

# PRACTICAL GUIDE ON POSTING

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## **1. INTRODUCTION**

EU legislation on posting of workers ensures the protection of posted workers during their posting in relation to the freedom to provide cross-border services by laying down mandatory provisions regarding working conditions and the protection of workers' health and safety that must be respected. In order to ensure the fair exercise of the freedom to provide services and enhance workers' protection, the Juncker Commission launched a revision of Directive 96/71/EC on the posting of workers, which has been adopted by the co-legislators as Directive 2018/957/EU. In order to ensure that the rules on posting are applied uniformly, the co-legislators also adopted Directive 2014/67/EU on the enforcement of Directive 96/71/EC.

This reform of the legal framework aims at ensuring fair labour mobility on the internal market. For that purpose, the Juncker Commission also proposed the establishment of the European Labour Authority (ELA), which has been set up by Regulation (EU) 2019/1149. ELA is tasked to support the enforcement by national authorities of EU legislation on labour mobility, including the rules on posting of workers, facilitate access to information to individuals, employers and social partner organisations, mediate cross-border disputes between national administrations and support cooperation of Member States in tackling undeclared work.

### **1.1. Why do we need this document?**

This document aims at assisting workers, employers and national authorities in understanding the rules on posting of workers, as they have been revised with the adoption of Directive 2014/67/EU and Directive 2018/957/EU. This understanding is essential to ensure that workers are aware of their rights and that the rules are correctly and consistently applied by national authorities and employers throughout the EU.

Please note that national measures transposing Directive 2018/957/EU can only apply from 30 July 2020.

To make it easier to consult, the document is organised by clarifying questions in the order in which they usually arise: what to do before the posting of workers, during the posting, and after the posting. This document is a practical guide on posting. It does not constitute a legal interpretation of the provisions of the Directives.

### **1.2. The rules at a glance**

Articles 56 to 62 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') lay down the freedom to provide services within the Union. Article 57 specifies that the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals. The freedom to provide services includes the right of a service provider established in a Member State to temporarily post workers to another Member State in order to provide a service.

Under the case law of the Court, the freedom to provide services may be restricted in order to attain a legitimate objective, such as the protection of workers, provided that the measures concerned are suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it.

The EU legislative framework on posting of workers is composed of different acts.

As far as the terms and conditions of employment of posted workers are concerned, three Directives (*hereafter “the Posting of Workers Directives” when referring to all three Directives*) are in place:

- Directive 96/71/EC concerning the posting of workers in the framework of the provision of services;
- Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’); and
- Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The provisions of this Directive are applicable only as from 30 July 2020. Until that date, Directive 96/71/EC remains applicable in its original wording.

As far as social security is concerned, the insurability of posted workers (within the meaning of Directive 96/71/EC) is regulated by Articles 12, 13 and 16 of Regulation (EC) No 883/2004 on the coordination of social security systems, and its implementing Regulation (EC) No 987/2009. These Regulations provide a legal framework which determine in which Member State the posted worker is to be insured, as well as other conditions which need to be satisfied in order for the person to remain covered by the social security legislation of the Member State where he/she normally pursues an activity as an employed person.

The recently adopted Directive 2019/1152/EU on transparent and predictable working conditions in the European Union requires each worker to be informed of the essential aspects of the employment relationship. As from 1 August 2022, it replaces the obligation to provide information under Directive 91/533/EEC. Article 6 of Directive 2019/1152/EU requires employers to provide that information to workers sent to another Member State before their departure, also specifying additional information that must be provided to workers posted within the meaning of Directive 96/71/EC (see question 2.19).

## **2. BEFORE THE POSTING**

### **2.1. When can an undertaking envisage posting workers to another Member State?**

Posting of workers occurs in the context of cross-border provision of services. Only undertakings legally established in one Member State (the “home Member State”) can make use of the freedom to provide services. An undertaking is established when it pursues an economic activity for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out.

As regards the terms and conditions of employment, the posting of workers is covered by Directive 96/71/EC if it occurs, in the context of a cross-border provision of services and for a limited period, by an undertaking that is in one of the following situations:

(a) it has concluded a contract of services with a party for whom the services are intended, operating in another Member State (“the host Member State”) (*hereafter “posting under a contract of services”*); or

(b) it wants to post a worker to an establishment or to an undertaking owned by the same group in the territory of another Member State (*hereafter “intra-group posting”*); or

(c) it is a temporary employment undertaking or a placement agency and plans to hire out a worker to a user undertaking established or operating in the territory of another Member State (*hereafter “temporary agency posting”*).

In all these cases, the undertaking may post a worker under Directive 96/71/EC only if an employment relationship exists with the worker during the whole period of posting.

## **2.2. Do I need to comply with any formalities before starting the provision of services in another Member State?**

Yes.

