

Long Term Posting. New Posting Rules Well Explained

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The deadline for the transposition of the revised rules on posting of workers is approaching. This causes rising concerns among companies, posted workers as well as inspectors. According to Directive 2018/957 as of 30th of July 2020, employers will be obliged to apply new posting regime, however national rules are still not there yet. The situation is even more worrying as draft implementing rules vary from country to country and there is a risk that they may not respect the interpretation given by the European Commission.

The revised Posting of Workers Directive has been finally adopted in 2018 giving Member States 2 years for implementation of new posting rules. The envisaged changes are significant therefore this time was needed for national administrations as well as posting companies to prepare for new reality. A few Member States are making efforts to transpose revised directive on time. However, it seems that one of the basic elements of the new legislation, the so called long-term postings, might be interpreted in a way that will cause lack of legal clarity.

According to the revised directive in case of postings, that last longer than 12 or 18 months, all applicable terms and conditions of employment of the host Member State should apply to the posted workers, except concluding and terminating contracts. The problem is in discovering which terms and conditions of employment are “applicable” in a given service, profession, task or region. The good news is that they should be clearly stated on the single national web site. If they are not, they still apply, but the employer who follows the instructions from the single national web site should not be punished for failing to apply the non-listed conditions. The other problem is that the Directive fails to indicate how to calculate a period of posting, which leaves too much discretion to

the Member States and their control institutions. Clearly the 'posting period' is a different notion from 'the period of working on the territory' of a given Member State - an important distinction overlooked in the German provisions. In her reply to a written question from February 2019 Commissioner Marianne Thyssen clarified, that „the duration of posting shall be calculated per posting assignment. For example, in case a worker is posted again by the same employer to provide another service to another client or to the same client in the same host country, but in another location, the calculation of the posting period will start anew.”¹ This clearly differentiates the calculation for the purpose of posting from the calculation for the purpose of the coordination of social security legislation, where all periods spent on a territory of a given MS are added up.

Unfortunately it seems that this interpretation has not been taken into account e.g. in the draft German implementing rules. According to the draft we have seen all the periods of posting in the professional career of a worker will add up, regardless of duration of breaks, type of contract or if it is the same or different employer. The German national rules are constructed in such a way, that a worker will never again be subject to terms and conditions of employment of the sending country, even after a long lasting break in posting, a change of employer or under completely new contract. In other words, there are no conditions, circumstances nor periods, which would allow to start counting the period of posting for individual worker ever again.

Besides the reply to the written question there is no clear interpretation of these provisions by the European Commission. The answer to the question how to calculate the posting period cannot be found neither in the Q&A document issued by the European Commission to help MSs to transpose EU rules nor in the guidelines published in May 2020 by the Commission Committee of Experts on Posting of Workers. This raises questions within national administrations and may lead to legal chaos.

The new Directive introduces other substantial changes. It replaces the obligation to apply the minimum rates of pay of the receiving country (if they are higher than in the sending MS) by the obligation to pay out remuneration with all locally applicable bonuses and allowances. What is more from the 30th of July employers will be also obliged to apply collective agreements applicable generally or at local, regional or sectorial level. Both, information about all constituent elements of remuneration as well as applicable collective agreements should be published on single official national websites. However, this is still not the case. Less than 1 month before applying new rules employers do not have basic information.

¹ https://www.europarl.europa.eu/doceo/document/E-8-2018-006446-ASW_EN.html

The implementation did not happen on time to a wide extent due to Covid-19 pandemic. National administrations have been recently busy fighting negative economic and social consequences of the crisis. This was the reason why few weeks ago various organisations issued a request to the European Commission, European Parliament and Council of the EU to postpone the date of application of new posting rules. However, the Commission and the Parliament have not responded positively to this call.

This all shows that the ambition to provide clear and easily enforceable posting rules may not be realised on time. The lack of clear rules on how to calculate a period of posting and whether there is any reset period or event that allows restart counting of the posting period from the beginning causes huge problems for posting companies, posting workers and inspection authorities. In addition the lack of information about new posting rules on single official national website does not help neither to respect posting rules and protect workers.

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