Social Security Act II and III, agriculture, forestry and horticulture, textile and clothing industry and laundry services for commercial services

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2. Obligations of the Employer / Compliance: Notification

- **Notification** pursuant to the **Minimum Wage Act** (*Mindestlohngesetz, MiLoG*) :
 - employers with registered office abroad who post one or more employees to Germany to perform services are required
 - to give notification about their workers (**§ 16 (1), (2) MiLoG** in connection with § 1 MiLoMeldV) and
 - to submit an assurance pursuant to § 16 (2), § 20 MiLoG (= obligation to pay minimum wage to the posted employees),
 - if posting into the following branches pursuant to § 2a of the Control of Unreported Employment Act (*Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG*):
 - ▷ branches (SchwarzArbG): setting up and dismantling trade fair and exhibitions, building industry, meat industry, forestry, catering and hotel business, industrial cleaning, passenger transportation industry, fairground and amusement sector, haulage, transport and associated logistics industry
 - ▷ exception: the control and correction of infringements pursuant to MiLoG in case of transport and haulage services which are purely in transit from EU Member States or third countries has been suspended

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2. Obligations of the Employer / Compliance: Notification

- **Notification** pursuant to the **Temporary Workers Act** (Arbeitnehmerüberlassungsgesetz, AÜG) :
 - users who hire workers from a supplier domiciled abroad (*Entleiher*) are required
 - to give written notification of their workers (§ 16 (3) MiLoG, § 18 (3) AEntG and **§ 17b (1) AÜG**) and
 - to submit an assurance of the foreign employer pursuant to § 16 (4), § 20 MiLoG, § 18 (4) AEntG and § 17b (2), § 10 (5) AÜG

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2. Obligations of the Employer: Formalities

- Notification must be submitted separately for each individual place of employment and/or each individual building site.
- Employees may not be concurrently registered for more than one place of employment or building site.
- The notification must include the following details:
 - ▷ the industry in which the posted workers are to exercise their activities
 - ▷ the place of employment / the building site
 - ▷ the beginning and the expected end of the employment
 - ▷ the place in Germany where the documents (in particular, employment contracts, working time records, pay slips, records of wage payments, § 17 MiLoG, § 19 AEntG) will be available
 - ▷ the surname, first name, date of birth, and German address of the relevant contact in Germany (accountable domestic representative)
 - ▷ the first name, surname and address of an individual in Germany who is authorized to accept the service of documents (authorized recipient),
 - ▷ the surnames, first names and dates of birth of the workers employed by the employer in Germany, and the length of their employment (as a supplement of the notification)

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2. Obligations of the Employer / User: Formalities in case of changes

- Notification of changes: the employer and the user shall submit notification about changes if:
 - the beginning of the performance of the work or service changes
 - the beginning or end of the period during which the temporary workers are supplied changes,
 - other workers than those or whom notification was originally given are employed or used,
 - workers of whom notification has already been given are to be assigned to a different work location – in the case of construction services, to a different building site – within Germany,
 - an individual other than the one of whom notification had previously been given is appointed as the authorized recipient, or
 - the address of the authorized recipient changes.
- Notifications of changes should be designated as such on each form
- for employers: form 033035E; for users: form 033036E
- special cases for notification (special forms):
 - operational scheduling when employing in shifts or night work at one location or at more than one location on the same day
 - operations scheduling when engaging workers in exclusively mobile activities

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2. Obligations of the Employer: Assurance of the employer domiciled abroad

- Notification shall be accompanied by the **assurance of the employer** (§ 16 (2) and 4 MiLoG, § 18 (2) and 4 AEntG, § 17b (2) AÜG)
- in the assurance pursuant to § 16 (2) MiLoG, § 18 (2) AEntG, the employer declares that he is complying with the minimum conditions of employment as laid down in the MiLoG and the AEntG.
 - it must be submitted by all employers domiciled abroad who are also required to submit notification of their workers pursuant to § 16 MiLoG and § 18 AEntG (see branches!)
 - the forms for the notifications that can be downloaded from the internet already include the appropriately worded assurances
- in case of providing temporary workers, the **supplier** must give an assurance that it is complying with the minimum wage conditions of the employment as laid down in the MiLoG, the AEntG and/or the AÜG (minimum wage floor, § 10 (5) AÜG)
 - it must be submitted by all those suppliers who are also required to give notification of the workers they have supplied pursuant to § 16 (3) MiLoG, § 18 (3) AEntG or § 17b (1) AÜG
 - the forms for the notifications that can be downloaded from the internet already include the appropriately worded assurances
- the notification and the assurance have to be submitted before start of the work in Germany at the competent Customs authority in Germany