For social security purposes, Regulations 883/2004 and 987/2009 on the coordination of social security system foresee formalities in the home Member State: an undertaking that posts a worker to another Member State must contact the competent institution in the posting State and wherever possible this should be done in advance of the posting. The competent institution must provide the worker with an attestation A1, certifying that the worker comes, up to a specific date, within the special rules for posted workers under Regulations 883/2004 and 987/2009. The attestation should also indicate, where appropriate, under what conditions the worker comes within the special rules for posted workers. See also the Practical Guide on the applicable legislation in the EU, the EEA and Switzerland<sup>1</sup>.

As far as the terms and conditions of employment of posted workers are concerned, Directive 2014/67/EU allows the host Member State, but does not require it, to impose further administrative requirements and control measures, provided that these are justified and proportionate in accordance with EU law.

Article 9(1) of Directive 2014/67/EU thus allows the host Member State to require in particular the following administrative measures **before the posting**:

- an obligation to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision containing the relevant information necessary in order to allow factual controls at the workplace, including:
  - the identity of the service provider;
  - the anticipated number of clearly identifiable posted workers;
  - the person of liaison and the contact person;
  - the anticipated duration, envisaged beginning and end date of the posting;
  - the address(es) of the workplace; and

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<sup>1</sup> Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, available here: <http://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>

- and the nature of the services justifying the posting.
- an obligation to designate a person to liaise with the competent authorities in the host Member State;
- an obligation to designate a contact person who can act as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State.

Please note that host Member States are entitled to put in place other administrative requirements provided they are justified and proportionate.

### **IN PRACTICE**

Most of the Member States have put in place an electronic system for the prior declaration.

To see which of these measures are in place in different Member States please consult this document<sup>2</sup> or visit single national official websites which can be accessed from the pages of Your Europe: [https://europa.eu/youreurope/business/human-resources/posted-workers/posting-staff-abroad/index\\_en.htm](https://europa.eu/youreurope/business/human-resources/posted-workers/posting-staff-abroad/index_en.htm)

### **2.3. I am envisaging posting workers for a very short duration. Are the same rules applicable?**

As far as the terms and conditions of employment of posted workers are concerned, Directive 96/71/EC applies to all postings, irrespective of their duration. However, some provisions of the Directive are not applicable to a short-term posting or allow host Member States not to apply their rules to postings of short duration.

First of all, there is a mandatory exception in cases of initial assembly and/or first installation of goods when the posting does not exceed eight days. In these cases, the rules of the Directive on minimum paid annual leave and remuneration do not apply (the exception does not concern the construction sector).

Second, there are the options for host Member States

- to decide, after consultation of social partners, not to apply the rules on minimum paid annual leave and remuneration when the length of the posting does not exceed one month over a reference period of one year;
- to allow exceptions from the rule on remuneration made by collective agreements to postings under a contract of services or intra-group postings where the length of the posting does not exceed one month. Note that this is not possible for temporary agency posting.
- not to apply the rules on minimum paid annual leave and remuneration on the grounds that the amount of work to be done is not significant. Note that this is not possible for temporary agency posting.

The above mentioned periods are calculated over a reference period of one year. For the purpose of such calculations, account shall be taken of any previous periods for which the post has been filled by a posted worker.

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<sup>2</sup> Link to the Implementation Report Annex I

Note that all the other provisions of Directive 96/71/EC remain applicable to the workers concerned.

Please note that some host Member States have exempted short-term postings or other types of postings from certain obligations that they impose as national control measure under Article 9 of the Directive 2014/67/EU, in particular from the obligation to make the declaration prior to the posting.

### DEROGATIONS IN PRACTICE

#### BELGIUM

Before posting workers to Belgium, the cross-border service provider must make a declaration through the [Limosa](#) platform.

Nevertheless, some activities are exempted from the obligation to make the declaration, in particular:

- workers in the international transport sector for passengers and goods (except inland transport);
- workers attending meetings with a closed attendee list (strategic negotiations, contract negotiations with clients, performance reviews, etc.);
- specialised technicians required to carry out urgent maintenance or repair work on machines or equipment (for less than 5 days per month).
- athletes: workers in foreign companies if travelling for an international sports competition.
- artists with an international reputation, if their stay does not exceed 21 days per quarter.
- Scientists participating in a scientific programme at a host university or scientific institute, provided the stay does not exceed 3 months per calendar year.

For social security rules concerning short term postings, see question 2.4.

#### **2.4. What about “business trips” to another Member State? Are the rules on posting applicable to any mission abroad of workers?**

Workers who are sent temporarily to work in another Member State, but **do not provide services** there, are not posted workers. This is the case, for example, of workers on business trips (when no service is provided), attending conferences, meetings, fairs, following training etc. Such workers are not covered by the Posting of Workers Directives and the administrative requirements and control measures set out in Article 9 of Directive 2014/67/EU are therefore not applicable to them.

