



POSTING OF WORKERS

PRACTICAL GUIDE
for Employers



About the Project

The international project STEP UP – “Stepping up the European cooperation and communication among Public & Private organizations for the PROTECTION of posted worker’s rights” is focused on the phenomenon of transnational posting of workers and aims to verify the application of recent European regulations in the field of labour migration, entrepreneurial behaviour and the concrete role played by inspection bodies. STEP UP PROTECTION is managed by universities in 5 European countries and takes place between 2020 and 2022.

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1. Introduction

Posting of workers, which has been widely used on the labour market of the European Union in the recent decades, is a unique legal and social phenomenon of the Union. As it is known, the existence of the European Union and the functioning of the single market is ensured by the fundamental principles: freedom of establishment, freedom to provide services and free movement.

The freedom to provide services includes the right of companies to provide services in the territory of another Member State and to post their own workers temporarily to the territory of that Member State for that purpose.

Article 56 of the Treaty on the Functioning of the European Union is the legal basis for the posting of workers in the European Union. The article provides that restrictions on the freedom to provide services within the Union of nationals of Member States established in a Member State other than that of the person for whom the services are intended are forbidden.

Posting is a specific form of cross-border labour mobility necessary to ensure the freedom to provide services. Whereas companies can provide services not only in the Member State where they are established but also in other Member States, they must have an opportunity to send out their employees to another Member State to carry out the tasks required.

It should be noted, however, that the posting of workers has been and still is regarded as controversial primarily because it is difficult to find the right balance between the protection of workers, their employment guarantees and the competitive conditions of companies.

In line with its commitment to remove obstacles to the free cross-border movement of services and ensure equal conditions for business as well as the protection of employee rights, the European Union adopted a special directive for the posting of workers – the Posting of Workers Directive. The Directive established a set of “hard core” minimum terms of employment and working conditions (such as maximum work periods, minimum paid annual holidays, minimum rates of pay, health and safety at work, etc.) which must be respected in accordance with the host state principle. For the rest of the employment relationship, the labour law rules of the sending country continued to apply.

As new Member States have joined the European Union over time and the European Treaties have been revised, the labour mobility situation has changed considerably and the European Union has reformed the legal regulation of posting of workers in order to:

- create a level playing field for cross-border service provision with the least restrictions possible;
- protect the rights of posted workers by ensuring equal social rights in order to prevent unfair treatment and the creation of a low-cost workforce.

For this purpose, the following Directives have been adopted:

1. Directive 2014/67/EU – the Enforcement Directive which creates a common legal

framework for identifying the real extent of posting and allows for a more uniform implementation, application and enforcement of common standards. The Directive also clarifies the definition of posting and defines the responsibilities incumbent on Member States to verify compliance with the Posting of Workers Directive, especially in sectors with a greater risk of malpractice, such as construction or road haulage. The Directive seeks to ensure better cooperation between the national authorities in charge of posting (such as labour inspectorates), by enforcing the obligation to respond to requests for assistance and setting time limits for responses to information requests. It also provides for the possibility to have the administrative penalties and fines imposed on service providers by one Member State enforced and recovered in another Member State.

2. Directive (EU) 2018/957 revising and amending the 1996 Posting of Workers Directive – the Revised Posting of Workers Directive. This Directive establishes that: (i) posted workers shall be subject to the rules on remuneration in the country they have been sent to (this could either be set by law or by certain collective agreements); (ii) employers shall have to pay for travel, food and accommodation; (iii) defines the concept of long-term posting – at the expiry of 12 months, it shall be considered that an employee has been posted for a long time (with a possible extension of this time period for six months after the service provider submits a reasoned notification) and he/she shall be subject to almost all the labour rules of the host country; (iv) temporary employment agencies shall guarantee posted workers the same conditions that apply to other temporary workers hired in the country they have been sent to; (v) enhanced cooperation to tackle fraud and violations in the area of posting.

Facts and figures

The issue regarding posted workers is relevant all over the European Union. Each Member State is involved in the assurance of posted workers' rights and in the application of the respective guarantees. Although posted workers represent only 0.4% of the EU's total workforce, the recent period suggests that these figures are likely to increase. There was, for instance, a major increase between 2010 and 2016, when the number of posted increased by as much as 69%.