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2. Obligations of the Employer: Formalities

- Notification and assurance have to be submitted before the start of the work in Germany at the competent customs authority in Germany
- from 01.01.2017 the employer / users should give the notification online: Meldeportal-Mindestlohn (www.zoll.de -> www.meldeportal-mindestlohn.de)
- until 30 June 2017 employer / users can also use form 033035 / form 033036
- forms may be filled in electronic form or by handwriting
- notification is given by sending via fax (no confirmation about receipt)
- notification by Meldeportal-Mindestlohn: confirmation about receipt will be sent

- Controlling authority: *Finanzkontrolle Schwarzarbeit* (“FKS”), part of the Customs
- The employer is **obliged to cooperate** with German controlling authorities (especially Central Customs / *Hauptzollamt*)
 - provide all and complete documents and information about complying with the relevant German provisions

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2. Obligations of the Employer: Notification if regulated crafts

- in addition: written **notification** pursuant to § 8 (1) EU/EWR HwV (*Handwerksverordnung*, Crafts Code Ordinance) is required if the activities in Germany are considered as performing a **regulated craft** pursuant to Appendix A of § 1 HwO (*Handwerksordnung*, Crafts Code) / “*reglementierte Tätigkeiten/zulassungspflichtige Handwerke gem. Handwerksordnung (HwO)*”
 - <http://www.zdh.de/organisationen-des-handwerks/handwerkskammern/deutschland.html>
 - form: http://www.hwkno.de/artikel/einheitlicher_ansprechpartner-76.2861.2679.html -> Downloads -> Meldung der vorübergehenden Erbringung von Dienstleistungen
 - competent authority (Chamber of Crafts) in the Federal State of the employment place
 - notification has to be made before posting the employees to Germany
 - renewal of the notification: every year (failure: administrative offence with fine, § 118 HwO, § 10 EU/EWR HwV)
- the representative of the foreign employer in Germany has to proof the relevant education / qualification for performing the craft

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2. Obligations of the Employer: employment law, immigration law

➤ **Employment law:**

- applicability of German mandatory provisions also for employment relationships which are concluded under foreign employment law
- **§ 2 AEntG:** minimum wage (from 01.01.2017: at least EUR 8.84 gross per working hour), minimum paid leave, working time provisions, etc. -> please note that this **applies for every employee who is posted to Germany!**

➤ **Immigration law:**

- non EU nationals: requirement of a residence (incl. work) permit

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2. Obligations of the Employer: social security law, tax law

➤ **Social Security law:**

- A1 certificate: certifies that foreign social security law applies, and not German social security law

➤ **Tax law:**

- the provisions of the relevant Double Taxation Treaty and German tax provisions apply (wage tax, corporate tax, trade tax)
- creating of a permanent establishment in Germany?
- is registration for VAT purposes in Germany (with the competent German foreigners financial authority) required?
- application for certificate of exemption (*Freistellungsbescheinigung*) with regard to payments for building services?
- etc. etc.

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2. Obligations of the Employer: obligation to cooperate

- Controlling authority: especially *Finanzkontrolle Schwarzarbeit (FKS)* (= part of German Customs)
- The employer is **obliged to cooperate** with German controlling authorities (social security authorities, financial authorities, especially Central Customs / *Hauptzollamt, FKS*)
 - provide all and complete documents and information required for checking whether the employer complies with the relevant German provisions
 - answer questions etc.

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3. Consequences of violation of the law:

- Violation of immigration law: illegal employment of a foreigner
 - ▷ administrative offence:
 - fine of up to EUR 500,000; entry into Central Trade Register (min. EUR 200), § 404 SGB III
 - ▷ criminal offence:
 - up to 3 (or 5) years imprisonment or monetary penalty, § 11, § 10 SchwarzArbG
- Violation of social security law:
 - ▷ administrative offence: violation of reporting obligation
 - fine up to EUR 25,000, § 111 SGB IV
 - ▷ criminal offence: non payment of social security contributions into the German system
 - up to 10 years imprisonment or monetary penalty, § 266a StGB (*Strafgesetzbuch*, Criminal Act)

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3. Consequences of violation of the law:

- Violation of minimum working conditions (MiLoG, AEntG, AÜG):
 - ▷ administrative offence:
 - fine of up to EUR 30,000, in some cases EUR 500,000, § 21 MiLoG, § 23 AEntG, § 16 AÜG
 - entry into Central Trade Register (min. EUR 200)
 - if min. EUR 2,500: exclusion from competition at the public procurement market
- Violation of Temporary Workers Act (AÜG):
- for the supplier: supply of employees without license
 - ▷ administrative offence:
 - fine up to EUR 30,000 and , § 16 AÜG
 - entry into Central Trade Register (min. EUR 200)
 - ▷ criminal offence:
 - up to 3 (or 5) years imprisonment or monetary penalty, § 15 AÜG