Please note that, as far as the coordination of social security is concerned, Regulations (EC) No 883/2004 and 987/2009 provide that, for every cross-border work-related activity (including “business trips”) the employer, or any self-employed person concerned, is under the obligation to notify the competent (home) Member State, whenever possible in advance, and obtain a portable document A1 (PD A1). That

obligation covers any economic activity, even if only of short duration. These Regulations do not provide for any exceptions for business trips either<sup>3</sup>.

## **2.5. Can a third-country national be posted to a Member State?**

Yes. If a third-country national is legally residing and working in a Member State, the employer can post that worker to another Member State under the same conditions as a Union citizen.

As far as the terms and conditions of employment are concerned, the Posting of Workers Directives apply fully to such workers.

The European Court of Justice has made clear in *Van der Elst* (C-43/93) that host Member States are not entitled to require a work permit for third-country nationals posted by an undertaking established in another Member State.

In the area of social security coordination, third country nationals are covered by Regulation (EU) No 1231/2010, provided that they are legally resident (legally staying and working) in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State, and therefore they can be considered posted under the social security coordination rules under the same conditions as EU nationals.

## **2.6. What does EU law provide for concerning the terms and conditions of employment of posted workers?**

Directive 96/71/EC as amended by Directive 2018/957/EU (applicable from 30 July 2020), lists the terms and conditions of employment of the host Member State that must be granted to posted workers:

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual leave;
- (c) remuneration<sup>4</sup>, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- (g) equality of treatment between men and women and other provisions on non-discrimination;
- (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work<sup>5</sup>;
- (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons<sup>6</sup>.

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<sup>3</sup> The formalities regarding business trips are currently being discussed under the revision of the EU Social Security Coordination rules.

<sup>4</sup> From 30 July 2020. Until that date, "minimum rates of pay".

<sup>5</sup> From 30 July 2020.

This list is exhaustive with only one exception: a host Member State may, in compliance with the Treaty, and on a basis of equal treatment, also require application of terms and conditions of employment on matters other than those referred to above **in the case of public policy provisions**.

The notion of policy provisions must be interpreted strictly. It can only apply to national provisions compliance of which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.

Finally, it is worth noting that the Directives list the elements of the law of the host Member State that apply to posted workers but do not harmonise their substance. It is therefore up to the Member State, for example, to determine the level and the constituent elements of remuneration and to decide whether and how national law regulates all the terms and conditions of employment listed in Article 3(1).

## **2.7. What does “remuneration” mean in the context of posting of workers?**

Directive 2018/957/EU does not define “remuneration”<sup>7</sup>. However, it specifies that remuneration, as far as posted workers are concerned, includes “all the constituent elements of remuneration rendered mandatory by national law (...) or by collective agreements which (...) have been declared universally applicable”.

Directive 2018/957/EU provides that the concept of remuneration is determined at the appropriate level i.e. by the national law and/or practice of the host Member State. The Directive does therefore not attempt to determine the notion of remuneration or to define any of its constituent elements.

The remuneration (with its different elements) of a worker of the host Member State may be set by rules of different nature: legislative and other regulatory provisions, different types of collective agreements (national, sectoral, local, at the level of the undertaking), and the individual employment contract agreed between employer and employee.

For posted workers only the elements of remuneration mandatorily applicable to all workers in the geographical area or sector are to be considered as remuneration. Mandatorily applicable are considered those elements, which are stated by national law or by collective agreements made universally applicable or that otherwise apply to all local workers in the geographical area or sector concerned, in accordance with Article 3(8).

Note that there are specific rules for temporary agency workers, see question 2.8.

### **IN PRACTICE**

Under Directive 96/71/EC, only “minimum rates of pay” were granted to posted workers.

With Directive 2018/957/EU, posted workers are entitled to all the elements of

<sup>6</sup> From 30 July 2020.

<sup>7</sup> Please note that the concept of “remuneration” provided for by Directive 2018/957/EU only applies from 30 July 2020. Until that date, posted workers are entitled to “minimum rates of pay” as provided by Directive 96/71/EC.

remuneration rendered mandatory by law or by collective agreement made universally applicable or that otherwise applies in accordance with Article 3(8), whatever their denomination.

For instance, in Austria, in the construction sector, this includes overtime rates, allowance for working at night, allowance for working on Sundays, or on public holidays, holiday remuneration, extra holiday allowance, end of the year bonus and the 13th month bonus. Bonuses for dirty, heavy or dangerous work would be applicable to posted workers, provided they meet the conditions to benefit from them.

