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How will the revision of the Posted Workers Directive impact your assignments?



Introduction

With this brochure, Deloitte intends to keep you updated on the latest policy developments regarding the revision of the Posted Workers Directive (“PWD”).

The topic of posted employees (i.e. “assignees”) and the PWD has always been under the attention but is recently becoming an extremely hot topic again in view of the nearing deadline of 30 July 2020 for transposition of its revision. The information published is scarce and the press is not always fully accurate or complete and may lead to confusion on the impact for employers and employees. Through this webpage, Deloitte will clarify the state of affairs and share all relevant updates on the subject.

You will find an overview of the current PWD as well as an analysis of the main points of its forthcoming revision.

Current EU legislation on Posted Workers

Posted Workers Directive: host state's "hard core set of labour law" applies

In order to guarantee temporary posted employees the protection offered in their host state and with the aim of combating social dumping, [European Directive 96/71/EC](#) (Posted Workers Directive, PWD 1996) was adopted in 1996 by the then European Community.

When assigning employees within the EU, PWD 1996 currently obliges employers to comply with a "hard core set" of labour law provisions in the host state during the assignment period. This hard core consists of national laws and collective bargaining agreements regarding:

- Minimum wage;
- Working time;
- Vacation;
- Health and safety;
- Conditions of hiring out employees;
- Protective measures for pregnant women or women with young children;
- Equal treatment between men and women;
- Other local public policy provisions.

Employees assigned to Belgium are subject to the Belgian terms and conditions of employment that are sanctioned by criminal law. In practice, this means that almost the entire Belgian labour legislation (termination rules excluded), including all generally binding collective bargaining agreements, is applicable to assigned employees as of day one of their assignment to Belgium.

Posted Workers Enforcement Directive: better monitoring of employers' compliance

Since many EU countries continued to struggle in enforcing those minimum employment standards and non-compliance led to unfair competition and cases of social dumping, action was taken at European level in 2014 with the adoption of the Posted Workers [Enforcement Directive](#). The latter aims to improve local compliance with the hard core set of labour law, through general enforcement measures and additional employer's obligations. The latter mainly concern prior notifications of posting, the appointment of a liaison person for the authorities and the retention of social documents.

In Belgium, this was implemented through:

- Introduction of criteria to better define genuine postings;
- The obligation for foreign employers to keep specific social documents available (e.g. employment agreement, payslips, and time-sheets). There are however some exemptions to this obligation (based on the length and/or the nature of the activity) for a 12-month period. The employees of the international transport sector (cabotage operations on the Belgian territory excluded), the employees posted to Belgium for the initial assembly and / or first installation of a property as well as specialised technicians are nevertheless not covered by these exemptions.
- The obligation for foreign employers to appoint a contact person with whom Belgian authorities can liaise (since October 1, 2017, the name of the liaison person has to be mentioned in the Limosa declaration);
- A specific joint liability regarding payment of remuneration in construction sector;
- Specific sanctions against violations of the above rules.

Revision of the Posted Workers Directive: “equal pay for equal work”

EU Commissioner Thyssen proposed to revise the PWD in order to ensure a level playing field between foreign and local employers in the host state. In October 2017, the Council of the EU reached an agreement regarding this proposal. On 28 June 2018, the European Union finally adopted the [European Directive 2018/957](#) (revised Posted Workers Directive) which aims to revise the original PWD from 1996.



The essence of this revision is:

- Introduction of the principle of “equal pay for equal work” between posted and local employees;
- The full application of the host state’s mandatory labour law for assignments exceeding 12 months (extendable to 18 months on the basis of a reasoned notification) with the exception of termination rules and supplementary occupational pension schemes;
- The application of universally applicable collective bargaining agreements to posted employees across all sectors;
- The equal treatment of temporary agency workers and local employees.

What is the impact for employers?

The revision of the PWD will have an impact for all employers assigning employees to the European Economic Area (EEA), i.a. depending on the host state concerned. Global employers should take into account that more national legislation may apply when they assign employees within the EEA.

Member States have the obligation to adapt their national legislation to the revision of the PWD by 30 July 2020 at the latest. Member States can also only apply the new provisions stemming from this revision as of this date. Until that time, the current version of the PWD continues to apply.

I. No impact for social security

We draw your attention to the fact that the revision of the PWD does not have any impact on the EU social security coordination rules provided for by EU Regulation 883/2004. Based on its provisions, an assigned employee remains covered by the home social security scheme during a period of maximum 5 years (with A1 form as proof). This remains unchanged.