The issue of posted workers is particularly relevant for certain business areas. Most posted workers work in the construction sector – 45%, in the manufacturing industry – 21.8%, in the services sector – 29.4%, and in agriculture and fisheries – 1.5%.

It is also possible to single out individual EU Member States that either send out their workers to other States very often or receive a large proportion of posted workers. In the recent years, Germany, France and Belgium have been the countries receiving more posted workers (50%), while Poland, Germany and Slovenia have been the ones to send out most of them.

Information about the workers hosted and posted by each EU Member State, as well as about the States that send out and host most of the posted workers, is available

on the European Parliament's website:

<https://www.europarl.europa.eu/news/en/headlines/society/20171012STO85930/posted-workers-the-facts-on-the-reform-infographic>

2. General framework of transnational posting

2.1. Notion of posting

Posting of employees includes the following cases:

Situation	Subcontracting	Transfer within a company	Temporary agency work
Description	An employee is posted to perform work for which a contract has been made between the posting company, i.e. the employer, and the contractor. The employee performs work on behalf of the posting company and under the direction of its management.	An employee is posted to work for a company located in another member state and belonging to the same group of companies.	An employee is posted to another state for use by another company. The employee's own employer is a temporary employment agency.

Important !!!

Posting is always temporary. The company can only post workers for a limited time, and an employment relationship must exist for the entire posting.

In order to assess whether a worker is actually employed in one state (for example, Portugal) and carries out temporary work functions in another state (for example, Germany), the following criteria are considered:

- 1) the work is carried out in a foreign state for a **limited period of time**;
- 2) after completion of the work or the provision of services for which the worker was posted, he/she returns for permanent work to the State from which he was posted, he/she **returns for permanent work to the State from which he was posted**;
- 3) **the employer who posts the worker reimburses the expenses relating to the posting** (travel, accommodation, meals, and other costs).

Posting duration. Directive 96/71/EC applies to all postings irrespective of the duration of posting. Some provisions of the directive, however, are not applicable to short-term

posting or allow host countries not to apply their rules to short-term posting:

- (i) an exemption always applies in the case of initial assembly and/or first installation of goods, if the period of posting does not exceed 8 days. In this case, the rules on minimum paid annual leave and remuneration do not apply (however, this exception does not apply to the construction sector);
- (ii) host countries may (after consulting social partners) decide not to apply the rules on:
 - minimum paid annual leave and remuneration when the length of posting does not exceed one month within the time period of one year from the start of the posting;
 - the rates of remuneration set out in collective agreements when posting takes place under service agreements or within a group of companies and the duration of posting does not exceed one month within the time period of one year from the start of the posting (however, this exemption is not applicable to temporary workers!);
 - minimum paid annual leave and remuneration on the grounds that the amount of work to be done is not significant as defined in national legislation (however, this exemption is not applicable to temporary workers!);
- (iii) host Member States may exempt from the requirement to submit declarations in the cases of short-term posting.

In Portugal:

Provisions relating to holidays, remuneration and overtime pay are not applicable, in our country, to the posting of a skilled worker by a company that supplies goods, to carry out the assembly or initial installation essential for its operation, provided that that it is included in the supply contract and its duration does not exceed eight days in a period of one year.

Currently, remuneration is understood to cover all the constituent elements of the obligation that are mandatory either by law, or by possible collective labour regulations of general efficacy.

This exception to the application to posted workers of the provisions concerning holidays, remuneration and additional work, does not include posting in the context of construction activities involving the realization, repair, maintenance, alteration or elimination of constructions, namely excavations, embankments, construction, assembly and disassembly of prefabricated elements, installation of equipment, transformation, renovation, repair, maintenance, namely painting and cleaning, dismantling, demolition and sanitation.

As regards these construction activities, as well as the remaining situations of posting not covered by the exception alluded above, the regime concerning posted workers shall apply, in Portugal, irrespective of the duration of the posting.

Long-term posting

With the coming into force of the **Revised Posting of Workers Directive** as of 30 July 2020, the workers posted for periods longer than 12 months (or 18 months, following a motivated notification from the employer) are entitled to all the mandatorily applicable terms and conditions of employment of the host Member State, except the procedures and conditions for conclusion and termination of the employment contract and the rules of supplementary pension schemes which are not applicable to long-term postings as well.

