

Transposition of EU rules on posting of workers

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National legislation, in force since 1999, is now amended to accommodate full transposition of new European Union (EU) provisions. It is a matter of safeguarding the rights of workers who are temporarily posted in the framework of the provision of services. To this end, measures of cooperation between the authorities of the different Member States in order to prevent and sanction any abuse or circumvention of applicable employment rules are strengthened. Not surprisingly, the cross-border provision of services requires ensuring respect for the terms and conditions of employment, pay, working hours, occupational health or contributions for posted workers.

1. The new Royal Decree-Act 9/2017¹, transposing EU directives in the fields of finance, commerce and healthcare, also brings changes to some issues concerning the posting of workers.

And so the Posted Workers (Transnational Provision of Services) Act 45/1999² is amended, mainly by Title IV of Royal Decree-Act 9/2017, to adapt national legislation to Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the

¹ Real Decreto-ley 9/2017, de 26 de mayo, por el que se transponen directivas de la Unión Europea en los ámbitos financiero, mercantil y sanitario, y sobre el desplazamiento de trabajadores.

² Ley 45/1999, de 29 de noviembre, sobre el desplazamiento de trabajadores en el marco de una prestación de servicios transnacional.

enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. EU rules provide a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in the field of posting in practice, including measures to prevent and sanction any abuse and circumvention of the applicable rules. The aim is to ensure respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers within the EU and the European Economic Area (EEA).

2. In this regard, the employer who posts workers to Spain in the framework of a transnational provision of services must notify the posting, before its commencement and regardless of the duration of the worker's posting, to the competent Spanish employment authority with regard to the territory where the services will be provided. The notification will be given by electronic means, in the manner determined by regulations. To this end, the Ministry of Employment and Social Security will set up, in agreement with the regional governments, a central electronic register of such notifications.

Notifications of postings must contain, inter alia, a set of particulars and information related to both the undertaking making the posting and the posted worker, the envisaged beginning and anticipated duration of the posting or the determination of the provision of services that the posted worker is to perform in Spain. When the undertaking making the posting to Spain is an employment business, notification of the posting must also include evidence of being an employment business and of the temporary needs of the user undertaking to be met with the staffing services contract.

3. The obligation to appear and to keep and deliver documents is also regulated. Thus, employers included in the scope of Act 45/1999 must appear, at the request of the Labour and Social Security Inspectorate, at the public offices designated for this purpose and provide such documents as may be requested, making available at the worksite or in electronic form for immediate consultation, inter alia and in respect of each posted worker, the employment contract or documents concerning the essential elements of the same, pay slips, proof of payment of wages, time sheets indicating the beginning, end and duration of the daily working time, and the document evidencing the work permit of nationals of third countries in accordance with the law of the State of establishment. Employers must also notify, as the case may be, harm to the health of posted workers during or resulting from work performed in Spain.

Naturally, the Labour and Social Security Inspectorate is responsible for the surveillance and enforcement of Act 45/1999, performing the functions provided in the Labour and Social Security Inspection System Act 23/2015³. The Inspectorate will sanction breaches in accordance

³ Ley 23/2015, de 21 de julio, Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social.

with the Infringements and Penalties (Employment Branch) Act, also amended by this new Royal Decree-Act. On the one hand, to consider as minor infringements (art. 10), inter alia, the following: (a) formal defects in the notification of the posting of workers to Spain in the framework of a transnational provision of services, under the terms established by law; or (b) a failure to report in the prescribed time and manner to the competent employment authority, in accordance with current rules and regulations in force, work-related injuries and illnesses when these are classified as minor.

On the other hand, to add to the list of serious infringements: (a) the submission of the notification of posting after commencement of the same or without designating either the company representative to liaise with the competent Spanish authorities and to send out or receive documents and/or notices, or a person who can act in Spain on behalf of the undertaking providing services in employee information, consultation and bargaining procedures affecting workers posted to Spain; (b) not having available in Spain, during the period of posting, documentation relating thereto, in the legally established terms; (c) not reporting, in the prescribed time and manner to the competent employment authority, in accordance with current rules and regulations in force, work-related injuries and illnesses when these are classified as serious, very serious or fatal; (d) not submitting the documents required by the Labour and Social Security Inspectorate or submitting any of the documents without a translation thereof.

4. To determine whether a worker temporarily posted to Spain normally carries out his work in another Member State, all the factual elements characterizing such work and the situation of the worker must be examined; assessing, therefore, whether the work is done in Spain for a limited period of time, the start date of the posting, the Member State in which, or from which, the worker posted to Spain usually performs his or her work, if the posted worker returns to or is expected to resume working in the Member State from which he or she has been posted after completion of the work or the provision of services for which he or she was posted to Spain, the nature of the activities, if travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement, and any previous periods during which the post was filled by the same or by another posted worker. The failure to satisfy one or more of the foregoing factual elements will not automatically preclude a situation from being characterised as one of posting.

The assessment of these elements should be adapted to each specific case and take account of the specificities of the situation. These elements can also be taken into account by the competent authorities to determine whether a posted person falls within the definition of a “posted worker” contained in Act 45/1999 (*“worker [...] posted to Spain for a limited period of time within the framework of a transnational provision of services, provided there is an employment relationship between such undertakings and the worker during the period of posting”*, art. 2(2)), for which they should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how

the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties.

5. One of the most interesting features of this new legislation concerns the cross-border notification and enforcement of financial penalties and administrative fines imposed for failure to comply with the applicable rules on posting of workers.

In accordance with the provisions of Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), the competent Spanish authorities receiving a request for notification of a decision or other documents related to the imposition of an administrative penalty or a fine or a request for recovery thereof, transmitted through the Internal Market Information System, will recognize the administrative penalty and the request for recovery without any further formality being required and will forthwith take all the necessary measures for its execution. Such will be the case unless one of the following grounds for refusal is invoked: (a) following inquiries by the requested authority it is obvious that the envisaged costs or resources required to recover the administrative penalty and/or fine are disproportionate in relation to the amount to be recovered or would give rise to significant difficulties; (b) the overall financial penalty and/or fine is below EUR 350 or the equivalent to that amount; or (c) fundamental rights and freedoms of defendants and legal principles that apply to them as laid down in the Constitution of the requested Member State are not respected.

Therefore, to conclude, inter-administrative cooperation mechanisms are strengthened while adjusting those factual elements that make it possible to determine whether or not this is a temporary posting of workers. Directive 2014/67 stressed the need to safeguard the rights of workers in the event of posting but without imposing an unnecessary administrative burden on service providers. To this end, it considers the factual elements referred to in the provisions on the identification of a genuine posting and preventing abuse and circumvention to be "*indicative and non-exhaustive*", stressing in particular that there should be no requirement that each element is to be satisfied in every posting case. However, situations representing the same factual elements should not lead to a different legal appreciation or assessment by competent authorities in different Member States. Hence the need to introduce more uniform elements and ensure that the competent authority of the host Member State, in close cooperation with the Member State of establishment, applies the same legal regime.