II. Equal pay for equal work

At the moment, PWD 1996 provides that an employer is only obliged to comply with the minimum wage of the host state.

The new principle “equal pay for equal work” implies that the remuneration of assigned employees should be at the same level of the salary of their local peers, including the additional salary elements such as bonuses or allowances. This new principle applies irrespective of the duration of the assignment or the amount of working days. In this way, the revision aims at ensuring fair wages and a level playing field in the host state between posting and local companies whilst also maintaining the free movement of services.

For now, it remains still unclear what “equal pay” exactly will mean. Based on our analysis of the revision of the PWD, “equal pay” does not imply that a posted employee will become entitled to an identical salary and benefits package as his local colleagues (e.g. group insurance, hospitalisation, company car, lunch allowances, etc.). Equal pay rather refers to the salary scales and specific allowances applicable due to local legislation or generally binding collective bargaining agreements. For some countries, this is nevertheless a substantial change compared to the current obligation to (merely) comply with the minimum wage level.

In the documents that are published today, the following salary elements are mentioned in the framework of this notion: seniority, 13th month, Christmas bonus, allowance for bad weather, mobility allowance, pay supplement for special works, allowance for wear of tools, allowance for difficult work, meal vouchers or other type of vouchers, etc. Supplementary pension systems are however explicitly excluded from this new notion by PWD 2020.

Generally speaking, the core set-requirement to comply with the “minimum wage” has been changed to the core set-requirement to comply with the “remuneration” rules of the host state. The notion of remuneration is no longer limited to minimum wages.

Example #1

If a Christmas premium is guaranteed to local employees by law or a generally binding collective bargaining agreement, such a premium should be paid to posted employees too, but only insofar it is a mandatory remuneration element according to national law or collective bargaining agreement.

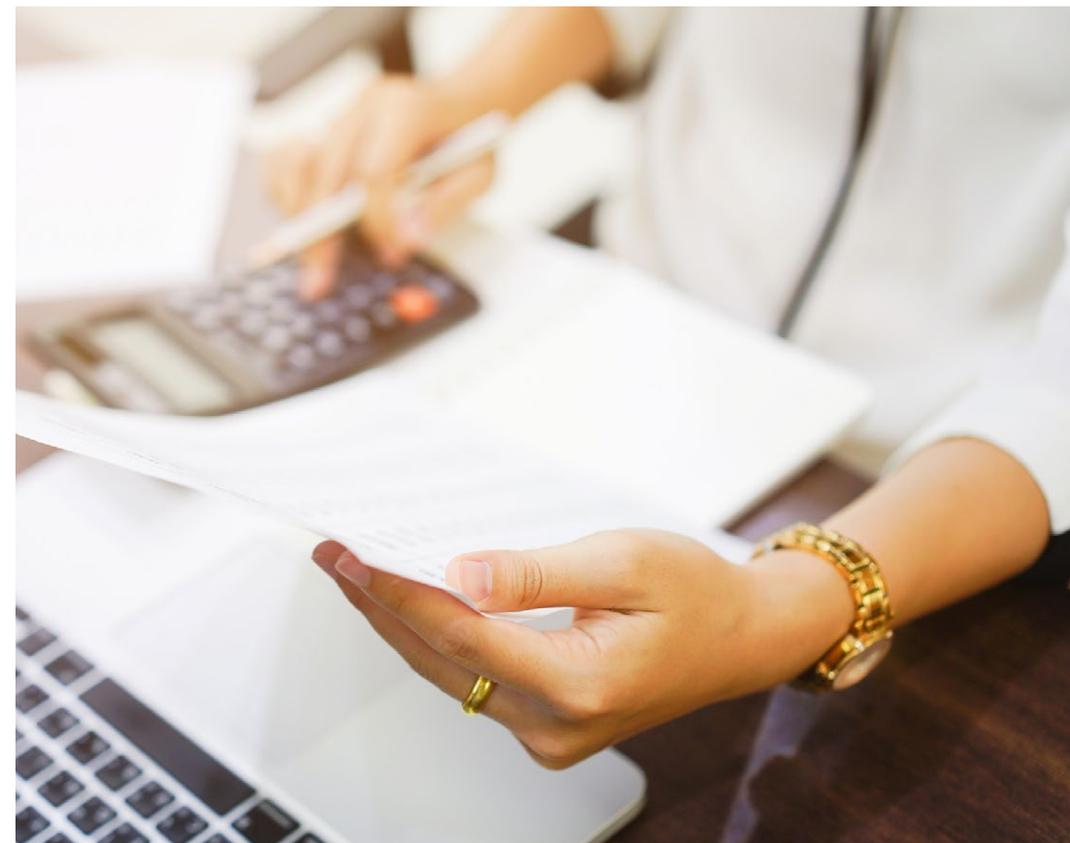
Example #2

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 employees, provided they meet the conditions to benefit from them.

