



EFBWW NEWSLETTER

POSTING DIRECTIVE TRILOGUE

The trilogue in the process of the revision of the Posting Directive is on-going, and the chairmanship has now been taken over by the Bulgarian Presidency. The EFBWW had a meeting with its Strategic group on 8 January and has identified a number of matters of highest priority.

Travel, board and lodging

Some Member States consider the payment of flat-rate daily allowances as a compensation for the fact that the worker is away from home. The CJEU has ruled that such daily allowances are part of remuneration and must therefore be paid to the posted worker, to the extent that they are also due to a local worker in a similar situation. This is to avoid competition on labour costs. The current legal situation must not be worsened. For this reason, the EFBWW cannot support the Council's position second part of (gb) ("this point applies exclusively etc".) as well as Council's recital 7b.

Concerning the inclusion of costs linked to travel, board and lodging, it is common practice within the construction industry that workers are employed on distant workplaces. For this reason, virtually all Member States have specific "provisions", either in their national legislation or in (binding) collective agreements, on how the expenditures for travel, board and lodging should be settled.

It is important to note that these national provisions belong to the worker's rights and are part of the worker's package «terms and conditions of employment». In order to ensure a level playing field for domestic and foreign companies and, at the same time, guaranteeing "equal treatment," the national provisions of board, lodging and accommodations must be explicitly included in Article 3.1 of the Directive.

As all domestic companies have to pay these expenditures to their own workers, the EFBWW considers that foreign companies should pay the same expenditures to their posted workers. If not, fair competition would be seriously distorted.

The EFBWW would like to stress that construction workers are on a business trip just like any other sent out by their employer. When e.g. an engineer or a financial controller on behalf of his or her company is posted, he or she has everything paid for. Why not construction workers?

As EFBWW, we would like to stress that the offered board, accommodation and travel arrangements always have to meet certain quality standards, according to the rules of the host country.

These above-mentioned expenditures should also always be paid by the employer in addition to the standard remuneration of the workers and must never be deducted from the standard remuneration. After all, the worker is sent by his employer to a distant workplace. This is a choice of the company and not a worker's choice.

For posted workers, board, travel and lodging can be split in two parts: (1) the expenditures covering the trip from the worker's habitual place of work to the workplace in the host Member State and (2) the expenditures in the host Member State covering board and lodging and the daily travel from the lodging to the workplace.

It should be noted that, within the different Member States, various "board, lodging and accommodation" systems are in place, often defined and calculated in various manners and sometimes with a fiscal advantage. This is part of the heterogeneous European labour market. A European Directive cannot provide a detailed formulation or definition of the concept "travel, board and lodging expenditures". Therefore, the EFBWW proposes that the PWD only refers to a broad concept of "provisions", which would fit all Member States and provides sufficient flexibility in the implementation phase.

The EFBWW can support the proposal of the European Parliament, provided the word "rates" is deleted, as follows:

(gb) allowances to cover travel, board and lodging expenses for workers away from their habitual place of work.

The EFBWW can also support the Council's position first part of first sentence, provided the rest of the text is deleted, as follows:

(gb) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons (rest of the text deleted).

Duration and time limit

We cannot stress enough that cross-border posting is a temporary activity and that lengthy posting options reverse the notion of "temporary" to "long-term".

Meanwhile, it is well known that the average duration of temporary posting in the construction industry amounts to approximately three months. Therefore, the duration issue is of utmost importance to the workers of the construction industry.

The time limit proposed by the European Parliament allows, promotes and facilitates lengthy postings via the derogation option. Therefore, the time limit derogations proposed by the European Parliament are not acceptable to the EFBWW. However, we do consider the proposed time-limit of the Council a suitable compromise.

Double legal basis

For the EFBWW, the creation of a double legal basis in the PWD is a crucial issue. It would restore the balance between "the protection of workers" and the "free movement of service providers". The EFBWW would like to remind the negotiators that the current legal basis is actually an "artificial legal trick" which was used to obtain a majority in the Council, when the PWD was adopted in 1996. Meanwhile, the Treaty on the Functioning of the European Union has been extended to social and employment matters. As a consequence, the PWD should align itself with the new employment provisions of the TFEU.