## **2.8. Are there specific terms and conditions of employment for posted temporary agency workers?**

Yes. Directive 2018/957/EU lays down specific rules for posted temporary agency workers. The employer (the temporary agency) must guarantee to posted temporary agency workers the terms and conditions of employment which apply pursuant to article 5 of Directive 2008/104/EC on temporary agency work, i.e, in principle at least those that would apply if they had been recruited directly by the user undertaking to occupy the same job.

Member States may also require that, in addition to the provisions of Article 5 of Directive 2008/104/EC, posted temporary agency workers benefit from any more favourable terms and conditions that apply to temporary agency workers at national level.

### **IN PRACTICE**

The hiring out of workers by a temporary work or placement agency established in a Member State other than the Member State of the user undertaking is a specific form of posting.

The Court held, in *Rush Portuguesa*, that an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State.

This special link with the labour market of the host Member State justifies that workers posted through temporary work agencies benefit from the principle of equal treatment.

## **2.9. Are collective agreements at the level of the user undertaking (although they are not universally applicable) also applicable to posted temporary agency workers?**

Yes, contrary to other types of posted workers, the terms and conditions of employment of posted temporary agency workers are not limited to those set out by law or universally applicable collective agreements. If there is a collective agreement at the level of the user undertaking, it must be applied to national temporary agency workers by virtue of Directive 2008/104/EC on temporary agency work – unless the host Member State applies one or several of the alternatives to this rule provided for in that Directive - and to posted temporary agency workers in accordance with Directive 2018/957/EU.

**2.10. How is the temporary agency supposed to know the terms and conditions of employment applied in the user undertaking (essentially when set out in collective agreement at the level of the undertaking)?**

The user undertaking is obliged to inform the temporary agency of the terms and conditions of employment that it applies regarding the working conditions and remuneration.

**2.11. Can the user undertaking post to another Member State a posted temporary agency worker (“chain posting”)?**

As regards the terms and conditions of employment, when a worker posted by a temporary agency to a user undertaking is sent by the user undertaking to another Member State, the worker is considered as being posted by the temporary agency with which the worker has the employment relationship.

The temporary agency must therefore comply with all the provisions of the Posting of Workers Directives, including all the relevant administrative requirements and control measures.

In order for the temporary agency to be able to comply with the above mentioned obligations, the user undertaking must inform the temporary agency in due time before the posted temporary agency worker starts carrying out tasks in another Member State.

**IN PRACTICE**

A temporary work agency established in Member State A hired out a worker to a user undertaking in Member State B. One month later, the user undertaking posts the same worker to Member State C in the context of a contract of services.

In such a case, the authorities of Member State C must consider that it is the temporary agency established in Member State A that has made the posting. The temporary agency is responsible for complying with the right terms and conditions of employment, but, for example, also for making the declaration prior to posting.

In such a case, the worker is entitled to the more favourable terms and conditions of employment of the two, i.e.:

- either the terms and conditions of employment applicable in the user undertaking in Member State B;
- or the terms and conditions of employment applicable in Member State C.

For social security coordination rules concerning situations where workers are recruited in a Member State for posting in another; workers posted to work at several undertakings; and situations where the social security rules on posting cannot be applied please see the Practical Guide on applicable legislation in the EU, the EEA and Switzerland<sup>8</sup> points 5, 6, and 7.

<sup>8</sup> <http://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>

## **2.12. I am envisaging to post workers for a long period. Which specific rules apply to long-term postings?**

In case of long-term postings, the link between the labour market of the host Member State and the workers posted to that Member State is reinforced by Directive 2018/957/EU, which provides for the application of **all of the the mandatorily applicable terms and conditions of employment of the host Member State** once the actual duration of the posting exceeds 12 months (or 18 months following a **motivated notification** from the employer)<sup>9</sup>.

There are two exceptions to this rule as mentioned above: the host Member State's procedures and conditions of conclusion and termination of the employment contract and the rules on supplementary occupational pension schemes do not apply to workers posted for long term according to the host Member State's rules.

In the area of social security coordination, Regulations (EC) No 883/2004 and 987/2009 do not make any distinction depending on the duration of the posting period. However, if the anticipated duration of the work or activity in the receiving Member State exceeds 24 months, for the person concerned to remain covered by the social security legislation of the sending Member State, an extension has to be agreed according to Article 16 of Regulation (EC) No 883/2004. If such agreement under Article 16 is not made to extend the application of the application of the legislation of the posting State, the legislation of the Member State where the person is actually working will become applicable as soon as the posting period ended. For more information, please refer to the Practical Guide on the applicable legislation in the EU, the EEA and Switzerland, point 12<sup>10</sup>.

## **2.13. What is a motivated notification?**

Directive 2018/957/EU<sup>11</sup> provides that Member States shall extend the period of 12 months to 18 months when the service provider submits a motivated notification.

