



STATUTORY INSTRUMENTS.

S.I. No. 412 of 2016



EUROPEAN UNION (POSTING OF WORKERS) REGULATIONS 2016

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I, MARY MITCHELL O'CONNOR TD, Minister for Jobs, Enterprise and Innovation, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving effect to Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014¹ hereby make the following regulations:

Citation

1. These Regulations may be cited as the European Union (Posting of Workers) Regulations 2016.

Interpretation

2. (1) In these Regulations—

“Act of 1946” means Industrial Relations (Amendment) Act 1946 (No. 26 of 1946);

“Act of 2000” means National Minimum Wage Act 2000 (No. 5 of 2000);

“Act of 2015” means Workplace Relations Act 2015 (No. 16 of 2015);

“competent authority” means Workplace Relations Commission;

“contractor”, in relation to a posted worker, shall be construed in accordance with Regulation 7;

“Directive” means Directive 2014/67/EC of the European Parliament and of the Council of 15 May 2014;

“Framework Directive” means Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996²;

“net remuneration”, in relation to a posted worker, means the statutory minimum hourly rate of pay—

(a) declared by order under section 10D (inserted by section 8 of the National Minimum Wage (Low Pay Commission) Act 2015 (No. 22 of 2015)) of the Act of 2000, or

(b) that is—

¹OJ No. L 159,28.5.2014, p.11

²OJ No. L 18, 21.1.97, p.1

Notice of the making of this Statutory Instrument was published in “Iris Oifigiúil” of 29th July, 2016.

- (i) fixed under an employment regulation order made under section 42C (inserted by section 12 of the Industrial Relations (Amendment) Act 2012 (No. 32 of 2012)) of the Act of 1946, or
- (ii) payable under any registered employment agreement or sectoral employment order (each within the meaning of the Industrial Relations (Amendment) Act 2015 (No. 27 of 2015)),

applicable to activities referred to in Schedule 2, that applies to the class of posted worker,

less the amount of any deduction (or payment) which is required to be made by or under any statute or statutory instrument;

“posted worker” means a worker who normally works in another Member State but, for a limited period, carries out his or her work in the State.

(2) A word or expression used in these Regulations that is also used in the Directive has, unless the contrary intention appears, the same meaning in these Regulations that it has in the Directive.

Competent authority and liaison office

3. The Workplace Relations Commission is—

- (a) the competent authority in the State for the purposes of the Directive, and
- (b) the central liaison office for the purposes of the Framework Directive.

Administrative requirements and control measures

4. (1) A service provider established in another Member State who temporarily posts workers in the State shall—

- (a) make a declaration (in the English language and using the form set out in Schedule 1) and furnish it to the competent authority no later than the date on which he or she commences providing the service, containing—
 - (i) the identity of the service provider,
 - (ii) the anticipated number of clearly identifiable posted workers,
 - (iii) the anticipated duration and envisaged beginning and end dates of the posting of each worker,
 - (iv) the address of the workplace to which each worker is to be posted, and
 - (v) the nature of the services justifying the posting,
- (b) keep at a place identified by the service provider to the competent authority and make available to the competent authority at its

request, in paper or electronic form, for the duration of the period of the posting, in respect of each posted worker—

- (i) his or her contract of employment or a written statement of terms of employment (within the meaning of section 3 of the Terms of Employment (Information) Act 1994 (No. 5 of 1994)) or an equivalent document,
 - (ii) his or her payslips or equivalent documents,
 - (iii) where relevant, time sheets, or equivalent documents, indicating the beginning, end and duration of his or her daily working time, and
 - (iv) proof of payment of wages,
- (c) after the period of the posting and at the request of the competent authority, deliver to the competent authority, within a period of one month after the request, the documents referred to in paragraph (b) and, where necessary, a translation of those documents into the English language, and
- (d) designate a person to liaise with the competent authority and to send out and receive documents and notices as necessary be.

Offence

5. (1) A service provider who fails to comply with Regulation 4 commits an offence and is liable—

- (a) on summary conviction, to a class A fine, or
- (b) on conviction on indictment, to a fine not exceeding €50,000.

(2) Proceedings for an offence under paragraph (1) may be brought summarily by the competent authority.

(3) If an offence under Regulation 4 is committed by a body corporate and the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a person who is a director, manager, secretary or other similar officer of the body, or is a person who was purporting to act in any such capacity, that person as well as the body corporate commits an offence and is liable to be proceeded against and punished as if that person had committed the first-mentioned offence.

(4) If the affairs of a body corporate are managed by its members, paragraph (3) applies in relation to the acts and omissions of a member of the body in connection with the member's functions of management as if the member were a director or manager of it.