The notion “same level of remuneration” is to be defined by the host state in accordance with its national law and/or practice and will need to include all mandatory remuneration elements (including those stemming from universally applicable collective bargaining agreements). It will therefore be up to the member states to specify in a transparent way the different elements of how remuneration is composed on their territory.

The revision of the PWD additionally states that “remuneration” includes any allowances specific to posting unless they are paid in reimbursement of expenditure on travel, board and lodging. The latter reimbursements are not considered as remuneration and are therefore not taken into account for the comparison. If it is not clear which elements of a posting allowance are paid as reimbursement for expenses due to the posting, then the entire allowance is considered to be a reimbursement and not an element of remuneration. As a result these allowance(s) will not be taken into account for the comparison.

In order to understand which amount is due to be paid, a comparison between the amount actually paid to the employee and the amount due under the host state rules, is needed and it must be based on the gross remuneration of local employees (i.e. before contributions, deductions or taxes), rather than on the individual constituent elements of remuneration.



[See example on the next page](#)

The European Commission has provided some examples of this comparison that can serve as a guideline.

Example

Gross amount to be paid in host state according to revised PWD		Gross amount actually paid	
Wage for the specific employee category	1.550,00 EUR	Wage	500,00 EUR
		Posting Allowance	1.100,00 EUR
		Compensation for board and lodging costs	500,00 EUR
Total	1.550,00 EUR	Total	2.100,00 EUR

In this example, the amount paid complies with the requirement put forward by the revised PWD. The reimbursement of costs is not taken into account, but the wage and posting allowance are together higher (1.600,00 EUR) than the amount due under host Member State rules (1.550,00 EUR).

Gross amount to be paid in host state according to revised PWD		Gross amount actually paid	
Wage for the specific employee category	1.550,00 EUR	Wage	800,00 EUR
		Posting Allowance	900,00 EUR
Daily allowance	400,00 EUR	Compensation for lodging costs	400,00 EUR
Compensation for travel time	150,00 EUR		
Total	2.100,00 EUR	Total	2.100,00 EUR

In this example, the amount paid does not comply with the requirement put forward by the revised PWD. The compensation for lodging costs cannot be taken into account and the amount paid (1.700,00 EUR) is therefore inferior to the amount due under host state's rules (2.100,00 EUR).

For employees assigned to Belgium, there will be no substantial changes. Considering that Belgium has already implemented the PWD in a very broad sense by determining almost the entire Belgian labour law code as applicable to posted employees, which also includes all salary conditions, the revision will have a minimal impact. Only in case “remuneration” would be interpreted as comprising collective bargaining agreements at company level, the revision would have a substantial impact. Although this is currently still unclear, it appears that remuneration will be restricted to general and sectoral collective agreements, which are already to be applied by foreign employers posting employees to Belgium.

III. Full application of the host state’s mandatory labour law after 12 months

Currently there is no clear formal limit to the maximum duration of a posting from a labour law point of view, which leads to a lot of uncertainty. Such a formal limit is therefore introduced by PWD 2020.

After 12 months of assignment not only the hard core set, but the full mandatory labour law provisions of the host state will be applicable with the exception of the termination rules and supplementary occupational retirement pension schemes. Do note that where the contractually chosen labour law is more beneficial to the employee, it will continue to be applicable.

This 12-month period can be extended to 18 months on the basis of a reasoned notification.

Once again, the impact for posted employees to Belgium will be considerably low as currently almost the entire Belgian labour law already needs to be applied prior to the 12 (or 18) month limit. For posting assignments to other EEA countries, the impact can be substantial as we can see in the below example and should be analysed on a case-by-case basis.