Please note that the extension cannot be subject to an authorisation procedure (it is a "notification", not a "request"), but Member States may require that service providers give reasons for the extension.

## **2.14. Where can I find information on the terms and conditions of employment of posted workers?**

Host Member States have the obligation according to Article 5 of Directive 2014/67/EU to create and maintain updated a single national website containing the information on the terms and conditions of employment applicable to workers posted to their territory. This information must be made generally available free of charge, in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means and in formats and in accordance with web accessibility standards that ensure access to persons with disabilities. The website should include, where possible, links to existing websites and other contact points, in particular the relevant social partners.

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<sup>9</sup> Applicable from 30 July 2020.

<sup>10</sup> <http://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>

<sup>11</sup> Applicable from 30 July 2020.

It should be noted that Directive 2018/957/EU<sup>12</sup> provides that when the information on the single national website does not indicate which terms and conditions of employment are to be applied, that circumstance should be taken into account in determining penalties in the event of infringements of the national provisions adopted pursuant to the Directive.

In most cases, the undertaking envisaging the posting has a contact point in the host Member State: the undertaking with which the contract of services was (or is to be) signed, the undertaking of the same group established in the home Member State or the user undertaking. This could be the first source of information on the terms and conditions of employment applicable during the posting.

Please note that the user undertaking has the obligation to inform the temporary agency of the terms and conditions of employment that it applies regarding the working conditions and remuneration.

### **2.15. Are Member States obliged to indicate the amount of remuneration to which workers posted to their territory are entitled?**

No, the host Member State does not have the obligation under Directive 2014/67/EU to provide the actual remuneration to be paid. Member States have the obligation to provide the information on the terms and conditions of employment, including the constituent elements of remuneration to be applied to workers posted to their territory. But it remains the responsibility of the employer to establish in each individual case how much a posted worker must be paid, based on this information.

### **2.16. Which kind of collective agreements should be taken into account?**

There are two categories of collective agreements of the host Member State that are to be applied to posted workers:

- those which have been made universally applicable by the competent national authorities;
- those which are generally applicable to all similar undertakings of the geographical area, profession or sector concerned or which have been concluded by the most representative social partners at national level and which are applied throughout national territory.

The latter category of collective agreements is only applicable to the extent that their application to the posting undertakings ensures equality of treatment defined as follows:

- national undertakings in a similar position are subject, in the place in question or in the sector concerned, to the same obligations as cross-border undertakings;
- national undertakings are required to fulfil such obligations with the same effects as cross-border undertakings.

It is up to the host Member State to identify which collective agreements comply with the above mentioned criteria. As mentioned in question 2.14, Member States must publish the information on the terms and conditions of employment applicable to posted workers on the single official national website, including stemming from collective agreements

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<sup>12</sup> Applicable from 30 July 2020.

made universally applicable by national authorities or because they comply with the above mentioned conditions.

Note that there are specific rules for temporary agency workers, please see question 2.8.

**2.17. Are Member States obliged to provide in the single official national website the text of any collective agreement applicable to posted workers?**

Member States have the obligation to provide the information on the terms and conditions of employment to be applied to workers posted to their territory, therefore including any collective agreement that meets the conditions to be applied to posted workers (see question 2.14).

Regarding collective agreements, Directive 2014/67/EU<sup>13</sup> specifies that Member States must make generally available on the single official national website information on:

- 1) which collective agreements are applicable and
- 2) to whom they are applicable, and
- 3) which terms and conditions of employment are to be applied by service providers from other Member States, including where possible, links to existing websites and other contact points, in particular the relevant social partners.

There is no explicit obligation for the text of the collective agreements to be available on the single national website, either in full or as a summary. But the single national website does need to allow cross-border service providers to identify easily which collective agreements are applicable in their case. The information provided should also cover the constituent elements of remuneration, the method for its calculation, and, where relevant, the qualifying criteria for classification in the different wage categories.

Some Member States go further than what is required by Directive 2014/67/EU and provide the text of collective agreements translated into several languages and/or summarised for an easier access to the relevant provisions.

**2.18. Can an employer post workers recently recruited?**

As regards the terms and conditions of employment, Directive 96/71/EC requires that there is an employment relationship during the whole period of posting between the worker posted and the employer making the posting. The Directive therefore applies to posted workers even when the employment relationship was not established a certain time before the posting, provided the employment contract exists from the start to the end of the posting assignment.