Acknowledgement of declaration

6. Where the competent authority receives a declaration from a service provider that complies with Regulation 4(1)(a) it shall give an acknowledgement to the service provider concerned.

Subcontracting liability

7. (1) This Regulation applies in respect of a contracting chain operating in one or more of the activities mentioned in Schedule 2.

(2) Subject to Regulation 8, where the employer of a posted worker is a direct subcontractor of a contractor and the posted worker has not received net remuneration due to him or her for work under the contractual relationship between the contractor and the posted worker's employer, the posted worker's employer and that contractor are jointly and severally liable for the amount of net remuneration outstanding.

Due diligence

8. A contractor shall not be liable for any outstanding net remuneration due to a worker by virtue of Regulation 7 where the contractor shows that he or she has taken all reasonable steps to obtain from the employer of the relevant posted worker—

- (a) a copy of the acknowledgement of the employer's declaration to the competent authority issued under Regulation 6,
- (b) a list of all persons employed by him or her to carry out work under the contractual relationship between the contractor and the employer, and in respect of each person, his or her personal public service number (PPSN), date of birth, job description, nationality, start date and end date of posting, gross weekly wage and normal number of hours to be worked per week,
- (c) a written assurance that he or she will pay the worker's net remuneration, and
- (d) once per month during the period of the contract, wage records, time sheets and proof of payment (EFT details) in respect of the worker for each pay period.

Presentation of complaint under Act of 2015

9. (1) A posted worker referred to in Regulation 7 may present a complaint, naming both his or her employer and a contractor as co-respondents, under section 41 of the Act of 2015 to the Director General (within the meaning of that Act) that he or she has not been paid net remuneration in accordance with section 20(2) of the Protection of Employees (Part-Time Work) Act 2001 (No. 45 of 2001) and—

- (a) section 14, 15 or 16 of the Act of 2000,

- (b) an employment regulation order made under section 42C (inserted by section 12 of the Industrial Relations (Amendment) Act 2012) of the Act of 1946,
- (c) a registered employment agreement (within the meaning of Chapter 2 of Part 2 of the Industrial Relations (Amendment) Act 2015), or
- (d) a sectoral employment order (within the meaning of Chapter 3 of Part 2 of the Industrial Relations (Amendment) Act 2015).

(2) Where a complaint is presented under paragraph (1) the Director General shall, subject to section 39 of the Act of 2015, refer the complaint for adjudication by an adjudication officer (within the meaning of that Act).

(3) References to employee and employer in—

- (a) Part 4 (other than section 41(1) and (2)) of the Act of 2015,
- (b) section 26(1) of the Act of 2000,
- (c) section 23(2) of the Industrial Relations (Amendment) Act 2015, and
- (d) section 45A of the Act of 1946,

shall, in so far as they relate to a complaint by a posted worker against a contractor under this Regulation, be construed as references to the posted worker and contractor, respectively.

(4) Each of the provisions specified in subparagraphs (b), (c) and (d) of paragraph (3) are relevant redress provisions for the purposes of section 41(5) of the Act of 2015 in relation to a complaint against a contractor under this Regulation presented under that section.

Inspections

10. (1) An inspector (within the meaning of the Act of 2015) may, for the purposes of these Regulations and any law in force in relation to the matters set out in Schedule 3, exercise any of the powers specified in section 27 of the Act of 2015. Inspections shall be conducted primarily but not exclusively on a risk based assessment.

(2) A reference in section 27 of the Act of 2015 to a relevant enactment includes a reference to these Regulations.

Cross border enforcement of financial administrative penalties and fines

11. (1) The Workplace Relations Commission is the competent authority in the State to which a request for assistance, information, notification or recovery of a penalty or fine is to be made as referred to in Chapter VI of the Directive.

(2) The requested authority is responsible for the transmission and reception of requests and shall assist other relevant authorities in accordance with Chapter VI of the Directive.

(3) An amount payable in pursuance of an EU penalty may be recovered by the requested authority as if it were an amount payable under a judgement or decree of the District Court.

(4) Where a requesting authority in another Member State, requests the requested authority to recover an EU penalty, the requested authority is entitled to recover the amount of any sum owing as part of that EU penalty.

(5) In this Regulation—

“EU penalty” means a financial administrative penalty or fine including fees and surcharges relating to non-compliance with the Directive or the Framework Directive—

- (a) imposed on a service provider established in the State by a requesting authority in another Member State, or
- (b) confirmed by an administrative or judicial body in a Member State other than the State as payable by a service provider established in the State;

“requested authority” means the Workplace Relations Commission;

“requesting authority in another Member State” means a competent authority designated by the other Member State for the purposes of the Directive.

