

Changes in the Act on Foreigners

On 29 January 2022, the Act of 17 December 2021 amending the Act on Foreigners and certain other acts will enter into force (Journal of Laws of 2022 item 91). It introduces a number of significant amendments to the rules governing the legalisation of stay of foreigners in the territory of Poland, placing particular emphasis on persons who work.

The key amendments to the rules on temporary residence and work permits

The amending Act introduces a number of changes to the provisions of the Act of 12 December 2013 on foreigners (Journal of Laws of 2021, item 2354), which provide regulations on granting and altering the temporary residence and work permits. After its entry into force, the following requirements for granting a temporary residence and work permit will cease to apply:

- the foreigner has a source of stable and regular income sufficient to cover his/her subsistence expenses and the subsistence expenses of dependent family members (current Article 114 section 1 item 1(b) of the Act on Foreigners);
- the obligation for a foreigner to have a place of residence on the territory of the Republic of Poland (current Article 114 section 2 of the Act on Foreigners).

At the same time, the current requirement that a foreigner's remuneration cannot be lower than the minimum wage is going to be amended (Article 114 section 1 item 5 of the Act on Foreigners). In result of this specific amendment, the monthly remuneration of a foreigner cannot be lower than the minimum wage, regardless of the working hours or the type of legal relationship constituting the basis for the foreigner's employment. Therefore, it also applies to cases where a foreigner performs a part-time job.

This amendment will also entail the addition of a new provision, i.e., Article 114 section 4b of the Act on Foreigners, which will take into account a case where a foreigner applies for a temporary residence permit due to the performance of work for more than one entity entrusting the performance of work. In such case, the requirement to grant a temporary residence and work permit will be deemed to be fulfilled if the sum of wages indicated in Appendices 1 to the application for a temporary residence and work permit is not lower than the minimum wage.

In addition, a new provision will be introduced in Article 114(4a) of the Act on Foreigners, according to which the requirement for a foreigner to have health insurance within the meaning of the provisions of the Act of 27 August 2004 on health care services financed from public funds (Journal of Laws of 2021, item 1285, as amended) will also be considered fulfilled if the

foreigner has health insurance due to the performance of the work forming the basis for applying for a temporary residence and work permit. Thus, the provision will enable to take into account situations where a foreigner is to be entrusted with work which will result in an obligatory right for health insurance pursuant to Article 66 section 1 of the Act of 27 August 2004 on health care services financed from public funds.

Article 119 of the Act on Foreigners will be amended by introducing two new circumstances, the occurrence of which will not require a new temporary residence and work permit or its amendment. Namely, these circumstances include a change of the name of the position in which the foreigner performs the work, while retaining the scope of his/her duties and an increase in the working time with a proportional increase in remuneration.

The amending Act also introduces, as a result of the practical demands, significant changes in the procedure for amending the temporary residence and work permit. In the current legal status, a change of this permit may include a change of the user employer or a change of the conditions for performing work specified in the permit pursuant to Article 118 section 1 items 2-5 of the Act on Foreigners. The upcoming amendment will consist in the fact that the scope of the change allowed under this procedure will also include the change of the entity entrusting the performance of work, as well as the fact that the foreigner will be granted an exemption from the obligation to possess a work permit specified by separate provisions. The application for change of the temporary residence and work permit will be submitted on a form in accordance with the template to be defined in the regulation of the Minister of the Interior and Administration, issued pursuant to the introduced Article 120b of the Act on Foreigners. The application for the change of the temporary residence and work permit will have to be filed together with Appendix No. 1 to the application for granting a temporary residence permit according to the template specified in Appendix No. 2 to the Regulation of the Minister of Internal Affairs and Administration of 17 April 2019 on the application for granting a temporary residence permit to a foreigner (Polish Journal of Laws, item 779) and documents necessary to confirm data included in the application and circumstances justifying the change of the temporary residence and work permit. The change of the temporary residence and work permit will be subject to pay stamp duty at the new rate of PLN 220 (half of the stamp duty rate for granting the temporary residence and work permit).

