

GMS Flash Alert

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European Union - Amended Directive for Posted Workers

The amended European Union (EU) directive for posted workers enters into force on 30 July 2020.¹ The directive introduces a set of new requirements for employment terms and conditions for employers who send their employees to provide services temporarily in another EU member state. As each member state must transpose this directive into their national legislation, employers will experience variations in the way each country implements the directive's requirements.

This article sets out the important aspects of the directive that employers must observe when posting their workers in the EU.

WHY THIS MATTERS

The difference in terms and conditions for employment of posted workers, including salary, working hours and reimbursements of costs, compared to those of local workers is a highly sensitive topic in the EU. The level of salaries and protections for workers can vary significantly from one EU member state to another and the objective of this directive is to reduce, rather than to close, the gap between posted workers and local workers in the context of the terms and condition for their employment.

Any non-compliance with the directive carries a significant risk for reputational damage in addition to the risk of financial fines.

It is crucial that employers prioritise implementing terms and conditions for employment correctly in their contracts for workers who provide services in other EU countries. Moreover, they must timely and fully complete a registration for every posted worker in the host country.

Posted Worker

The definition of a posted worker continues to refer to a person who is sent by an employer in one EU member state to another EU member state to provide services on a temporary basis.

Generally, attending business meetings, trade fairs and conferences are excluded from the directive. However, it is important to observe the local interpretation of activities that are excluded from the requirements set out in the directive.

In determining whether an activity falls in the scope of the provision of services outlined in the directive, it is essential that employers not use their own internally defined definitions for business meetings and travel. What is understood as business travel internally in a company is often not the same as what is understood as a business travel in the legislation for posted workers. This can lead employers to fail to comply with the directive for posted workers.

Employers should note that the scope of what is considered to be a posted worker is much narrower in France than in the rest of the EU. This means that a larger number of workers posted to France will not be considered as posted workers in the light of this directive; and therefore, French labour law will apply more extensively to a larger number of posted workers than it otherwise would had the definition of a posted worker in France been aligned with the definition in the directive.

KPMG NOTE

It is possible that the French interpretation of posted workers in the context of the directive on posting of workers could be viewed as being in breach of the EU legislation. However, until an EU institution or the European Court of Justice intervenes, we will not have clarity on this topic and the authorities in France will continue applying their own definition of a posted worker. (For more, see [GMS Flash Alert 2020-238](#) (May 19, 2020).)

Long-Term Posting

The directive introduces a time limit to a posting, so in principle we will now have a concept of a long-term posting.

Employers who post workers to another EU member state for **up to 12 months** must comply with the regulations in the host country on the following matters:

- Working and resting periods;
- Minimum paid annual leave;
- Remuneration, including overtime rates;
- The conditions for hiring-out workers;
- Health, safety and hygiene at work;
- Protective measures for women in the context of pregnancy and childbirth;
- Non-discrimination;

- The conditions for accommodation when provided by the employer;
- Allowances and reimbursement for cost for travel, board and lodging.

In addition to these terms and conditions for employment, those employers who post workers to another EU member state for **more than 12 months** must also apply the employment law in the host country for other terms and conditions.

A posting that is longer than 12 months is in principle defined as a long-term posting, and, as such, requires extensive application of the employment law in force in the host member state.²

The time limit of 12 months can be extended with an additional 6 months and this requires a separate application to and an approval by the authorities in the host member state. Such application must be filed before the expiry of the first 12 months of posting.

KPMG NOTE

Employers should note that the calculation of the 12-month period (or 18, for those states with automatic extensions) begins when a posting is initiated. This means that the calculation of 12 (18) months **will not begin on 30 July 2020**, so workers posted prior to 30 July 2020 have already begun their 12-month (or 18-month) period.

Some EU member states have announced that they will grant the extension of 6 months automatically to postings initiated prior to 30 July 2020 and which are expected to last for more than 12 months. But most member states require an application before the expiry of the 12 months of posting regardless of when the posting is initiated.

Replacement

The duration of a posting of 12 (18) months is deemed to be the effective cumulative duration of different posting periods during which one or several posted workers carry out the same task at the same place on behalf of their employer.

This means that if a worker is posted for 12 months and the employer then sends another worker to do the same job at the same place for another 12 months (replacing the first posted worker), then the employer must apply the labour law in the host member state for the second posted worker. The limit of 12 months is used by the first posted worker and an extension is allowed only up to 6 months, so the second posted worker will be considered as a long-term posting.

KPMG NOTE

It is extremely important that employers understand the condition of replacement in local legislation. It is to be expected that some EU member states will apply this condition broadly, while others will limit the condition to specific situations.

Remuneration

The condition of remuneration requires that posted workers are remunerated according to the rules and practices in the host member state.

A posted worker must be paid at least the basic salary of the category, position, professional qualification and seniority that is paid to the "same" local employee in the host member state. In addition to the basic salary, a posted worker must be paid any other **mandatory** element of remuneration that is paid to local workers in the relevant category, position, professional qualification and seniority in the host member state according to the local rules and practices.

KPMG NOTE

Employers should note that they may pay workers more than what is required by rules and practices in both home and host countries. However, even though a basic salary, for example, paid to the posted worker is much higher than what is required, the employer will still not be compliant if the worker is not paid a mandatory bonus that is required by the host state. A salary "slip" must contain all mandatory elements of remuneration according to the rules and practices in the host state.

Therefore, the employers should not rely on paying a higher salary to a posted worker and assuming that all elements of remuneration are thereby covered. Even though the amount itself might cover all costs, it must be transparent on a salary slip what amount is paid for which part of the remuneration.

Registration Obligation

Although the registration obligation is not a part of this directive, the registration obligation itself will continue. Employers must register their posted worker in the host member state prior to the commencement of work in the host country.

EU member states are adjusting their registration systems to accommodate the requirements in the new directive.

KPMG NOTE

It is important to emphasise that the rules concerning terms and conditions for employment and the registration obligation are the employers' responsibility. The condition of replacement in the calculation of the 12-month (18-month) period and the remuneration of posted workers present some of the greatest challenges in this context.

Additionally, it is important to note that the objective of these rules is not to achieve identical remuneration between posted and local workers. The objective is to keep to a minimum the gap that might exist today between the remuneration and protection of posted workers compared to the equivalent local workers. It is for this reason that the directive focuses exclusively on elements of remuneration that are mandatory in the host country.

Regardless of its overall economic effect on posted workers, this directive is driven by a political ambition to even out the playing field between local and foreign companies. Therefore, compliance with the rules in this directive is essential.

KPMG NOTE (continued)

It is crucial that employers map out the movements of their workers and align their contracts so that they meet the requirements for applicable employment laws in all the member states where workers are providing services.

We can reasonably expect more labour inspections in the future. As noted earlier, non-compliance with applicable employment law and registration obligations carry a significant risk of reputational damage and financial fines.

FOOTNOTES:

1 Full text of the [Directive 2018/957/EU](#) on posting of workers. For related coverage of the directive, see GMS *Flash Alert* [2020-292](#) (23 June 2020). For coverage of the revised directive, as well as what other countries are doing to transpose the directive into national law, see the following issues of GMS *Flash Alert*: [2020-327](#) (23 July 2020), [2020-292](#) (23 June 2020), [2018-111](#) (24 August 2018), and [2017-160](#) (6 November 2017).

2 Procedures for conclusion and termination of a contract, including non-competition clauses and supplementary occupational retirement pension schemes, are excluded and can continue to be governed by the rules in the home country irrespective of the duration of a posting.

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