In order to prevent future one-sided interpretations of the PWD and its compatibility with the TFEU, the EFBWW strongly supports the proposal of the European parliament to extend the legal basis of the PWD to Article 53(1), Article 62, and Article 153(1)(a) and (b) in conjunction with Article 153(2) TFEU.

Posting of temporary agency workers

Over the years, the EFBWW has observed that most abusive forms of cross-border posting are organised as cross-border temporary agency work. Cross-border TAW has become one of the business tools to evade and circumvent the applicable wages and working conditions, in particular in the construction industry. For this reason, the EFBWW considers that the right to “equal pay” for temporary agency workers posted to another country should mean “equal to the employment conditions of workers in the industry where the temporary work is taking place”, rather than equal to the general pay level of the workers in the TAW.

However, over the years the number of “triangular posting” TAW schemes have increased substantially. Virtually all have been set up to organise social fraud and abuse on a massive scale. It goes without saying that these methods have absolutely nothing to do with genuine posting and only exist as a dishonest business model to exploit workers and to commit social fraud. The revision of the PWD is a unique opportunity to end these fraudulent practices, by banning triangular temporary agency work as a way to post workers abroad. The EFBWW strongly supports the proposal of the European Parliament.

Fake posting and the Enforcement Directive

Fake or non-genuine posting was one of the major discussion points in the Enforcement Directive 2014/67EU. The legislative discussion resulted in a new article 4, which sets criteria to assess whether an undertaking genuinely performs substantial activities and whether a posted worker is correctly posted. Unfortunately, the Enforcement Directive is an enforcement directive of the existing PWD and thus does not stipulate what happens when a worker is incorrectly posted or when a company incorrectly posts workers abroad. This needs to be included in the new Posting Directive.

The EFBWW considers it absolutely essential that the PWD unambiguously stipulates that non-genuine posting, considering article 4 of the Enforcement Directive 2014/67, cannot be considered as posting and that the national authorities of the host Member States can requalify the posting status of the worker. Without this provision, Article 4 of the Enforcement directive would be an empty shell.

Public policy provisions

As the PWD needs to restore the minimum character of the Directive and at the same time have sufficient flexibility to align itself with the national provisions of the host member States, the notion of public policy provisions needs to be restored. As such, the EFBWW strongly supports the proposed amendment of the European Parliament (am 35) on public policy provisions

Amendment 35

“10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions. For the purpose of this Directive, public policy provisions shall refer to non-discriminatory measures taken in the public interest, including measures in the fields of protection of workers, equal treatment, fair competition and the proper functioning of the labour market. Such measures shall not serve economic ends.”

SERVICES PACKAGE

The decisive vote on the services e-card is scheduled to take place in March in the Committee on the Internal Market and Consumer Protection of the European Parliament. The EFBWW is strongly lobbying for the rejection of the e-card and is calling on its members to contact the Members of the European Parliament and governments. The e-card will introduce the country of origin principle through the backdoor and will facilitate bogus self-employment. The amendments tabled do not help to meet the very basic criticism of the EFBWW on the e-card.

Meanwhile the European Parliament and the European Council have adopted positions to enter interinstitutional/trilogue negotiations on a proportionality test before the adoption of new regulations of professions. The liberalisation of regulated professions in construction has in the past resulted in worse working conditions particularly in those countries where the access to professions in construction is or has been attached to certain qualification requirements. The EFBWW objective for the trilogue negotiations is not to endanger existing regulations such as the German “Meister” (Master), to ensure the autonomy of social partners in the national systems of vocational training, and to avoid that the scope of the directive is extended to matters like posting or the recognition of professional qualifications.

EUROPEAN LABOUR AUTHORITY

The European Commission aims to present a proposal on a European Labour Authority in March 2018. A final assessment of the proposal can only be made after the presentation of the legislative texts, since as for now the European Commission has only presented a very short leaflet. The EFBWW has a positive attitude towards a better cooperation and better exchange of information between the different national labour inspectorates which could be facilitated by a European Labour Authority. At the same time it must be clear that the European Labour Authority shall not interfere in the social partners’ autonomy.

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