The amending act will also introduce, in the form of a new provision of Article 117b of the Act on Foreigners, a legal basis for the Voivode to first handle the cases of granting temporary residence and work permits in which the entity commissioning the work will be an entrepreneur conducting activity of strategic importance for the national economy, who will be included on

the list established by way of an ordinance by the minister competent for economy (currently the Minister of Economic Development and Technology) on the basis of Article 88cb of the Act of 20 April 2004 on employment promotion and labour market institutions (Journal of Laws of 2021 item 1100 as amended). The application of Article 117b of the Act on Foreigners will depend on whether a relevant regulation is issued (its issue is optional).

Other key amendments to the rules governing the granting of temporary residence permits

The amending Act will also amend the provisions on granting temporary residence permits for the purpose of family reunion. These amendments are aimed at adapting Polish law to the provisions of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ EU L.2003.251.12 of 3 October 2003) as interpreted by the Court of Justice of the European Union in its judgment of 16 July 2020 in the following cases: *C-133/19 B.M.M. and B.S. v Belgian State*, *C-136/19 B.M.M and B. M. v Belgian State* and *C-137/19 B.M. O. v Belgian State*, as well as in the judgment of 12 April 2018, Case *C-550/16, A et S v Staatssecretaris van Veiligheid en Justitie*. One of the amendments will consist in the fact that the assessment whether a family member who is to join a foreigner residing on the territory of the Republic of Poland is a minor (Article 159 section 3 items 2-4 of the Act on Foreigners) will be evaluated according to the status as at the day of submitting the application for a permit for temporary residence and not – as it has been the case so far – according to the status on the day of issuing the decision in the case (new provision of Article 159 section 3a of the Act on Foreigners). The second change shall consist in the fact that a family member entitled to obtain a temporary residence permit shall not only be an ascendant in direct line or an adult responsible for a minor in accordance with the law in force in the Republic of Poland, when currently a refugee or a beneficiary of subsidiary protection (whom the family member is to join) is a minor, but also such a person, when the refugee or the beneficiary of subsidiary protection on the day of submitting the application for international protection was an unaccompanied minor or was subsequently left unaccompanied, and the application for a temporary residence permit for the purpose of family reunion was submitted within 6 months from the date of obtaining the refugee status or granting subsidiary protection (new wording of Article 159 section 4 of the Act on Foreigners).

The amending act will change the wording of Article 127(3) of the Act on Foreigners, which regulates one of the requirements for granting a temporary residence permit for the purpose of highly qualified employment, concerning the amount of remuneration that a foreigner should receive. Currently it cannot be lower than 150% of the average salary in the national economy in the year preceding the conclusion of the agreement between the foreigner and the

entity commissioning the work, announced by the President of the Central Statistical Office on the basis of Article 20-point 1 letter a of the Act of 17 December 1998 on pensions from the Social Insurance Fund (Journal of Laws of 2021 item 291). In result of the amendment, the amount of remuneration will be referred to the amount of the average remuneration in the national economy in the year preceding the application for this permit.

Establishment of new time limits for handling cases regulated by the Act on Foreigners.

The amending act will also make significant changes to the regulation of time limits for handling cases:

- on granting a temporary residence permit (and to amend a temporary residence and work permit);
- on granting permanent residence permit
- on granting residence permit for long-term EU resident

In the case of proceedings to grant a temporary residence permit (and proceedings to amend a temporary residence and work permit), the time limit for the Voivode to resolve the case will be 60 days (new provision of Article 112a section 1 of the Act on Foreigners) and will be counted from the moment the last of the following events occurs (new provision of Article 112a section 2 of the Act on Foreigners):

- submission of an application in person or subsequent personal appearance of the foreigner in the voivodeship office (except for cases in which the foreigner is not obliged to appear in person);
- submission of an application without formal defects or the completion of such defects;
- submission by the foreigner of documents necessary to confirm the data contained in the application and the circumstances justifying the application for a temporary residence permit, or ineffective expiry of the time limit for their submission set by the Voivode.