Example – Assignment to the Netherlands

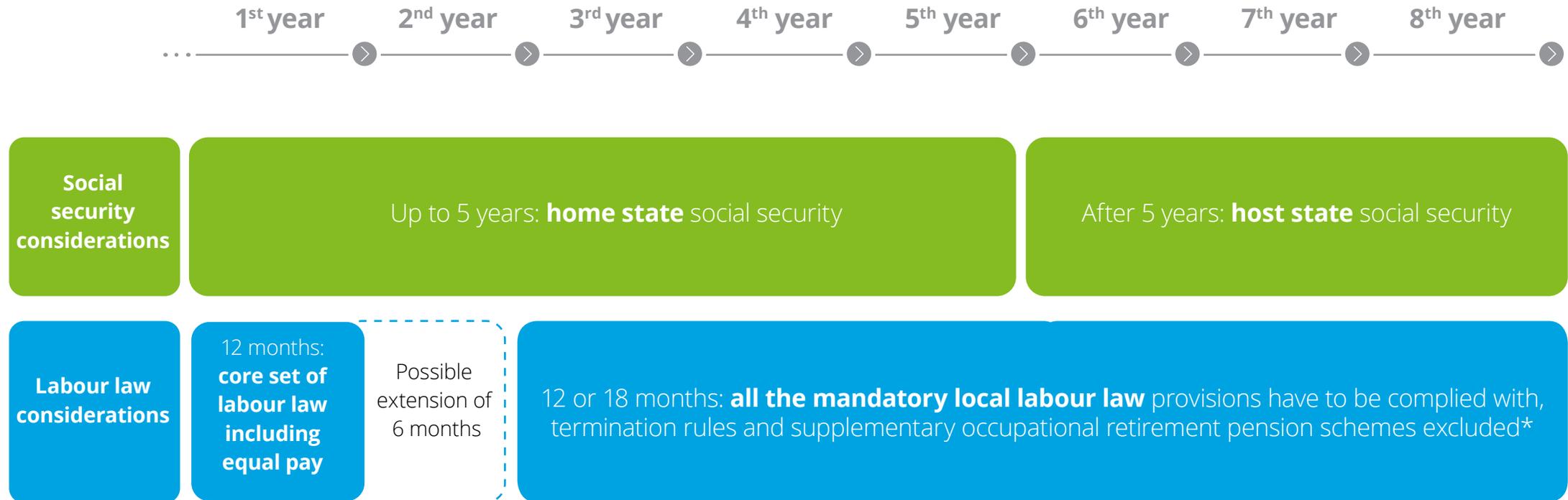
Currently, as of the first day of assignment to the Netherlands, all mandatory core terms of Dutch employment law will be applicable. These (Dutch) employment terms include, amongst others, maximum working hours (general ground rule: max 12 hours per shift; max 60 hours per week), minimum wage (1.653,60 EUR gross as of 1 January 2020), minimum holiday allowance (a gross payment of a minimum of 8% of the annual salary) minimum number of holidays (20, based on fulltime employment). These employment terms or conditions can also be included in (universally binding) collective bargaining agreements.

- Under the future rules, in the first 12 (or 18) month-period, the amount to be paid might be higher than the current entitlement to the minimum wage and minimum holiday allowance. In case of a generally binding collective bargaining agreement, the specific minimum wage scale and certain specific allowances (such as an overtime allowance) will have to be paid to the employee.
- However, certain other allowances (such as a seniority allowance) that are not applicable, will become applicable after 12 (or 18) months.