In Portugal, in cases where the effective duration of the posting of a worker exceeds 12 months, all the applicable terms and conditions of employment laid down by provisions with general efficacy shall be applied. However, such terms and conditions shall not comprise procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses, as well as those referring to complementary professional pension schemes. These last matters shall continue subject to the *lex contractus* governing the employment contract between the worker and the employer that posted the worker in Portugal.

Where a reasoned notification is submitted to the ACT indicating the reasons for the extension of the duration of the posting, after 12 months, the terms and conditions mentioned shall be applicable after 18 months of effective duration of the posting.

Where a posted worker is replaced by another posted worker, the duration of the posting shall correspond to the accumulated duration of the posting periods of all those workers, as long as they have been posted to perform the same task, at the same place, taking into consideration the nature of the service to be provided, the work to be performed, and the address, or addresses, of the workplace. Workers hired by a company established in Portugal and posted in another State shall have the right to the conditions of employment described above, laid down by provisions with general efficacy in Portugal, without prejudice to a more favourable regime provided either by the law of the State of destination/posting, the law chosen by the parties to govern the contract, or the contract itself.

Do you know that?

Workers who are temporarily sent to work in another Member State, but do not provide services there, are not posted workers. Such situations are called “business trips” and such workers are not covered by the Posting of Workers Directive. For example, a worker travels for business (when no service is provided), attends a conference, a business meeting, fair, training courses and etc.

2.2. European Union and national legal acts

- Directive 96/71/EC of the European Parliament and of the Council of 16 December

1996 concerning the posting of workers in the framework of the provision of services.

- Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC 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').
- Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.
- Articles 12, 13 and 16 of the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.
- Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.
- Articles 6 to 8 of the Portuguese Labour Code
- Act 29/2017, of 30 May, which transposes Directive 2014/67.
- Decree-law 101-E/2020, of 7 December, which transposes Directive 2018/957.
- Decree 47/2012, of 31 July, laying down the proceedings for the Labour Inspection Authority activities.
- Law 107/2009, of 14 September, approving the procedural regime applicable to labour and social security administrative offences.

3. Official reporting about posting of workers

The Enforcement Directive (Directive 2014/67/EU) allows, but does not require, host Member States who receive posted workers of the European Union to impose further administrative requirements and control measures.

3.1. Administrative measures applicable before or at the very outset of posting

Article 9 (1) of the Directive allows the host Member State to impose the following requirements to be complied with not later than at the beginning of the posting:

- 1) make a declaration to the responsible national competent authorities containing the relevant information necessary in order to allow factual controls at the workplace, including:
 - (i) the identity of the service provider;
 - (ii) the anticipated number of clearly identifiable posted workers;
 - (iii) the person of liaison and the contact person;

- (iv) the anticipated duration, envisaged beginning and end date of the posting;
 - (v) the address(es) of the workplace;
 - (vi) the nature of the services justifying the posting;
- 2) designate a person to liaise with the competent authorities in the host Member State;
 - 3) designate a contact person who can act as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State.

It should also be noted that the Directive also requires, in case the Member States impose the above-referred requirements, to make it possible to complete the procedures and formalities relating to the posting of workers at a distance and by electronic means.

Do you know that?

Although, as mentioned, the Directive allows collecting the above-referred information, all the Member States have actually made use of this possibility and introduced the relevant administrative measures in their law or practice for the cases when employees from other Member States are posted to companies established and/or operating in their territories. It should be noted that the Member States are required to communicate all the information about the administrative measures in place to the European Commission which, in its own turn, informs other Member States; moreover, anybody interested can get this information on the national website of each Member State.

Useful link:

Practically all Member States have put in place the electronic system for the prior declaration of posted workers.

Links to the **contact point** of a specific country and its information are available here: http://europa.eu/youreurope/citizens/national-contact-points/index_en.htm?topic=work&contacts=id-611492

The Directive does not establish that directly, however, virtually all Member States oblige **the posting employer** to fill out the relevant declarations and inform the competent national authority. Thus, all legal and administrative information is published by competent authorities of the Member States on their websites not only in their national language but also in English and in other official languages of the Member States and, in some cases, also in the languages of third countries (normally considering the labour market situation, the states of origin of posted workers, etc.).

