



Global Employer Services Legal and Immigration

The EU Posted Workers Directive: old and new employers' liabilities

Context

The EU legislation on Posted Workers was introduced at the end of the 1990s to strike a balance between the free movement of services and the social protection of workers within the EU. It was to ensure the application of certain host country employment terms and conditions to assignees.

When assigning employees within the EU, the Posted Workers Directive (EC/96/71) – hereafter referred to as the “PWD” – obliges employers to comply with a “hard nucleus” of labour law provisions in the host country during the assignment period. Since many EU countries continued to struggle in enforcing those rules, and non-compliance led to unfair competition, action was taken at European level with the Enforcement Directive (EU/2014/67). The latter aims to improve local compliance with this “hard nucleus” through general enforcement measures and specific new employers’ obligations.

In addition, the European Commission recently proposed to revise the original PWD to increase the social protection of assigned workers and guarantee equal pay for equal work.

The Posted Workers Directive

Adopted in 1996 (implementation into national law: 16 December 1999), its goal is to guarantee social protection of

employees and avoid unfair competition in intra-EU assignments by obliging employers to comply with a hard nucleus of labour law provisions in the host country. This hard nucleus consists of national laws and collective agreements regarding:

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

The home country's employment terms and conditions that are more favourable to workers continue to be applied.

Some national implementation laws extend the obligations to employees assigned from non-EU countries.

In Belgium, the PWD was implemented into the Law of 5 March 2002, applicable to all workers assigned to Belgium (not limited to employees assigned from an EU Member State). Employees assigned to Belgium are subject to the Belgian terms and conditions of employment that are criminally sanctioned if violated. In practice, this means that the near entirety of Belgian labour legislation is applicable to assigned employees.

In December 2016, EU Commissioner Thyssen proposed to revise the PWD to further address unfair practices and ensure a level playing field between foreign and local employers in the host country. The most striking parts of this proposal are (1) the principle of equal pay for equal work between assigned and local workers (currently, foreign employers only need to respect minimum wage levels), and (2) the equal treatment of temporary agency workers and (3) the full application of the host country's mandatory labour law for assignments exceeding 24 months.

The Enforcement Directive

Adopted in 2014 (implementation into national law: 18 June 2016), its goal is to guarantee compliance with and enforcement of the hard nucleus through EU-driven enforcement measures and new employers' obligations

General enforcement measures:

- **Stricter definition of "assignment"**: introduction of a list of criteria to assess whether an assignment is "temporary" and whether the employer has "substantial activities" in the home country
- **Better information for employers**: national actions to better inform employers and employees about their rights and obligations under the PWD (e.g. single official national website with information on which working conditions are to be applied to assigned employees)
- **Enhanced cooperation between national authorities**: stricter framework for administrative cooperation (e.g.

reasoned requests for information between competent authorities and time limits for replies, mutual consultation of company registers)

- **Additional action to increase monitoring and enforcement of PWD:** conduct non-discriminatory and proportionate inspections; ensure effective mechanisms for posted workers to lodge complaints directly against their employer; ensure that trade unions can participate on behalf or in support of the posted workers in any judicial or administrative proceedings)
- **Better cross-border execution of criminal and administrative penalties.**

New employers' obligations:

- **Prior declaration/notification of assignment:** EU countries may impose an obligation for foreign employers to report assignments and provide basic information upon the posting's start at the latest (e.g. employer's identity, posted employees' identity, anticipated duration of posting, nature of services justifying the posting).
- **Keeping social documents:**
 - Obligation to keep copies of the employment contract, payslips, work schedules, etc. (translated into one of the official languages of the host Member State);
 - Obligation to retain the documents referred to under previous point, for a certain period after the end of the assignment.
- **Contact person:** obligation to designate a liaison person for labour inspections.
- **Joint liability for wages in subcontracting chains:** posted workers can hold the contractor in a direct subcontracting relationship liable to any outstanding net remuneration corresponding to the minimum wage and/or contributions to local social funds, in addition to or instead of their employer.

Some national implementation laws extend the obligations to employees assigned from non-EU countries.

In Belgium, the Enforcement Directive was implemented into the Law of 11 December 2016. In essence, it contains:

- Criteria to determine genuine posting ("temporary", "substantial activities")
- Obligation for foreign employers to provide specific social documents (e.g. employment agreement, payslips, working schedules) to the Federal Public Service of Employment, Labour and Social Dialogue
- Obligation for foreign employers to appoint a contact person with whom Belgian authorities can liaise
- Specific joint liability regarding payment of remuneration in construction sector
- Specific sanctions against violations of the above rules

Main attention points for employers

In view of the current changes and enhancements introduced by the ED, the following attention and action points for companies are underlined:

- Before the assignment of employees, gathering information on the host country's terms and conditions of employment applicable during the assignment period
- Getting acquainted with all EU countries' pre-assignment reporting requirements (e.g. "Limosa" in Belgium, "Posting Declaration" in Croatia, "Déclaration préalable de détachement" in France, etc.)
- To avoid penalties, familiarisation with EU countries' local requirements for:
 - keeping social documents during and after the assignment (e.g. Belgium, France, Italy, the Netherlands)
 - designating a person to liaise with the competent authorities (e.g. Belgium, Italy, Poland)
 - preventing joint liability for wages of subcontractors' employees
- Having a view on whether above obligations also apply to assignments from non-EU countries

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