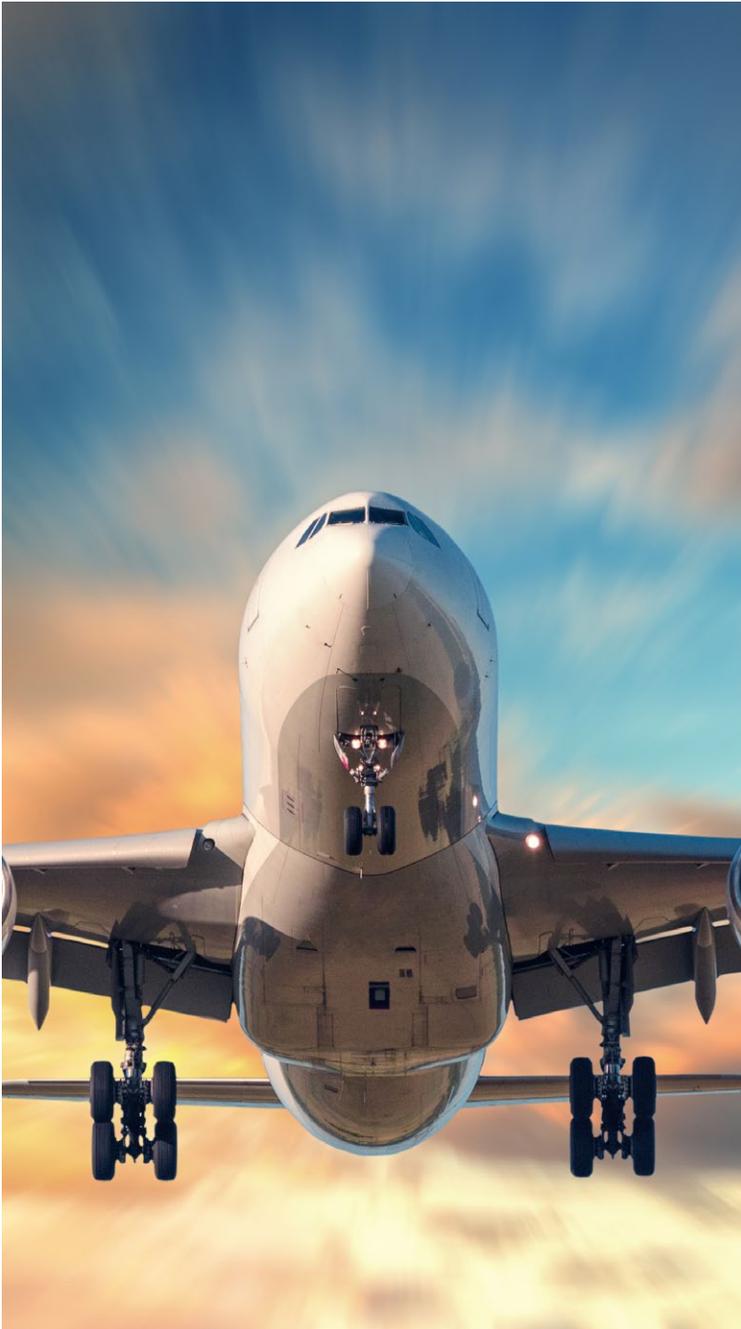
Another example: A Spanish engineer (of 55 years old) is assigned to the Netherlands for a period of one year. A universally binding collective bargaining agreement is applicable with the following relevant rules included: the relevant Dutch wage scale minimum for his job is 1.800,00 EUR (including holiday allowance); an overtime allowance that in a given month amounts to 100,00 EUR; and a seniority allowance that in a given month amounts to 250,00 EUR.

- In the current situation, the Spanish engineer is entitled to the relevant wage scale minimum and the overtime allowance (in total: 1.900,00 EUR).
- As of the implementation of the revision, he would also be entitled to a seniority allowance and, therefore, his salary would amount to 2.150,00 EUR.
- After the 12 (or 18) month-period, an extended nucleus of mandatory Dutch labour law provisions will have to be complied with. This will further include for instance bonuses or allowances (other than the already applicable emoluments). In addition, several leave regulations may become applicable. For example, the Spanish engineer might be entitled to specific age-related leave.

IV. Assignment timeline



* Do note that if the contractually chosen labour law is more beneficial to the employee, this will continue to be applicable.