In the case of proceedings on granting of a permanent residence permit and proceedings on granting of a residence permit for a long-term EU resident, the time limit for Voivode to process the case is going to be 6 months (Article 210 section 1 and Article 223 of the Act on Foreigners). The duration of the time limit will depend on the occurrence of the same events as in the case of proceedings for granting a temporary residence permit (new provision of Article 210 section 2 of the Act on Foreigners).

The time limit for the Head of the Office for Foreigners to resolve each of the aforementioned cases in the appeal proceedings will be 90 days, counted from the date of handing over the

appeal, and in the case the appeal does not meet the requirements set by law (formal requirements) – from the date of supplementing any potential missing documents (new provision of Article 112a section 4 and 5, Article 210 section 4 and 5 and Article 223 of the Act on Foreigners).

Article 13 of the amending act states that the new time limits for processing cases shall apply to procedures which are already pending and will run anew from the date of its entry into force at the earliest.

Other procedural changes regarding proceedings under the provisions of the Act on Foreigners

The amending act provides for an amendment to Article 7 of the Act on Foreigners, which will allow a foreigner to receive information about the principles and procedures of the procedure and about his or her rights and obligations in a language he or she understands, also in an electronic form, to an electronic mail address (e-mail) indicated by him or her or by indicating a website address where such electronic information will be available. In order to instruct a foreigner in such a form, the authority will first have to obtain the foreigner's consent in this respect. This new form of sending instructions to foreigners will also be applicable in proceedings that will be pending on the date the amending act enters into force.

The amending act will also introduce into the provisions of the Act on Foreigners a clear basis for the exchange of information between the Voivode or the Head of the Office for Foreigners and the authorities to which these authorities have requested information on whether the foreigner's entry into the territory of the Republic of Poland and his/her stay therein may constitute a threat to state defence or security or to the protection of public security and order (the Voivodeship Commander of the Police, the Chief of the Border Guard Division, the Chief of the Internal Security Agency, the Head of the Border Guard Unit, the Head of the Office for Foreigners), commanding officer of the Border Guard division, Head of the Internal Security Agency), could be carried out by means of electronic communication, thus facilitating the circulation of documents between them and contributing to the streamlining of proceedings.

Rules for conducting proceedings pending at the date of entry into force of the amending act

Article 7 section 1 of the amending Act establishes a general rule that proceedings under the Act on Foreigners which have not been completed by the date of entry into force of the amending Act shall be governed by the provisions of the current law. Thus, as a rule, the changes in legal provisions discussed above will apply to proceedings that will be initiated on 29 January 2022 at the earliest. Exceptions from this rule will relate to the discussed new form

of instructions to foreigners (new provision of Article 7 section 3 of the Act on Foreigners) and new time limits for handling cases and for voivodes to summon foreigners to submit evidence (new provisions listed in Article 13 section 1 of the amending act).

In addition, an exception from the principle of applying the previous provisions to the proceedings remaining in progress is established by Article 8 of the amending Act, which provides for a specific procedure for terminating the proceedings on granting temporary residence and work permits initiated before 1 January 2021.

Special procedure for the termination of proceedings on the granting of a temporary residence and work permit initiated before 1 January 2021.

The special procedure for completion of proceedings introduced in the amending Act (Article 8) consists in the fact that if the proceedings on granting a permit for temporary stay and work are still pending on the date of entry into force of the Act (Article 114 or Article 126 of the Act on Foreigners), the proceedings should end with granting a permit for a period of 2 years counting from the date of issuing the decision, except for cases where:

- it will be mandatory to enter the foreigner's data in the register of foreigners whose residence in the territory of the Republic of Poland is undesirable;
- the foreigner's data will be held in the Schengen Information System for the purpose of refusing entry;
- granting the permit will be prevented by reasons of national defence or security or the protection of public security and order, or obligations arising from the provisions of ratified international agreements binding the Republic of Poland.