As regards the coordination of social security, under Regulations 883/2004 and 987/2009 a person recruited with a view to being posted to another Member State will be considered as remaining affiliated to the social security of the Member State in which the employer is established only if, immediately before the start of his employment, the person concerned is already subject to the legislation of that Member State. In practice, the Administrative Commission for the coordination of social security systems considers

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<sup>13</sup> Applicable from 30 July 2020.

that a worker satisfies such requirement if he or she has been affiliated to the legislation of the sending Member State for at least one month before the start of the posting. See Decision A2 of the Administrative Commission.<sup>14</sup>

### **2.19. Which information should the employer give to the worker before the posting?**

Under EU law, the recently adopted Directive (EU) 2019/1152 on transparent and predictable working conditions requires employers who envisage to post workers to another Member State to give them in writing, before the worker's departure, information on<sup>15</sup>:

- the country or countries in which the work abroad is to be performed;
- the anticipated duration of the work abroad;
- the currency to be used for the payment of remuneration;
- where applicable, the benefits in cash or kind relating to the work assignments;
- information as to whether repatriation is provided for, and if so, the conditions governing the worker's repatriation.
- the remuneration to which the worker is entitled in accordance with the applicable law of the host Member State;
- where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging;
- the link to the single official national website developed by the host Member State (see question 2.14).

This information is mandatory for all workers posted for a consecutive period of more than four weeks. Member States may extend the information requirements to workers posted for a shorter period.

This obligation exists in addition to the requirement to inform workers on the essential aspects of their employment relationship, including the identity of the social security institutions receiving the social contributions, as set out in Article 4 of the Directive on transparent and predictable working conditions.

### **2.20. Does the employer have to pay or reimburse the travel costs for posted workers?**

Posting of workers is undertaken at the initiative and in the interest of the employer. It is therefore logic that the employer supports the additional costs linked with the displacement from the usual place of work in the home Member State to the working place in the host Member State.

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<sup>14</sup> [https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32010D0424\(02\)](https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32010D0424(02))

<sup>15</sup> The rights and obligations set out in this Directive shall apply to all employment relationships by 1 August 2022. However, an employer shall provide the information referred to only upon the request of a worker who is already employed on that date.

Directive 2018/957/EU introduced a provision according to which the employer must reimburse the posted worker for travel, board and lodging expenditure in accordance with the national law and/or practice applicable to the employment relationship, which is, in general, the home Member State's law and/or practice.

It should be noted that the amounts paid by the employer (or the reimbursements made) concerning travel, board and lodging are not part of remuneration. They are therefore not taken into account when comparing the amounts actually paid to the worker and the amounts due in accordance with host Member State law: they are paid or reimbursed on top of the remuneration (see question 3.5).

Note that, as mentioned in question 2.19, workers must be informed about any arrangements for reimbursing expenditure on travel, board and lodging.

### **2.21. Which terms and conditions of employment are applicable to workers on “business trips”**

The terms and conditions of employment of workers who do not fall within the notion of posted worker are not regulated by the Posting of Workers Directives.

Workers carrying out activities in the host Member State but who do not qualify as posted workers may be in very different situations and it is impossible to generalise on the terms and conditions of employment applicable to them: the competent authorities of the host Member State will need to undertake a case-by-case assessment and decide on the basis of all the factual elements of each case.

The applicable legislation will have to be determined in accordance with the Regulation on the law applicable to contractual obligations (*Rome I*). This Regulation sets the principle of the freedom of choice of the applicable law, but specifies that such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law, that in the absence of choice would have been applicable. If no choice has been made on the law applicable to the employment contract, the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract will be applicable. The country where the work is habitually carried out shall not be deemed to have changed if the worker is temporarily employed in another country.

It should nevertheless be noted that, where it is established that an undertaking is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of the Posting of Workers Directives, the Member State where the work is carried out must ensure that the worker benefits from the relevant national law and practice and is **in any case not subject to less favourable conditions than those applicable to posted workers**.

For social security rules concerning business trips, see question 2.4.

### 3. DURING THE POSTING

#### 3.1. The employer of the posted workers has been approached by a trade union to engage into collective bargaining. Is this in accordance with EU law?

The service provider may be approached by the trade unions of the host Member State to engage into a collective bargaining on, for instance, the remuneration to be granted to the posted workers. This is typically the case in Sweden and Denmark.

Please note that Directive 2014/67/EU allows the host Member State to require the designation of a contact person through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State.

Without prejudice to the autonomy of social partners, paragraphs (1) and (1a) of Article 3 of Directive 96/71/EC as amended by Directive 2018/957/EU remain applicable in such a situation and the collective bargaining should concern the items mentioned in these provisions.

#### 3.2. How can Member States identify a non-genuine posting?

In order to check whether a worker qualifies as a posted worker, Member States must make an overall assessment, taking into account all factual elements. For example, in order to determine whether an undertaking genuinely performs **substantial activities** in the Member State from which the posting takes place, pursuant to Article 4(2) of Directive 2014/67/EU, Member States may take into account, in particular:

- the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions, etc.
- the place where posted workers are recruited and from which they are posted;
- the place where the undertaking performs its substantial business activity and where it employs administrative staff;
- the number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and SMEs.