(6) Any amount received under this Regulation shall accrue to the requested authority.

Amendment to Act of 2015

12. Part 3 of Schedule 1 to the Act of 2015 is amended by inserting after paragraph 13 the following:

“14. European Union (Posting of Workers) Regulations 2016 (S.I. No. 412 of 2016)”.

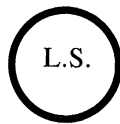
Schedule 2

Regulation 7

The activities mentioned in Regulation 7, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

1. excavation
2. earthmoving
3. actual building work
4. assembly and dismantling of prefabricated elements
5. fitting out or installation
6. alterations
7. renovation
8. repairs
9. dismantling
10. demolition
11. maintenance
12. upkeep, painting and cleaning work
13. improvements

1. Maximum work periods and minimum rest periods
2. Minimum paid annual holidays
3. The minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes
4. The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings
5. Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people
6. Equality of treatment between men and women and other provisions on non-discrimination



GIVEN under my Official Seal,
27 July 2016.

MARY MITCHELL O'CONNOR T.D.,
Minister for Jobs, Enterprise and Innovation.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation)

The purpose of these Regulations is to transpose into Irish law Directive 2014/67/EU (“the Directive”) on the enforcement of Directive 96/71/EC (“the Framework Directive”) concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System (“the IMI Regulation”).

Posted Workers are individuals who are employed in one EU Member State but are posted by their employer to work in another Member State on a temporary basis.

The Directive contains a number of new measures aimed at improving co-operation between Member States and their competent authorities to ensure the effectiveness of the protections provided for in the Framework Directive. Both Directives put in place a framework for the provision of services by posting workers, and create the conditions to enable those posted workers to enforce their rights.

Regulation No. 1 provides that these Regulations may be cited as the European Union (Posting of Workers) Regulations 2016 and will come into force on the date of signature by the Minister. Regulation No. 2 provides the interpretation for the Regulations. Regulation No. 3 provides that the Workplace Relations Commission is the competent authority in the State for the purposes of the Directive and the central liaison office for the purposes of the Framework Directive.

Regulation No. 4 specifies the information requirements that a service provider which is posting workers in the State will have to comply with in order to ensure effective compliance with the Directive and the Framework Directive. Regulation No. 5 provides for the penalties which apply when found guilty of an offence for failure to comply with the information requirements set out in Regulation No. 4. Regulation No. 6 provides that the competent authority in the State (i.e. the Workplace Relations Commission) shall be obliged to issue an acknowledgement to a service provider upon making a declaration that complies with the information requirements in Regulation No. 4.

Regulation No. 7 relates to posted workers in the construction sector and subcontracting liability. This concerns arrangements where the posted worker’s employer is the direct subcontractor of a contractor. This Regulation introduces the concept of subcontracting liability by providing that where a posted worker in the construction sector is not paid the applicable statutory rates of pay by their direct employer (the subcontractor) the contractor one up the supply chain, can be held liable either in addition to or in place of the employer. Regulation No. 8 provides that where the posted worker makes a complaint against the employer’s contractor pursuant to Regulation No. 7, the contractor can rely

upon the defence of due diligence. This means that where the contractor can demonstrate they have carried out due diligence in appointing the posted worker's employer to discharge a contract, they will not be liable for claims against them for unpaid statutory remuneration. Regulation No. 9 makes provision for the complaint and redress procedures which will allow a posted worker to pursue an action to the Workplace Relations Commission against both the direct employer and the contractor one up the supply chain where the worker concerned has not been remunerated to the level required under the Framework Directive.

Regulation No. 10 transposes the requirements in Article 10 of the Directive. Article 10 provides that Member States shall be obliged to ensure that effective and adequate inspections are carried out in their territory in order to monitor and control compliance with the provisions and rules laid down in the Framework Directive. In particular, Article 10 provides that the inspection of obligations in the Framework Directive shall be carried out in the host Member States through a system of random and risk based inspections.

Regulation No. 11 implements Chapter VI of the Directive and includes provisions to allow for the cross-border enforcement of financial administrative fines and/or penalties. Competent authorities in other Member States can request that the competent authority in the State (i.e. the Workplace Relations Commission) to enforce financial administrative penalties and fines against service providers established in the State.

Regulation No. 12 makes provision for a necessary amendment to the Workplace Relations Act 2015 to provide that complaints referred under these Regulations will be the subject of the WRC adjudication and redress structures established under the aforementioned legislation.

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