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3. Consequences of violation of the law:

- Violation of Temporary Workers Act (AÜG):
- for the supplier: supply of employees without license
 - ▷ administrative offence:
 - fine up to EUR 30,000, § 16 AÜG, skimming off of the economic advantages and entry into Central Trade Register (from EUR 200)
 - ▷ criminal offence:
 - up to 3 (or 5) years imprisonment or monetary penalty, § 15 AÜG
- for the user: employing supplied employees without license
 - ▷ fine up to EUR 30,000, § 16 AÜG
 - ▷ fine up to EUR 500,000 if foreign employees, § 404 SGB III, skimming off of the economic advantages and entry into Central Trade Register (from EUR 200)
 - ▷ fiction of an employment with the foreign worker, §§ 9, 10 AÜG

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3. Consequences of violation of the law:

- Violation of Temporary Workers Act (AÜG):
- for the supplier: employing supplied employees without valid work permit (for leased work) and a valid license
 - ▷ criminal offence:
 - up to 3 (or 5) years imprisonment or monetary penalty, § 15 AÜG
- for the user: employing foreign employees without valid work permit (for leased work) and under wage-dumping conditions
 - ▷ criminal offence:
 - up to 3 (or 5) years imprisonment or monetary penalty, § 15a AÜG, § 11 SchwarzArbG, § 10 SchwarzArbG
- if supplying into construction industry:
- for the user and the supplier:
 - ▷ fine up to EUR 30,000, § 16 AÜG, and skimming off of the economic advantages; entry into Central Trade Register (from EUR 200)

- etc. (violation of tax provisions etc. etc.)

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4. practical information, links, forms:

➤ useful websites with information and forms:

▷ *Hauptzollamt*: www.zoll.de -> Fachthemen -> Arbeit -> ...

▷ with service link (Zentrale / Auskunft / Zoll)

▷ *Bundesministerium für Arbeit und Soziales (BMAS)*: www.bmas.de -> Themen -> Arbeitsmarkt -> Arbeitsrecht -> Entsendung -> ...

▷ in Bavaria:

<https://www.freistaat.bayern/dokumente/leistung/874755671476?plz=83349&behoerde=62107993672&gemeinde=231968976669>

▷ other Federal states: ...

➤ information and forms mainly in German, English and French, partly also in other European languages

➤ registrations:

▷ online forms / via fax

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Competences

- Labor law
- Social security law
- Immigration and work permit law
- International labor and social law
- Secondment /assignment of employees
- Deployment of foreign employees
- Occupational status issues
- Fictional self-employment
- Personnel leasing

Career Development

- Legal studies at the University of Passau
- Studied Czech law at the University of Prague (Czech Republic), Czech and Russian at the universities of Passau, Prague and Moscow (Russian Federation)
- Experience abroad: elective stays in Moscow and Prague
- Lectures at the University of Passau
- Worked at the Prague office as "advokátka" until 1998
- With Noerr since 1994
- Admitted to the Munich Chamber of Lawyers

Seminars & Lectures

- Lectures on different aspects of secondment of employees, the employment of foreigners in Germany and assignment of employees abroad
- Lectures on international social insurance issues
- Lectures on deployment of agency staff and service personnel