In Portugal, the competent national authority is the Authority for Working Conditions: [https://www.act.gov.pt/\(EN-PT\)/CENTROINFORMACAO/DESTACAMENTOTRABALHADORES/Paginas/default.aspx](https://www.act.gov.pt/(EN-PT)/CENTROINFORMACAO/DESTACAMENTOTRABALHADORES/Paginas/default.aspx)

In Portugal - In order to ensure effective monitoring of the compliance with the legal regime of posting, according to article 9 of Act no. 29/2017, which transposes Directive 2014/67/EU, the service provider that posts employees to the Portuguese territory is obliged to present a declaration to the inspective authority containing the following elements:

- i) the identity of the service provider;
- ii) the anticipated number of clearly identifiable posted workers;
- iii) the identification of the persons referred to under point (d) (the contact person at the liaison office);
- iv) the anticipated duration, envisaged beginning and end date of the posting;
- v) the address(es) of the workplace; and vi) the nature of the services justifying the posting. This declaration is to be made electronically and sent to the inspective authority.

Furthermore, the service has the obligation of keeping or making available and/or retain copies, in paper or electronic form, of

- i) the employment contract or an equivalent document, according to the Labour Code;
- ii) payslips;
- iii) timesheets indicating the beginning, end and duration of the daily working time; and
- iv) proof of payment of wages. These documents shall be available in an accessible place, such as the workplace. At the request of the inspective authority, the service provider shall disclose those documents, within a year after the posting terminates.

Finally, the service provider has the obligation to designate a contact person to liaise with the competent authorities, to send out and receive documents and/or notices, and act as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining, if needed.

Both the declaration and the documents shall be in Portuguese or another language, but in the latter case, a certified translation has to be provided.

3.2. Administrative measures applicable during posting

The Enforcement Directive allows the Member States to impose an obligation on the host employer to keep or make available and/or retain copies, in paper or electronic form, of the employment contract or an equivalent document, payslips, time-sheets

indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided.

Employers operating in Portugal must file documents related to labour relations within the legally established time limits, which may vary depending on the subject matter, and always in compliance with data protection legislation. Among us, this is currently Law no. 58/2019, of 8 August, available at:

http://www.pgdlisboa.pt/leis/lei_print_articulado.php?tabela=leis&artigo_id=3118A0025&nid=3118&nversao=&tabela=leis

4. Working conditions and guarantees in the host country

4.1. Working conditions

The working conditions set out in the Posting of Workers Directive to be ensured for posted workers in the host country:

(1) *Maximum work periods and minimum rest periods* – the employee working in a company of the host country shall be ensured the same work and rest periods as applicable in the host country.

In **Portugal** – (i) As a rule, the maximum limit (rule) to the normal working period is 40 hours per week and eight hours per day, without prejudice to flexible working time regimes. Average working time, including overtime, cannot exceed 48 hours per week. Overtime shall not exceed a maximum of two hours in a normal working day, 175 hours per year in micro and small companies, and 150 hours per year in medium and large companies, and a number of working hours equivalent to the normal daily period of work in a rest day or public holiday.

(ii) Employees are entitled in each working day to a break so that in principle they do not work for more than five consecutive hours, or six, when their daily working period is over ten hours. They are also entitled to a rest period of at least 11 consecutive hours between two working days. Additionally, an uninterrupted weekly rest period shall not be shorter than 35 hours.

(2) *Minimum paid annual leave* – for the time period worked by a posted worker in a foreign company, he/she shall get at least the minimum paid annual leave guaranteed in that foreign country or a proportionate part of the paid annual leave for the time period worked.

In **Portugal** – the minimum annual leave comprises, at least, 22 work days. Payment cannot be taken in lieu of holiday, unless employment has terminated.

(3) **Remuneration**, including overtime rates (this requirement does not apply to supplementary occupational retirement pension schemes) – it should be noted that the initial Posting of Workers Directive required that the minimum remuneration shall be ensured. After the Revised Posting of Workers Directive comes into force, remuneration shall include all the constituent parts of remuneration mandatory and applicable to local employees under national laws or universally applicable collective agreements from the first working day of the posted worker in the host country, i.e. the principle of equal pay for equal work at the same workplace shall apply.

In **Portugal**, collective agreements usually determine the pay scales applicable to the various sectors of activity. However, unless subjected to an extension ordinance, these agreements will only be applicable to employees (1) affiliated to the signatory trade union and (2) with employment contract with the signatory employer (or an employer that is a member of the signatory employers' association).

