

Delegation of medical services during observation visits

How may foreign doctors who do not yet have a professional licence or licence to practise be employed in clinics and medical offices? This is an often-asked question to which, unfortunately, there is no such thing as THE one answer. Here are the key points.

Practice of medicine

"Anyone wishing to practise medicine without being certified as a doctor requires permission to do so. The practice of medicine is any professional or commercial activity to diagnose, cure or alleviate illness, suffering or bodily harm in humans, even if it is carried out in the service of others" (Art. 1 paras. 1 and 2 Non-medical practitioner act). Art. paras. 2 (1) and (2) of the Federal Medical Order (BÄO) states that a licence to practise medicine is required. The practice of medicine on a temporary basis or limited to certain activities is also permissible on the basis of a licence.

This makes it clear: Basically, foreign doctors are not allowed to practise medicine without a professional licence or licence to practise medicine. Even if they are persons who have worked as doctors in their country of origin, they must always be formally regarded as "non-doctors".

Definition of observation visit

However, during an observation visit, important experience can be gained in practices and hospitals, medical terminology can be learned more quickly and the German health care system can be familiarised with. Therefore, observation visits are also welcomed by the Saxony Medical Association.

There is as yet no legal definition of the term "observation visit" in medicine. However, there are indications in the case law. An observation visit, for example, is "merely an observational activity by those who are not already licensed to practise, in which at most parts of the medical activity are carried out in the sense of learning and which as a rule lasts at most days or weeks" (SG Marburg of 26/11/2008 – S 12 KA 459/07).

Delegation of services to visiting physicians

If practical activities of learning are to be added to the pure observation by the observers, the delegation of certain delegable services must also be considered.

The 2008 paper by the German Medical Association and the National Association of Statutory Health Insurance Physicians on the "Possibilities and Limits of Delegation of Medical Services" can still provide valid answers and give impetus for the sensible and legally secure use of visiting physicians¹.

If delegable services are provided by non-medical staff, they must be subject to supervision and professional instruction. This requires the doctor to act in a managerial and autonomous capacity when using visiting physicians to provide his or her own professional services. This does not apply to certain services that are exclusively reserved for doctors. This applies to the medical office and hospital alike.

Services with doctor's reservation are in particular:

- Medical history,
- Indication,
- Examination of the patient including invasive diagnostic services,
- Making the diagnosis,
- Patient education and counselling,
- Decision about the therapy and
- Performing invasive therapies including the core services of surgical procedures,
- Emergency or other exceptional cases.

¹ Possibilities and limits of delegation of medical services https://www.bundesaerztekammer.de/fileadmin/user_upload/_old-files/downloads/Empfehlungen_Persoенliche_Leistungserbringung.pdf

Here, for reasons of criminal and liability law, the question of delegation to non-physicians does not arise.

Unless a highly personal assumption of the activity is derived from the nature of the medical activity or the particular danger to patients associated with it or because of the circumstances of its provision, in particular the seriousness of the case of illness, services may be delegated to non-physicians. Standard examples of services that can be delegated in principle can be found in the above-mentioned paper by the German Medical Association and Federal Association of Statutory Health Insurance Physicians (KBV).

Delegation according to qualification

The decision as to whether and to whom doctors should delegate a service, whether they should give special instructions to the visiting physicians concerned and how they should supervise them, must depend on the qualifications of the visiting physicians in question. At the beginning of the cooperation, the doctor should make sure that the services provided by the visiting physician are of a quality that corresponds to the formal qualification and should check the quality of the services provided on a random basis. If the quality of the trainees' performance is not sufficient, they can be trained or monitored more closely. If the requirements for a delegation are not met, it shall be waived.

However, doctors cannot carry out this check themselves without any doubt within the framework of an observation visit. In case of doubt, no domestic authority has yet conclusively assessed the level of training. In order to have the necessary security before the act of delegation, visiting physicians should be regarded as employees under liability law, who also do not have a completed training in a health care profession.

In this case, the delegator has to check whether the employee seems suitable for a delegation of the service in question on the basis of his or her general abilities (duty of selection). He/she must then train him/her to independently perform the service to be delegated (duty to instruct). Even after he/she has satisfied him/herself that the employee is proficient in the performance of the service in question, the doctor must monitor him/her regularly in the process before he/she can limit him/herself to random checks over time, as in the case of a specialist professional (duty of supervision). If non-medical persons provide delegated services, the doctor is obliged to stay in the immediate vicinity (calling distance) as a matter of principle.

Visiting physician contract & remuneration

A visiting physician contract should include the essential obligations that apply during the period of employment. For example, working hours, remuneration, communication structures, contact person/disciplinary authority and confidentiality agreement should be considered. The employers' liability insurance association must be involved.

Finally, a note on remuneration. Foreign doctors are allowed to observe in clinics and practices free of charge as long as they "only accompany and observe". Only then do clinics and practices not violate the Minimum Wage Act. If the "accompaniment and observation" by the visiting physicians turns into regular practical work, this is considered an internship and would fall within its scope of application according to Art. 22 section 1 of the Minimum Wage Act. Further explanations can be found in a paper by the Marburger Bund².

² https://www.marburger-bund.de/sites/default/files/files/2019-05/Leitfaden-Beschaeftigung-auslaendischer-Aerzte_0.pdf