In order to be subject to this special regulation, an ongoing procedure for granting a temporary residence and work permit will have to fulfil several conditions (Article 8, sections 3 – 5 of the amending Act). In addition to the fact that the application for a temporary residence permit was submitted to the Voivode before 1 January 2021:

- the time limit for submitting the application set out in Article 105, section 1 of the Act on Foreigners (the time limit determined by the duration of legal residence) itself had to be retained;
- the application should not contain formal defects or the defects have been corrected on time;
- the foreigner has declared in the application for a temporary residence permit that the purpose of his/her stay on the territory of the Republic of Poland is employment, or

has made such a declaration to the authority conducting the proceedings on 31 December 2020 at the latest;

- proceedings should not be conducted under the circumstances of the existence of grounds for refusal to initiate them as referred to in Article 99, section 1 or section 1a, or Article 116 of the Act on Foreigners;
- proceedings – in the event that they remain suspended on the date of entry into force of the amending Act – should be resumed within 3 months after that date.

If a Voivode has not requested a foreigner to personally appear in a voivodeship office pursuant to Article 105 section 2 of the Act on Foreigners by the date of entry into force of the amending Act, he or she will not do so anymore, and fingerprints for the purpose of placing them in the residence card will be collected at a later time.

If these conditions are not met, the proceedings will be continued (or, where appropriate, terminated) on the basis of the existing provisions of the Act on Foreigners in accordance with the general rule under Article 7 section 1 of the amending Act.

A temporary residence and work permit under this special procedure may be granted either by a Voivode or the Head of the Office for Foreigners in the second instance – depending on the stage of the proceedings on the day the amending act enters into force.

Rights and obligations arising from the granting of a temporary residence and work permit under a specific procedure

A temporary residence permit granted under this special procedure will not specify the entity entrusting the work or the user employer (in the case of temporary employment) or the conditions for carrying out the work as in the case of a temporary residence and work permit granted under ordinary conditions. For which entity entrusting work (or entities entrusting work) a foreigner will perform work and under what conditions this will take place will be supplemented by a statement of the entity entrusting work on entrusting work to a foreigner (Article 9 section 1 item 3 of the amending Act).

Such a declaration will have to be made on an official form according to the model to be specified in the regulation of the Minister of Internal Affairs and Administration issued pursuant to Article 9 section 23 of the amending Act.

The time limit for submitting this statement will be 60 days, counting from the date of delivery of the decision of a Voivode or the Head of the Office for Foreigners on granting a temporary residence and work permit. The declaration will have to be submitted to the Voivode who will grant the permit. If a temporary residence and work permit is granted by the Head of the Office

for Foreigners in the second instance, such a statement should be submitted to the Voivode who adjudicated in the case in the first instance (Article 9 section 4 of the amending Act). The declaration will not have to be submitted to the Head of the Office for Foreigners.

The time limit for making the declaration will not be subject to restoration, so it is imperative that it is complied with. If the period for performance of the act ends on a day which is a public holiday or a Saturday, the period shall end on the first day which is not a public holiday or a Saturday. The time limit will be considered met if, before its expiry, the letter is, inter alia, posted in the Polish postal facility of the designated operator within the meaning of the Act of 23 November 2012. - Postal Law or a postal outlet of an operator providing universal postal services in another Member State of the European Union, the Swiss Confederation or a Member State of the European Free Trade Association (EFTA) – a party to the Agreement on the European Economic Area.

If the declaration on entrusting work to a foreigner is signed by a person acting for and on behalf of the entity entrusting the work, the person will be obliged to attach to the declaration the documents indicating the authority to sign the declaration (Article 9 section 3 of the amending Act).

It will be possible to submit the declaration only once or to submit a few declarations at the same time if a foreigner intends to perform work for the benefit of more than one entity commissioning work (Article 9, section 9 and section 15, sentence 1 of the amending Act).