- a. The employer shall inform the employees of the amount and periodicity of the remuneration.
- b. Collective agreements shall refer the agreed upon amounts of the basis remunerations for all jobs and professional categories (Article 492, no. 1, f), of the Portuguese Labour Code).
- c. Employees shall not receive salaries inferior to the minimum wage, as determined by the Government. Collective agreements may determine higher amounts. As from 1 January 2022, the statutory minimum wage is EUR 705.
- d. Employees performing their normal work on a public holiday for a company that is not required to suspend its operation on such days are entitled to a compensatory rest composed of half of the worked hours, or to a 50% increase of the corresponding remuneration, depending on the employer's choice. The hourly pay of overtime work is paid with an increase of 25% in the first hour (or in the first hour's fraction) and 37.5% per hour or subsequent fraction, on regular working days; and with a 50% increase per hour or fraction of hour, on weekly rest days, complementary or mandatory, or public days. In addition, when employees perform overtime work that prevents them from enjoying their daily rest, they shall be entitled to a paid compensatory rest equivalent to the missing rest hours, to be enjoyed on one of the three following regular working days. Furthermore, when employees perform their work on a mandatory weekly rest day, they shall be entitled to one day of paid compensatory rest, to be enjoyed on one of the three following regular working days. As for night work, it is usually paid with an increase of 25% by comparison with the work performed during the day.

Important !!!

The posted worker's employer must guarantee that the amount paid to the worker during posting is at least equivalent to the remuneration determined according to the rules of the host Member State. The comparison between the amount actually paid to the worker and the amount payable according to these rules of the host Member State must be based on gross remuneration (i.e., pay before contributions, deductions or taxes) rather than on separate constituent parts of the remuneration.

Points to note !

The host Member State does not have an obligation under Directive 2014/67/EU to indicate the actual remuneration to be paid. Member States must provide information on the terms and conditions of employment, including the constituent elements of remuneration to be applied to the workers posted to their territory. However, it is employer's responsibility to establish in each individual case how much a posted worker must be paid based on this information.

(4) Health, safety and hygiene at work – posted workers shall be ensured the same safety and health conditions during their work in the host company as those ensured for permanent workers according to work conditions and other specifics.

In **Portugal** – (i) occupational safety and health issues are regulated by a special law on safety and health at work, currently Law no. 102/2009, of 10 September, which establishes the legal regime for the promotion of safety and health at work, besides being dispersed in various other legislation;

(ii) The employer must ensure, continuously and permanently, that the activity is carried out in safe and healthy conditions for the worker, taking into account the following general principles of prevention: a) Avoid risks; b) Plan prevention as a coherent system integrating technical developments, work organization, working conditions, social relations and the influence of environmental factors; c) Identify foreseeable risks in all activities of the enterprise, establishment or service, in the design and construction of installations, workplaces and work processes, as well as in the selection of equipment, substances and products, with a view to eliminating them or, where this is not feasible, to reducing their effects; d) Integrate the evaluation of the risks to the safety and health of the worker into all the activities of the company, establishment or service, and adopt the appropriate protection measures; e) Combat the risks at source, so as to eliminate or reduce exposure and increase the levels of protection; f) Ensure that workers' exposure to chemical, physical and biological agents and to psychosocial risk factors in the workplace do not constitute a risk to their safety and health; g) Adapt the work to the man, especially as regards the design of workstations, the choice of work equipment and working and production methods, with a view, in particular, to alleviating

monotonous work and repetitive work and reducing psychosocial risks; (h) Adapt to the state of technical evolution, as well as to new forms of work organisation; (i) Replace what is dangerous with what is harmless or less dangerous; (j) Give priority to collective protection measures over individual protection measures; (l) Draw up and disseminate comprehensible instructions appropriate to the activity carried out by the worker.

(iii) Where tasks are assigned to a worker, his knowledge and skills in matters of safety and health at work shall be taken into account, and the employer shall provide the information and training necessary for the worker to carry out the activity in safe and healthy conditions.

(iv) When implementing preventive measures, the employer shall organise the appropriate services, whether internal or external to the company, establishment or service, by mobilising the necessary means, in particular in the fields of technical preventive activities, training and information, as well as the protective equipment needed.

(v) The employer shall establish the first aid, firefighting and evacuation measures to be adopted and identify the workers responsible for their application, and ensure the necessary contacts with the external entities competent to carry out those operations and those of a medical emergency.

(vi) Where several companies, establishments or services simultaneously carry out activities with their workers in the same workplace, the respective employers shall, taking into account the nature of the activities each carries out, co-operate for the protection of safety and health.