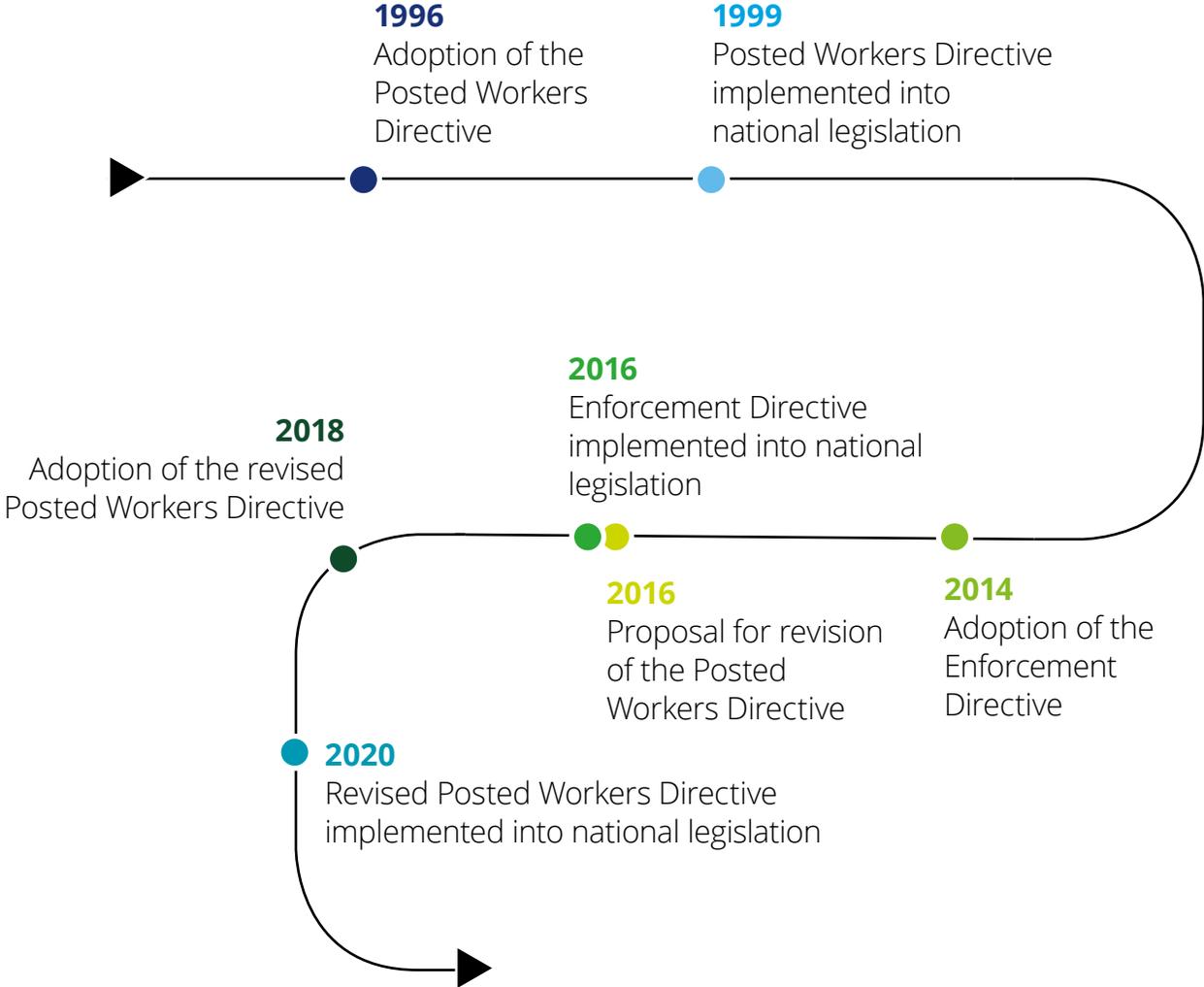
Related employers obligations

In a move to further ensure that the rights and working conditions of employees are protected throughout the EU, employers today face more stringent obligations and liabilities in most Member States with respect to their international assignees and business travelers.

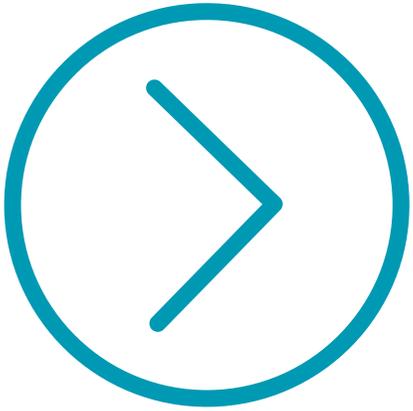
Since the implementation of the Posted Workers Enforcement Directive, strict compliance requirements are being imposed on employers, such as the prior notifications of posting, retention of social documents, appointment of a liaison person for the authorities, etc. These new employer obligations are increasingly under the spotlight, with increased scrutiny and strict penalties being imposed for failures with compliance.

We can refer you to our [Posted Workers Directive Brochure](#) for a more comprehensive analysis.

Policy Timeline



Way forward



Deloitte will continue to closely monitor the ongoing developments with regard to the transposition of the revised Posted Workers Directive and keep you posted of any update in that regard.

Key Contacts

If you have any questions concerning the items on this website, please contact your labour and social security law team at our Deloitte office in Belgium:



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