In order to assess the **temporary nature** of the activity carried out by the posted worker, pursuant to Article 4(3) of Directive 2014/67/EU, Member States may assess, in particular:

- whether the work is carried out for a limited period of time in the host Member State;
- whether the posting takes place to a Member State different from the country where the worker habitually carries out his or her work;
- whether the posted worker returns to or is expected to resume working in the home Member State;

- whether travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
- any previous periods during which the post was filled by the same or by another posted worker.

According to Article 4 of Directive 2014/67/EU, those elements are indicative factors in the overall assessment and should therefore not be considered in isolation.

### **3.3. In case of inspection, which documents must be available?**

Directive 2014/67/EU allows the host Member State to impose:

- an obligation to keep or make available and/or retain copies, in paper or electronic form, of the employment contract, payslips, time-sheets and proof of payment of wages or copies of equivalent documents
- an obligation to provide a translation of the documents referred to above into the official language of the host Member State or into (an)other language(s) accepted by the host Member State.

As far as the coordination of social security is concerned, Regulations (EC) No 883/2004 and 987/2009 provide that, for every cross-border work-related activity (including “business trips”) the employer, or any self-employed person concerned, is under the obligation to notify the competent (home) Member State, whenever possible in advance, and obtain a portable document A1 (PD A1). See also the Practical Guide on the applicable legislation in the EU, the EEA and Switzerland, point 11.

### **3.4. The labour inspectors of the host Member States refuse to consider the posting allowance as part of remuneration. Is this correct under EU law?**

According to the Directive 2018/957/EU the employer of the posted worker must guarantee that the amount actually paid to the worker during the posting is at least equivalent to the “remuneration”<sup>16</sup> required under the rules of the host Member State. In order to understand which amount is due to be paid, a comparison between the amount actually paid to the worker and the amount due under the host Member State rules, is needed and it must be based on the gross remuneration of national workers (i.e. before contributions, deductions or taxes), rather than on the individual constituent elements of remuneration.

Remuneration includes any allowances specific to posting unless they are paid in reimbursement or compensation of expenditure on travel, board and lodging.

Reimbursement or compensation of expenditure on travel, board and lodging are not considered as remuneration and therefore not taken into account for the comparison. If it does not appear clearly which elements of the posting allowance are paid in reimbursement of expenditure actually incurred because of the posting, then the entire allowance is considered to be paid in reimbursement of expenditure, not remuneration.

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<sup>16</sup> As from 30 July 2020. Until that date, “minimum rates of pay”.

## IN PRACTICE

In order to apply the Posting of Workers Directives, two sets of rules may need to be taken into account:

1. the rules of the host Member State which determine the required "remuneration", including, as the case may be, the rules set out in collective agreements made universally applicable or that otherwise apply;
2. the rules of the home Member State determining the remuneration paid to the worker, including the law, any applicable collective agreement and the individual employment contract.

The employer must ensure that the amount paid to the posted worker is at least equivalent to the remuneration required under the rules of the host Member State.

The total gross amounts of remuneration should be compared, rather than any individual constituent elements of remuneration.

When making this comparison, certain elements paid to the worker in accordance with home Member State rules cannot be taken into account in the host Member State as elements of the required remuneration: this is the case of payments for overtime, payments in respect of expenses actually incurred because of posting and any payment which compensates the worker for having carried out additional work or work under particular conditions.

Below some examples of such comparison.

Gross amount to be paid in accordance with Article 3(1) – host Member State		Gross amount actually paid	
Wage for the category	1550	Wage	500
		Posting allowance	1100
		Compensation for board and lodging	500
Total	1550		2100

In this example, the amount paid complies with the requirement of Article 3(1). The compensation for costs is not taken into account but the wage and posting allowance are together higher than the amount due under host Member State rules.

Gross amount to be paid in accordance with Article 3(1) – host Member State		Gross amount actually paid	
Wage for the category	1550	Wage	800
Daily allowance	400	Posting allowance	900
Compensation for traveling time	150	Compensation for lodging costs	400

Total	2100		2100
In this example, the amount paid does not comply with the requirement of Article 3(1) since the compensation for lodging costs cannot be taken into account and the amount paid is therefore inferior to the amount due under host Member State rules.			
Gross amount to be paid in accordance with Article 3(1) – host Member State		Gross amount actually paid	
Wage for the category	1550	Wage	800
		Posting allowance	600
		Payment for overtime work and work on Sundays	400
Total	1550		1800
In this example, the amount paid does not comply with the requirement of Article 3(1): if an employer requires a worker to carry out additional work or to work under particular conditions, compensation for that additional service is not taken into account for the purpose of calculating the remuneration.			