(vii) Notwithstanding the responsibility of each employer, the following entities shall ensure the safety and health of all workers referred to in the preceding paragraph: (a) the user undertaking, in the case of workers under a temporary work regime; (b) the transferee company, in the case of workers under a casual assignment regime; (c) the company in whose premises other workers provide service under service provision contracts; (d) in all other cases, the company awarded the work or service, for which it shall ensure the coordination of the other employers through the organisation of occupational safety and health activities.

(viii) The employer shall be obliged to transfer the liability for compensation arising from workplace accidents to entities legally authorised to carry out this insurance.

(5) Protective measures with regard to the terms and conditions of employment for pregnant women or women who have recently given birth, for children and young people – posted workers shall be ensured the same work safety and health conditions, the terms and conditions of an employment contract and related conditions (for example,

additional breaks, shortened working time, longer paid leave, etc.) during their work in the host company as those applicable to permanent workers of these categories.

In Portugal – (i) Health and safety conditions of employees who are pregnant, have recently given birth or are breastfeeding are entitled to special conditions in the workplace in order to avoid their exposure to risks. Notwithstanding other obligations laid down in special legislation, in an activity liable to present a specific risk of exposure to agents, processes or working conditions, the employer shall assess the nature, degree and duration of the exposure of a pregnant worker, or infant, in order to determine any risk to their safety and health, the repercussions on pregnancy or breastfeeding, as well as the measures to be taken. The employer shall take the necessary action to avoid the employee's exposure to such risks, namely: a) by adapting the working conditions; b) if such adaptation is impossible, excessively time-consuming or too costly, assign the employee to other tasks compatible with her professional status and category; c) if such measures are not feasible, exempt the employee from providing work during the necessary period. The pregnant employee, as well as the one with a child under the age of 12 months, is not obliged to provide overtime work. The employee is also not obliged to do overtime work during the whole duration of breastfeeding if it is necessary for her or the child's health. Employees who are pregnant, have recently given birth or are breastfeeding are entitled to be exempted from providing work according to an adaptability regime, an hour bank or a concentrated schedule. Such right shall apply to either parent in case of breastfeeding when the work performed under flexible working time arrangements affects its regularity. The pregnant employee is exempted from work between 8 pm of one day and 7 am of the following day, for a period of 112 days before and after the birth, of which at least 56 days must be before the expected day of delivery. Excusal from night work can be expanded for the remainder of her pregnancy or for the entire period in which she is breastfeeding if a medical report is presented that certifies that this is necessary for the health of the mother or child. An employee who is exempted from night work should be given a compatible daytime schedule whenever possible. Pregnant employees are entitled to time off to attend the necessary prenatal examinations or medical appointments, if it is not possible to do so outside working hours. The father is entitled to three leaves to accompany the pregnant women. The employee is entitled to three work absences for medical appointments in the context of each cycle of medically assisted reproduction.

(ii) Safety at work for persons under 18: Child labour is not allowed unless the worker has already completed the age of 16 or, if it is not the case, if he/she is at secondary school; in this latter situation, the employment contract is allowed in the condition that the job is light and unable to jeopardize physical, mental, moral and social development or learning. In any case, there are some activities that are prohibited to any person under 18: those set forth in articles 61 and ff. of Act no. 102/2009, of 10 September; further, some activities, provided in articles 68 and ff.,

are conditioned, i.e., they are not allowed to workers under the age of 18 unless the employer accomplishes special measures of risk assessment and control and informs the ACT. Besides these special cases, there are accrued obligations for employers regarding the health and safety of minor workers. Not only the risk assessment and the identification of prevention measures shall be adjusted to their special condition (article 66 of the Labour Code), but, in particular, the periodical medical exams are to be more frequent than those provided for employees in general (article 72 of the Labour Code). There is also a set of rules related to working time: according to article 73, the normal working period shall not exceed 8 daily hours and 40 per week, even if flexible regimes are applied (or 7/35 for workers under 16); for minor workers, flexible working time arrangements, such as adaptability (working time periods are set on average), time banks and concentrated schedules are not mandatory if they carry any risk for their safety or health (article 74); as set forth in article 75, overtime work shall not, in principle, be requested (which may only occur exceptionally and if no other employer is available, in case of force majeure, or to prevent or repair a severe damage; in that case, the minor is entitled to compensatory rest periods; according to article 76, night work is also not mandatory for minor workers (between 8 PM of a day and 7 AM of the next day, for those under 16; between 22 PM of a day and 7 AM of the next day, for those between 16 and 18 years old; for these, there are situations in which night work is permitted, but under special protection conditions that do not apply for the majority of workers).

