

Main measures of the 2016 Directive project and outstanding points

The draft of the 2016 Directive includes a number of measures detailed hereafter. The content of these measures is subject to change as the Directive draft is currently being discussed at European level, following requests from EU Member States to go beyond certain measures initially proposed.

Maximum length of secondment of 24 months

Where the period of posting exceeds 24 months, the labour law of the host country should apply as a whole to the posted employee in compliance with the new 2016 Directive draft. Labour Ministries of EU Member States have reached an agreement in October 2017 and have proposed the reduction to 12 months regarding maximum duration of secondment. This question is still under discussion at European level.

This is however subject to the provisions of international law applicable elsewhere (EU Regulation Rome I & Rome Convention) and the possibility to opt in the employment contract for the application of the law of another country. In this case, such labour law should prevail with the exception of the limited mandatory provisions applicable in the host country which should limit the scope of the new provisions.

Remuneration : Equal pay for equal work

1996 Directive requires posted workers to benefit from the minimum wage rate applicable in the host country in compliance with law and sector. The draft directive proposes a broader reference to the concept of remuneration in accordance with laws and collective agreements of general application. It would be up to each Member States to specify the various components of remuneration to be taken into account on their territory, beyond minimum wage rate. Member States will have to publish these elements on a national website. Consequently, all salary elements referenced and applicable in the host country would have to be taken into account when determining the posted worker's remuneration.

Provisions of collective agreements

The Commission proposes that the rules laid down in collective agreements of general application should apply obligatorily to posted workers in all sectors of activity and not only in the construction sector, as it is currently the case from 1996 Directive.

Nevertheless, it should be recalled that, actually, some Member States, including France, already provide for such application in all sectors of activity, while others have only used it for restricted sectors.

The principle of equal treatment with local agency workers

According to the draft revision of the Directive, workers posted by a temporary employment agency established in another Member States will be subject to the same conditions of remuneration as local temporary workers.

Ongoing discussions

The content of these measures have been the subject of numerous discussions between EU Member State representatives. Following the agreement reached between the EU Employment and Social Affairs Ministers of EU Member States in October 2017, discussions began at European level between the European Parliament, the Council and the Commission with a view to adopting the 2016 Directive draft . The adoption expected by the end of 2017 has been postponed and discussions are still ongoing. The question of the time-limit for transposition of the Directive is also being examined (transposition periods between 2 and 4 years under discussion).

Consequences in Switzerland

According to the Swiss State Secretariat for Economic Affairs (SECO), the possible repercussions of the reform of the 1996 Directive will have to be examined once its content is implemented.

In any case, the consequences arising from the 2016 Directive should remain limited for foreign employers, bearing in mind that the new provisions do not call into question the modalities and duration of secondment in the sense of social security, which remains possible up to 5-6 years in accordance with the applicable bilateral social security agreements, subject to obtaining a valid residence and work permit for third-country nationals (NB: ICT card limited to 3 years for non EU employees). Furthermore, the consequences of the Directive are limited regarding labour law through the provisions of international law (European Regulation 593/2008 or the Rome Convention) which remain applicable.

For further information please contact the ITX IMC department through Emilie RULLAND (CIMCO)

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