### 3.5. Can my employer deduct from my salary the costs of lodging and boarding?

No. Reimbursement or compensation of expenditure related to travel, board and lodging is provided in addition to the remuneration. It can therefore not be deducted by the employer from the remuneration paid to the worker.

### 3.6. Can the host Member State request that I comply with provisions of that Member State on the reimbursement of expenditure on travel, board and lodging?

Directive 2018/957/EU states that employers must reimburse the posted worker for expenditure on travel, board and lodging in accordance with the national law and/or practice applicable to the employment relationship, which is, in general, the home Member State's law and/or practice. While expressing the principle according to which such expenses must be supported by the employer, the Directive thus leaves it to the national law and or the practice (including collective agreements at any level) of the home Member State to regulate the issue.

Nevertheless, a posted worker who, **during the posting assignment**, is required to travel to and from the regular place of work in the host Member State, or is temporarily sent by the employer from that regular place of work to another place of work is entitled to any allowance or reimbursement of expenses required, in the host Member State, by law or by any collective agreement made universally applicable or that otherwise applies in accordance with Article 3(8) of Directive 96/71/EC as amended.

## IN PRACTICE

A Portuguese worker is posted for six months to a building site in Ostend (Belgium).

During the posting, the worker is sent for a week to Liège (Belgium) to attend a vocational training session.

The board and lodging allowances provided by the generally binding collective agreement in Belgium for the construction sector are to be paid to the posted worker for the time of working outside of the regular place of work (Ostend, in this example) in the host Member State.

### **3.7. In case of a subcontracting chain, who can be made liable for compliance with requirements?**

The rules on subcontracting liability are set out in Article 12 of Directive 2014/67/EU and can be summarised as follows:

- Member States may put in place, on a non-discriminatory and proportionate basis, a subcontracting liability, to ensure that, in subcontracting chains, the contractor of which the employer is a direct subcontractor may be held liable by the posted worker with respect to any outstanding net remuneration, in addition to or in place of the employer;
- as regards the construction sector, Member States must provide for such subcontracting liability;
- Member States may provide for more stringent liability rules on a non-discriminatory and proportionate basis with regard to the scope and range of subcontracting liability;
- instead of the liability rules above mentioned, Member States may put in place other appropriate enforcement measures, which enable effective and proportionate sanctions against the contractor.

In short, a system of subcontracting liability must be in place for the construction sector making the contractor in a direct subcontracting relationship liable. In other economic sectors, Member States may put in place a system of subcontracting liability, even with an extended scope or range, provided it is non-discriminatory and proportionate.

It should be noted that the Directive allows Member States to exempt from joint liability a contractor that has undertaken “due diligence obligations”, in accordance with national law.

### **3.8. Is it possible to put in place a subcontracting liability system only to cross-border situations?**

As mentioned in question 3.7, any system of subcontracting liability put in place in accordance with Directive 2014/67/EU must be non-discriminatory and proportionate. Accordingly, Member States may not set up a system of subcontracting liability which applies only to cross-border service providers, as this would directly discriminate against those service providers. Such system could discourage customers and contractors to contract or subcontract with undertakings established in other Member States.

**3.9. I am not being paid properly by my employer. Can I lodge a complaint or initiate judicial proceedings in the host Member State?**

Yes. Member States must ensure that there are effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to institute judicial or administrative proceedings, also in the host Member State.

Member States must allow trade unions and other third parties to engage, on behalf or in support of the posted workers or their employer, and with their approval, in any judicial or administrative proceedings with the objective of enforcing the rights or the obligations stemming from the Posting of Workers Directives.

**3.10. After an inspection, a high sanction has been imposed. Is this in accordance with EU law?**

Directive 2014/67/EU imposes on Member States to put in place appropriate and effective checks and monitoring mechanisms, on a non-discriminatory and proportionate basis.

It also provides that Member States must have in place penalties applicable in the event of infringements of national provisions adopted pursuant to the Directive and must take all the necessary measures to ensure that they are implemented and complied with.

The penalties provided for shall be **effective, proportionate and dissuasive**.

**4. AFTER THE POSTING**

**4.1. Can I lodge a complaint or start judicial proceedings against my employer after the end of the posting assignment? Should I do it in the host or in the home Member State?**

Yes, Directive 2014/67/EU expressly provides that Member States must have in place the mechanisms for lodging complaints or launching judicial proceedings even after the employment relationship has ended, concerning any due entitlements resulting from the contractual relationship between the employer and that posted worker and any loss or damage resulting from any failure to apply the posting rules. Such mechanisms must be available after the posted workers have returned from the Member State to which the posting took place.

**4.2. Can the host Member State request documents pertaining to a posting after the end of the posting?**

Indeed, Directive 2014/67/EU allows Member States to require service providers to provide certain documents (the employment contract, payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages) within a reasonable period of time **after the end of the posting**.