(iii) Employers with disability or chronic disease, besides being entitled to the adoption of reasonable accommodation measures – unless they carry a disproportionate burden (article 86-1 of the Labour Code) – benefit from a special protection in what regards working time. In cases where that adaptability, time banks, concentrated work, or night work may damage their safety and health, their application may not be mandatory, and they shall always be submitted to a prior medical check-up. They are also exempt from overtime work.

(6) Equality and non-discrimination between men and women and other provisions concerning the equality principle – posted workers shall not be discriminated against or treated less favourably during their job in the host company as a result of their personal or private circumstances not related to work skills.

In Portugal (i) Any discrimination, of any type (direct, indirect, etc.), of employees or job seekers is prohibited; they shall not be discriminated against on grounds of any factor, such as sex, sexual orientation, gender identity, age, race, religious belief, familiar situation, etc. (article 24 of the Labour Code). Regarding wages, any discriminatory treatment based on sex, or other factors, is especially prohibited; the principle of equal wages for equal work or work of equal value is mandatory (article 59-1-a) of the Portuguese Constitution; article 270 of the Labour Code), which imposes the definition of fair and common wage determination criteria for both

men and women (article 31 of the Labour Code). It is important to underline Act no. 60/2018, of 21/08, designed to strengthen the measures for granting the principle of equal pay for men and women and establish the obligation for employers to adopt a transparent payment policy, the lack of which leads to presume any payment differentiation discriminatory.

(ii) According to article 479 of the Labour Code, collective agreements are assessed by the Government's Labour Department in what concerns their compliance with the principle of equality and non-discrimination.

(iii) Harassment, both moral and sexual, whether discriminatory or not, is prohibited (article 29 of the Labour Code). Employers with over 7 employees shall adopt a code of conduct for preventing harassment in the company (article 127-1-k) and are obliged to take disciplinary action over employees accused of harassment (article 127-1-l). Unless they act maliciously, neither the plaintiff nor the witnesses can be disciplinary sanctioned on grounds of their declarations.

(iv) Any discriminatory act confers a right to compensation (article 28 of the Labour Code), and disciplinary sanctions applied for discriminatory reasons may be considered or presumed abusive (article 331).

(7) Working conditions of temporary workers – a temporary employment agency shall ensure that posted temporary workers are subject to at least the basic employment conditions which would apply to such workers if they were recruited by the user undertaking to occupy the same workplace, including all the collective agreements applicable on the company level.

Important !!!

The temporary work user undertaking shall inform the temporary employment agency about the employment terms and conditions it applies for working conditions and remuneration.

In **Portugal** – (i) Workers posted in Portugal by temporary employment agencies established in other States have the right to all the employment terms and conditions applicable to temporary workers hired out to user undertakings in Portugal by temporary employment agencies established in Portugal.

A temporary worker posted in Portugal in the context of a hiring out to a Portuguese user undertaking, shall therefore benefit from all the employment conditions provided either by law, or by collective agreement legal instruments with general efficacy applicable in Portugal, which the user undertaking may have to respect in Portugal, similarly to what would happen if the temporary employment agency hiring out the worker to the user undertaking was a Portuguese temporary employment agency.

The applicability of all these conditions shall cover all the provisions of the Portuguese Labour Code that set conditions or limit the use of temporary workers

by user undertakings, all the other provisions which govern the contracts for the use of temporary work, and which, in some way, constitute an expression of the constitutional principle of job security in Portugal, as well as those provisions of the Portuguese Labour Code that regulate temporary work.

Information on collective agreements celebrated in Portugal is available at <http://bte.gep.msess.gov.pt/>

(ii) Temporary workers posted in Portugal shall equally benefit from the regime concerning the conditions of accommodation, where provided by the user undertaking, as well as grants, allowances or reimbursements, to which the user undertaking in Portugal is subjected to cover, exclusively, the expenditures with travel, board and lodging incurred by the posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent from their regular place of work to another.