The statement should specify working conditions that do not differ from the minimum conditions, which include:

- receiving by a foreigner the minimum remuneration for work, irrespective of the work time dimension and the type of legal relationship constituting the basis for performance of work by a foreigner (Article 9 section 1 item 1 of the amending Act);
- performance of work under an employment relationship or on the basis of a contract of mandate (Article 9 section 1 item 1 of the amending Act).

The minimum condition concerning the minimum remuneration for work will also be fulfilled when a foreigner intends to perform work for the benefit of more than one entity commissioning work, and the sum of remuneration received from all entities will not be lower than the minimum remuneration for work (Article 9 section 15 of the amending Act).

Failure to submit the statement within 60 days will result in expiry of the temporary residence and work permit on the day following the expiry of the time limit for its submission (Article 9 section 10 item 1 and section 12 of the amending Act).

If the conditions specified in the declaration do not comply with the minimum conditions, the temporary residence and work permit will also expire, but in this case the Voivode will be obliged to issue a decision stating the expiry of the permit. In such a case, the Voivode will also determine the date of expiry of the permit (Article 9 section 10 item 2, section 11 and section 12). The decision of a Voivode on the expiry of a temporary residence and work permit will be subject to appeal to the Head of the Office for Foreigners (Article 9 section 11 of the amending Act).

If a temporary residence and work permit expires, a 30-day period to leave the territory of the Republic of Poland (the period specified in Article 299 section 6 item 1 of the Act on Foreigners) will start to run on the day following the expiry date, unless the foreigner holds a valid document entitling them to stay in the territory of the Republic of Poland or it results from the Act that their stay in the territory is considered legal (Article 9 section 13 of the amending Act).

The residence card will be issued to a foreigner ex officio only after the declaration is filed and after excluding the fact that the permit validity expires, and – in case the fingerprints have not yet been taken – after taking the fingerprints (Article 9, section 14 and Article 8, section 15 of the amending Act).

The information included in the declaration will be placed by the competent Voivode in the register of cases concerning temporary residence permits, which constitutes a part of the national collection of registers, records and lists of cases concerning foreigners stored in the ICT system.

A foreigner will be able to perform work already in the period preceding the submission of the declaration if the work will be performed for the entity commissioning work and on conditions indicated in the declaration submitted later (Article 9 section 19 of the amending Act).

If a foreigner wishes to change the entity entrusting the performance of work or the conditions for the performance of work, they will be able to follow the new procedure for changing the temporary residence and work permit (Article 9 section 18 of the amending Act).

A foreigner who has been granted a temporary residence and work permit under this specific procedure will be obliged throughout the entire period of validity of the permit to notify the Voivode who granted the permit, and in the case the permit was granted by the Head of the Office for Foreigners in the second instance – the Voivode who ruled on the case in the first instance, of each change of the place of residence. The foreigner will have 15 working days to do so (Article 9 section 21 of the amending Act). In the event that a foreigner fails to meet this

obligation this may bring negative consequences for the foreigner, as the delivery of the letter during the inspection or in the course of the subsequent proceedings (e.g., in the case of withdrawal of the temporary residence and work permit) to the foreigner's current address will be deemed effective (Article 9 section 22 of the amending Act).

If the foreigner fulfils the conditions for exemption from the obligation to possess a work permit, the Voivode will include information in the register of cases concerning temporary residence permits that the foreigner is authorised to perform work under the conditions specified in the provision being the basis for exemption from the obligation to possess a work permit (Article 9 section 24 and section 25 of the amending Act).

Grounds for withdrawal of a temporary residence and work permit granted under a specific procedure

Article 10 section 1 of the amending Act will define specific grounds for withdrawal of a temporary residence and work permit granted under this special procedure. They will include the following:

- cessation of the purpose of stay which was the reason for granting a temporary residence and work permit (Article 101 section 1 of the Act on Foreigners in connection with Article 10(1) of the amending Act);
- the validity of the entry of a foreigner's data to the register of foreigners whose residence on the territory of the Republic of Poland is undesirable (Article 10 section 1 item 1 of the amending Act);
- reasons of defence or national security or the protection of public security and order, or obligations arising from the provisions of ratified international agreements binding the Republic of Poland will require the permit to be withdrawn (Article 10 section 1 item 2 of the amending Act);
- the minimum conditions specified in Article 9 section 1 item 1 (with regard to the amount of remuneration) or 9 section 1 item 2 (with regard to the legal relationship forming the basis for the performance of work) will not be met (Article 10 section 1 item 3 of the amending Act);
- the work will not be performed under the conditions specified in the register of cases concerning temporary residence permits referred to in Article 428 section 1 item 2(d) of the Act on Foreigners (Article 10 section 1 item 4 of the amending Act);
- the foreigner will not have health insurance within the meaning of the provisions of the Act on health care services financed from public funds or a confirmation that the costs

of treatment on the territory of the Republic of Poland have been covered (Article 10 section 1 item 5 of the amending Act).

Control of the way the foreigner uses his/her temporary residence and work permit

Pursuant to Article 11 of the amending act, the Voivode and, if the permit was granted by the Head of the Office for Foreigners – also this authority, will be able to inspect the way the foreigner uses the permit for temporary stay and work in the scope of circumstances which constitute the basis for withdrawal. Such inspection shall be carried out at the premises of the competent authority by an authorised member of personnel. The foreigner will be obliged to appear at the place and time indicated in the summons on pain of considering that the purpose of stay, which was the reason for granting the temporary residence and work permit, has ceased. The course and results of inspections will be recorded in the form of minutes. Should specific findings in the course of the inspection indicate that any of the grounds for withdrawal of the permit exist, proceedings in this regard will be initiated.

Extension of the period of employment on the basis of a statement on entrusting work to a foreigner entered in the register of statements (amendment to the Act of 20 April 2004 on employment promotion and labour market institutions).

The amending Act will also make a number of changes to laws other than the Act on Foreigners. An example of a very significant change is the change in the wording of Article 87 section 3 and Article 88z section 2 item 3 of the Act of 20 April 2004 on employment promotion and labour market institutions which concerns the period of permissible work on the basis of a statement on entrusting work to a foreigner entered into the register of statements by a district employment office. As the law currently stands, the period of work performed on the basis of such a declaration cannot be longer than 6 months in any consecutive 12-month period. The change made by the amending law will be that the period of permitted work on the basis of a single statement will be extended to 24 months.

Such a change will result, for example, in visas issued for the purpose referred to in Article 60 section 1 item 5 of the Act on Foreigners, i.e., for the purpose of performing work on the basis of a declaration, being able to be issued with a period of permitted stay longer than 6 months, as Article 64 section 3 of the Act on Foreigners, which regulates this issue so far, will be repealed. Declarations entered into the register of declarations pursuant to the previous provisions may be submitted in the proceedings on the issuance of a visa for another 6 months from the date of entry into force of the Act (Article 14 section 1 of the amending Act). In such a case, it will be possible to obtain a visa for a period of stay longer than 6 months if an additional statement of the entity commissioning work on the extension of the period of

commissioning work in relation to the statement entered in the register of statements is attached to the visa application (Article 14 section 2 of the amending Act).

Inclusion of holders of humanitarian visas in the scope of application of the Act of 20 April 2004 on employment promotion and labour market institutions

The amending Act will also amend Article 1 of the Act on Promotion of Employment and Labour Market Institutions in order, inter alia, to include foreigners holding a visa issued for the purpose referred to in Article 60, section 1, item 23 of the Act on Foreigners, i.e. a visa for humanitarian reasons, due to the interest of the state or due to international obligations, within the scope of application of the provisions of this Act (Article 1, section 3, item 2(m) of the Act on Promotion of Employment and Labour Market Institutions). Such persons will be able to use the services of the labour market under the rules specified in the Act and within the limits specified by Article 1 section 6 and Article 43 section 1 item 9 of the Act on Promotion of Employment and Labour Market Institutions, i.e., trainings for persons seeking employment (Article 40 of the Act on Promotion of Employment and Labour Market Institutions).