



Q&A on Posting of Workers

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Background

Workers posted abroad temporarily will get more protection under a draft law informally agreed by Parliament and Council negotiators and to be voted on Tuesday. Parliament's negotiators strengthened the draft to clarify the rules for companies, by distinguishing genuine postings from attempts to circumvent the law, but also gave EU member states some flexibility in carrying out inspections.

The note details the new rules aimed at improving enforcement of the 1996 directive on the working conditions of workers posted from one EU country to another to provide services for a limited period.

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Background

Posted workers in the EU

What is a “posted” worker?

A posted worker is a person who is sent by his or her employer to work for a limited period in an EU member state other than that in which he or she normally works.

In sending a worker to work in another EU member state, the employer is exercising the freedom to provide cross-border services, as laid down in Article 56 of the Treaty on the Functioning of the European Union.

How many workers are posted in the EU?

The European Commission estimates the number of posted workers in the EU at 1.2 million in 2011, i.e. less than 1% of the EU's working-age population. The sector that most commonly uses posted workers is construction (25%), in particular small and medium sized companies. Other sectors include services, financial and business sectors, transport and communication and agriculture.

To count the number of posted workers, the European Commission usually uses the number of social security certificates issued for postings to another country. Indeed, when a worker is posted to another country for up to 24 months, a “portable document A1 (PDA1)”, previously known as E101, is issued to certify which social security legislation applies to the holder.

Based on these documents, the main sending countries are Poland (228,000 PDA1), Germany (227,000) and France (144,000) followed by Romania, Hungary, Belgium and Portugal (2011 figures).

The main receiving countries are Germany and France, followed by the Netherlands, Belgium, Spain, Italy and Austria.

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The 1996 Directive

What is the 1996 Directive on Posting of Workers about?

The posting of workers directive was approved in 1996 and entered into force in 1999. It requires that, where a member state has terms and conditions of employment in force, these must also apply to workers posted temporarily by their employer to work in that member state. However, social security contributions are paid in the country where the posted worker is normally based.

The host country's law therefore generally governs maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, conditions of hiring out workers, health, safety and hygiene at work, protective measures in the terms and conditions of employment of pregnant women or those who have recently given birth, equal treatment of men and women and other non-discrimination provisions.

As regards social security contributions and benefits, in line with EU regulation 883/2004 on the coordination of national security systems, posted workers continue, for up to 24 months, to pay their contributions in the member state where they are normally based and not in that to which they are temporarily posted. Posted workers must prove that they have paid their social security contributions in the member state where they are normally based by producing an A1 document to this effect. Thus, according to social security rules the duration of posting cannot exceed 24 months and a worker cannot be posted to simply replace another posted worker.

These provisions, which aim to balance the economic freedom to provide services enshrined in the Treaty with the rights of workers during the posting so as to avoid social competition and apply to:

- workers posted to another member state to provide services,
- intra-company postings, and
- temporary agencies who post workers.

What are the weaknesses of the 1996 Directive and how is it abused?

The directive suffers from various legal, administrative and enforcement weaknesses that have led to the rise of abusive practices throughout Europe.

These weaknesses include a lack of legal clarity on the posting situation, a lack of administrative monitoring due to insufficient cooperation among member states to exchange information, too little information being made available to companies and posted workers and difficulties in enforcing rights and handling cross-border complaints.

The above weaknesses have led to distortions and abuses by many posting companies. A widely-used way to minimise social security contributions, is to create so-called "letter box" companies in member states where labour taxes are lowest. Companies using this technique do not carry out significant economic activity in their home country, and are often constructed as a complex, multi-level net in different member states, which make them very difficult to track and hold to account.

Another type of abuse is false "self-employment". Many regulations relating to working time, taxes and wages, which should be guaranteed under the directive, are not systematically applied to self-employed workers. So some posting companies persuade or oblige workers to accept "self-employed" status, whereas in reality, there is a relationship of subordination.

Lastly, posted workers are often vulnerable due to language barriers and lack of information of their rights.

Background

Latest proposal to ensure that current rules are better enforced

Why an enforcement directive?

European Court of Justice judgments in the Viking-Line, Laval, Ruffert cases triggered an intense debate among EU institutions, academics and social partners on two key issues:

- how to balance the right to collective action with freedom of establishment and freedom to provide services (the Commission withdrew its proposal to this end following subsidiarity concerns raised by national parliaments), and
- how to interpret the 1996 directive's definition of "core protection" and its limits.

In 2010, Mario Monti, in a report on "a new strategy for the single market" recommended clarifying the directive's implementing arrangements and doing more to disseminate information on the rights and obligations of workers and companies, administrative cooperation and penalties in the context of free movement of persons and cross-border provision of services.

The Commission published a new legislative proposal in March 2012. The Employment and Social Affairs Committee amended the proposal in June 2013. Social affairs ministers agreed a general approach in December 2013, which enabled Parliament and the Council to enter into negotiations and to reach a compromise on 27 February 2014.

How would the latest proposals improve enforcement?

The text **improves legal clarity** by helping member states to assess whether a posting is genuine or an attempt to circumvent the law.

To determine whether a company really supplies services abroad, national authorities will be able to ascertain where it is registered, where it pays tax and social security contributions, where it recruits posted workers, where its business activity takes place and how many contracts it has to supply services.

To assess whether a worker is really posted temporarily, member states will be able to ascertain for how long the service is supplied and the date on which the posting began. The absence of an "A1" social security certificate may also indicate that the posting is not genuine, says the agreed draft, which includes a requirement to identify posted workers.

Member states which suspect that a worker is falsely "self-employed" may also check whether work was done and assess work relationships, including his or her subordination and remuneration, adds the final text, at Parliament's request.

When there is no genuine posting situation, the Rome I regulation (on the law applicable to the contractual obligations) applies, so as to ensure that employees are not deprived of protection.

The implementing directive also **improves access to information, both for member states and those providing services**. Parliament inserted clauses to ensure that this information will be transparent, and provided free of charge, in an accessible format on a single official website, in various languages, taking into account demands in the host member state's labour market. The information on the website will describe labour and social conditions applicable to posted workers, and procedures for making complaints.

Cooperation among member states will also be enhanced through the use of the Internal Market Information System (IMI). The deadlines for transferring information from one member state to another are 25 working days at most for normal cases and two working days for urgent cases.

The deal **strengthens checks and enforcement of fines**. To ensure that the 1996 directive is properly enforced, the deal provides includes a list of national control measures, to which host member states could nonetheless add others. For example, service providers would be obliged to make a declaration, at the latest at the time they start to supply the service, including the company's identity, the number of posted workers, its representative in the host member states, the duration of the posting, and the nature of services justifying the posting.

Member states would have to communicate new control measures to the European

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Commission, but as Parliament insisted, this does not constitute a prior authorisation requirement, and leaves member states the necessary flexibility to carry out out checks.

The compromise text says any member state may introduce **a system of “joint and several liability”** to tackle fraud and abuses . This means that in cases where work is contracted out, both the main contractor and the direct subcontractor would be held jointly and severally liable for any failure to pay posted workers. For the building sector, this system or other appropriate measures are mandatory. Member states may also introduce stricter provisions and include other sectors. Austria, Germany, Spain, Finland, France, Italy, the Netherlands and Belgium already have joint and several liability systems.

Once the new rules enter into force, member states will have two years to transpose them into their national laws. The European Commission would be required to report on their application, and if necessary propose further measures, within the following three years.