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Romania

The posting of workers in the framework of the provision of services: Main amendments brought to Directive 96/71/EC

Directive 96/71/EC on the posting of workers in the framework of the provision of services was amended by Directive 2018/957/EU, published on July 9, 2018, in order to ensure that a fair balance is struck between the freedom to provide services within the European Union, loyal competition, respectively the social protection of workers by promoting social justice.

One of the main amendments imposes on employers the obligation to grant/guarantee to posted workers the remuneration (and not only the minimum wage) regulated in the host Member State by means of both statutory and administrative provisions and, where applicable, by collective agreements or arbitration awards which have been declared universally applicable. In what follows, we will present the amendments brought to Directive 96/71/EC.

The entry into force of Directive 2018/957/EU amending Directive 96/71/EC (the „Revision Directive“)

The Revision Directive was published in the Official Journal of the European Union L 173 of 9.07.2018. Member States have the obligation to transpose its provisions into national law until 30.06.2020, date by which Directive 96/71/EC remains applicable in the version prior to the amendments made by the Amending Directive.

At the same time, according to the settled case law of the Court of Justice of the European Union, Member States are required during the transposition period of the Revision Directive (i.e. 30.06.2020) to refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive.

The main amendments brought by the Revision Directive refer to:

- Establishing the rule according to which **posted workers must, during the posting period, benefit from the working and employment conditions laid down in the host Member State** by means of both statutory and administrative provisions **as well as, where applicable, by collective agreements or arbitration awards which have been declared universally applicable¹**;
- Imposing employers the obligation to grant/ensure posted workers:
 - o The remuneration (and not only the minimum wage) regulated in the host Member State by means of both statutory and administrative provisions and, where applicable, by collective agreements or arbitration awards which have been declared universally applicable.

The concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and **means all the constituent elements of remuneration rendered mandatory** by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable.

With respect to allowances specific to posting, according to provisions currently in force, they are considered to be part of the remuneration insofar as they are not granted with the purpose to reimburse expenditure incurred on account of the posting (e.g. expenditure on travel, board and lodging). In this respect, the Revision Directive states that if it is unclear from the manner of establishing the working conditions² which elements of the allowance are allocated to the reimbursement of expenditure incurred on account of the posting and which are part of the remuneration, the posting allowance shall be

¹ In the absence or in addition to a collective agreement system or arbitration awards of general application, Member States may base themselves on either collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.

² By normative acts, administrative acts, collective bargaining agreements, individual labor agreements / posting letters etc.

presumed to be granted as reimbursement of expenditure (and therefore cannot be taken into account when determining the remuneration).

- o The accommodation conditions, as regulated in the host Member State by statutory and administrative provisions and, where applicable, by collective agreements or arbitration awards, which have been declared universally applicable.
- Establishing the rule according to which the level of reimbursement of expenditure to cover travel, board and lodging expenses, respectively of posting allowances for posted workers who are temporarily sent from their regular place of work in the host Member State to another place of work, will be the one set by the legislation of the host Member State;
- **Establishing the principle of equal treatment between temporary agency workers posted by a temporary employment agency and workers recruited directly by the user undertaking located in the territory of the host Member State.**

Thus, temporary agency workers must, during their posting, guarantee temporary posted workers the working conditions applicable in the territory of the host Member States in accordance with Article 5 of Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work (enshrining the principle of equal treatment between temporary agency workers and workers who are recruited directly by the user undertaking);

The aforementioned rules also apply where, in the context of the transnational provision of services, temporary workers made available to a user are sent to work temporarily in the territory of a Member State other than that in whose territory they usually perform their mission;

- Emphasizing the obligation for Member States to publish on the single national website the information on working and employment conditions applicable in their territory (including related to the elements of remuneration, without undue delay and in a transparent manner).

If Member States fail to comply with the above obligation, account will be taken of this when establishing the sanctions applicable to infringements of acts adopted by the Member States for the purpose of transposing Directive 96/71/EC, as amended and supplemented;

- The establishment, in order to ensure the freedom to provide services within the territory of a Member State, of the fact that **Member States may**, subject to the principle of equal treatment, **impose working and employment conditions on matters other than those covered by Directive 96/71/EC, only insofar as it concerns public policy provisions;**
- Impose on employers the obligation to observe, in relation with posted workers, the working and employment conditions applicable in the host Member State where the posting exceeds 12 months (18 months by way of exception), except for the provisions concerning (i) the procedures, formalities and conditions for the conclusion and termination of employment agreements, including non-compete

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clauses, respectively (ii) supplementary occupational retirement pension schemes;

- Establishing the rule according to which, where a Member State finds³ that an undertaking is improperly or fraudulently creating the impression that a worker is covered by the provisions of Directive 96/71/CE, the concerned Member State will take all necessary measures to ensure that the worker will benefit from the relevant law and practices.

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³ By applying the criteria regulated under Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 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')

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