

Marek Benio - “A Guide For You”

Report from the workshop on the posting of workers in the framework of free movement of services
Belgrade, 19-20 April 2018

Most debated by the participants:

1. Drainage of the skills from Central and Eastern European countries, especially from the candidating countries (Serbia, Macedonia). Posting of workers is a good preventive tool, which allows to keep the skilled manpower in the country and lets the workers earn “western salaries” at the same time. Yet what is accessible to the existing MS from CEE, could be applicable to candidating countries only through EU companies.
 2. The third type of posting mentioned in the POW Directive, namely posting workers abroad to another employer by temporary work agencies. This type of posting - not in order to deliver the service on behalf of the employer, but as a service *per se* – is legal and common in the EU. Romanian representatives have presented it as an abusive practice, presumably banned by new Romanian legislation.
 3. Revision of PWD on remuneration – the most problematic practical issue was access to information on mandatory elements of remuneration. This considers both posted worker and his/her employer. Will the provisions on remuneration no longer be part of the contract? Given diversity of the sources of law, how will they be published on the single national web page? Will the mandatory elements of the remuneration of the sending MS law still apply?
 4. Revision of PWD on applicable labour law – will the replacement of one posted worker by another force the employer to treat them unequally? Is the 12 (18) month period applicable to the posted worker or the place of work? Who/ what is protected by the 12 months rule? Which law will apply after 12 months in case when protection of worker is stronger (better) in the sending Member State?
-

The detailed list of issues discussed at the two days workshop:

Block I - Introduction of the basic notions:

1. Posting of workers
 - a. A distinction between the free movement of persons (workers) and work mobility based on freedom to deliver services.
 - b. posted worker vs. selfemployed vs. foreign employees
 - c. posting within the service,
 - d. intracorporate posting of workers
 - e. posting of workers by Temporary work Agencies – Posting as a service.
2. Seven years transition period for free movement of workers for the CEE countries accessing the EU in 2004 as the trigger for posting of workers. The “front door” to movement of workers was closed to all but three EU-15 Member States (Ireland, Sweden, the UK). The demand for skilled workers esp.in Germany and Austria could be met in two ways: traditional work permits or by subcontracting services to CEE – established companies. The latter has opened the “back door” access to workers from CEE Member States.
3. Economic analysis of the posting – the cost difference vs. the price difference. Price competition or Skill competition. How to breach the pay gap in the EU? Posting of workers convergence effect.
 - a. The measures to prevent skill draining,
 - b. The measures to prevent the ride to the bottom.

Block II - Labour law in the crossborder situation

4. Analysis of the Rome I Regulation and the basic Directive on Posting of Workers
 - a. Free choice of law vs. protection of workers’ rights guaranteed by the habitual place of work legislation
 - b. Seven areas of overriding mandatory provisions including “minimum rates of pay”
 - c. The significance of collective agreements in determining rights of the posted workers on non discriminatory basis.
5. Selected case law:
 - a. The “Laval quartet” - 4 TJEU rulings analysis and consequences
 - b. The “Elektrobudowa” case
6. Posting of the Third Country Nationals:
 - a. Work permit
 - b. Residence
 - c. Van Der Elst visa – the case and its consequences – the examples of Ukrainian, Serbian and Macedonian citizens.
7. Enforcement directive
 - a. Posting fraud – examples discussed with the view on enforcement measures effectiveness against fraud and abuses. How the diagnosed problems of undeclared work, selfemployment and bogus selfemployment are tackled by enforcement directive

tools and how will they be tackled by the change of basic rules of posting envisaged in the revision of POW Directive proposal.

- b. Features of the genuine posting of workers (worker's side and employer's side)
- c. Control measures – will semi-open catalogue deliver?
- d. Cooperation between liaison institutions (labour inspections). Is the IMI System sufficient or do we need a European Labour Authority as proposed by the Commission in 2018?
- e. The role of social partners.

Block III - Social security of posted workers

- 8. Coordination of social security systems
- 9. Determining the applicable legislation
 - a. Portable Document A1
- 10. Lex loci laboris – the principal rule
- 11. Temporary work abroad - Legislation of the 'sending' Member State
 - a. Posted of workers
 - b. Workers on a business trip
 - c. Selfemployed in another country than normal activity
 - i. "subject to legislation" prior to posting,
 - ii. "normal activity"
 - iii. 24 months limit and its extension, exceptional agreement
 - iiii. replacement of another posted person
- 12. Work in two or more Member States
- 13. Proposal for amendment of the basic directive
 - a. Remuneration
 - b. Time limit
 - c. Temporary Work Agencies

Issues only mentioned but not discussed during the workshop:

- 14. Proposal for amendment of the Coordination of Social Security
 - a. Sent vs. posted person
 - b. New rules on replacement
 - c. New conditions for 'normal activity' – letterbox fraud remedy?
- 15. Personal Income Tax
 - d. bilateral agreements,
 - e. 182 days rule