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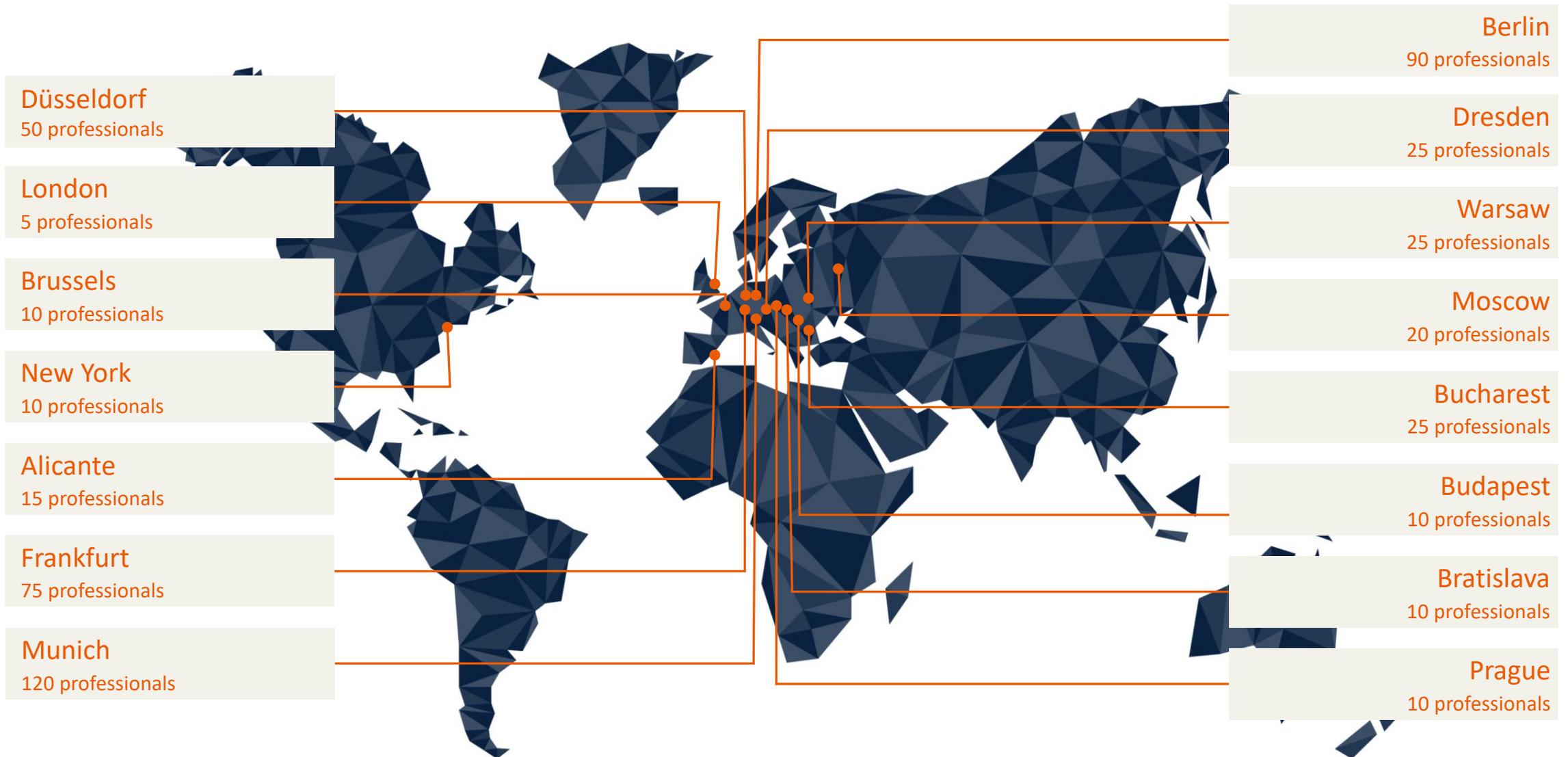
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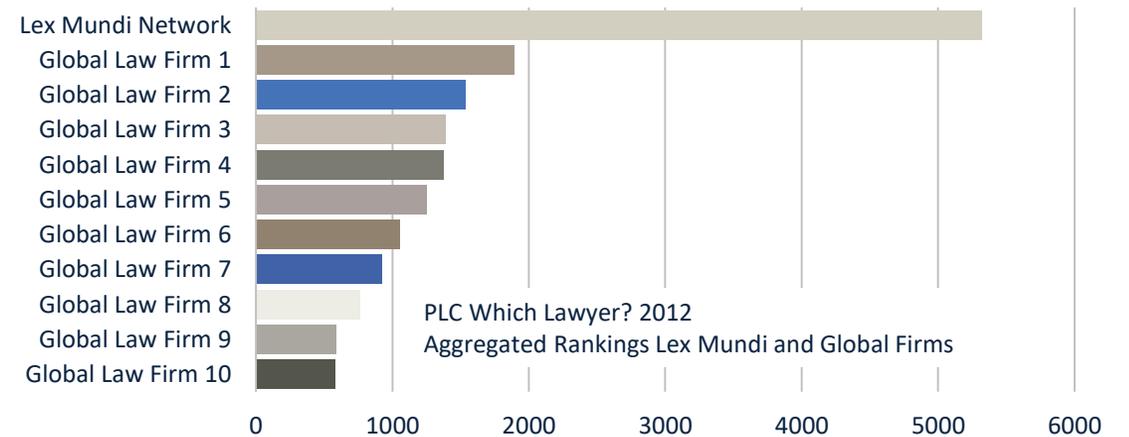
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The American Lawyer Global Legal Awards 2015

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