The user undertaking, in Portugal, of temporary workers posted in our country in the context of a hiring out by a temporary employment agency established in another State shall inform the temporary employment agency of the employment conditions applicable, including remuneration.

In the case of a worker posted in Portugal by a temporary employment agency of another State to the use of a Portuguese user undertaking, the worker shall be entitled to the most favourable regime provided either by the law competent to govern his/her employment contract with the temporary employment agency, or set forth in the employment contract itself between the worker and that agency.

If a temporary worker hired out by a temporary-work agency of another State to a user undertaking in Portugal is to carry out work in the framework of the transnational provision of services in a State other than Portugal, the user undertaking shall inform the temporary-work agency before the beginning of the work activity. In case of an infringement of such duty to inform, the worker shall be considered posted by the temporary-work agency with which the worker has an employment relationship in the territory of the State where he/she carries out the work.

Workers hired by a temporary-work agencies established in Portugal performing their activity in another State have the right all to the employment conditions mentioned above, applicable to workers of temporary employment agencies from other States posting their workers in Portugal in the context of a hiring out to a Portuguese user undertaking, notwithstanding a more favourable regime provided either by the law applicable or the contract.

(8) Conditions of workers' accommodation, where provided by the employer for workers away from their regular place of work – a new guarantee for posted workers set out in the Revised Posting of Workers Directive. In such a case, the employer shall ensure to posted workers the same accommodation conditions as required by national law or practice to the regular staff of the company when sent to a different location.

In **Portugal** – Service provider companies established in other States posting workers in Portugal shall accommodation conditions provide to such workers where that accommodation is provided by the employer, on the basis of equality of treatment, as resulting from the law and/or applicable collective labour regulation instruments with general efficacy. It must be understood that, in case accommodation is not provided by the employer, the worker, according to Portuguese Law, shall be entitled – as it would happen in case of temporary transfer of the place of work of the employee, within Portuguese territory, determined by the employer – to receive from the employer an amount to cover the expenditures resulting from the additional costs incurred by the worker with accommodation as a consequence of his/her posting in Portugal. It must be noted, however, that the right to such amount may be removed by collective labour regulation instrument.

The posted worker shall, in any case, benefit from the regime which is more favourable to him/her, in this matter, resulting either from the law governing the individual employment contract between the worker and the company posting him/her in Portugal, or from the individual employment contract provisions themselves.

As regards accommodation, workers hired by an company established in Portugal performing their activity in another State have the right to the same conditions just described. The worker may benefit, in any case, from the most favourable regime of the law of the State of destination/posting, the law chosen by the parties to govern the individual employment contract, or the regime resulting from the individual employment contact provisions.

(9) Allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons – the employer shall reimburse the travel, board and lodging expenses for a posted worker in accordance with legal acts and/or practice applicable to employment relations in the home Member State. The amounts payable (or the expenses reimbursable) by the employer in relation to travel, board and lodging expenses are not regarded as part of the remuneration. They shall be paid or reimbursed in addition to the salary.

In **Portugal** – Notwithstanding the more favourable regime set forth by the law governing the individual employment contract or the employment contract itself, workers posted in Portugal have the right, on the basis of equality of treatment, to employment conditions provided by Portuguese law or applicable collective labour regulation instruments with general efficacy concerning grants, allowances and reimbursements destined to cover exclusively the expenditures with travel, board and lodging incurred by such workers where they are required to travel to and from their regular place of work of posting in Portugal, or where they are temporarily sent by their employer from that regular place of work to another.

A worker hired by an company established in Portugal and executing his/her activity in the territory of another State has the right to the same conditions just described, notwithstanding the most favourable regime of the law of the State of destination/posting, the law chosen by the parties to govern the individual employment contract, or the regime resulting from the individual employment contract provisions.

Important !!!

The posting employer shall ensure non-discriminating working conditions to the worker compared to those guaranteed to the regular employees of the host country. That means that a posted worker is actually subject to the labour law of the country of his/her permanent employment (the employment contract with his/her permanent employer remains in force during posting) as well as to the legal acts of the country where he/she has been posted for work. If legal regulation differs, the employer shall ensure the most favourable working conditions for the employee.

4.2. Information to posted workers

In accordance with Article 4 of Directive 91/533/EEC on employers' obligation to inform employees of the conditions applicable to the contract or employment relationship, before posting an employee to work in another state, the employer shall provide the following written information:

- (i) the duration of the employment abroad;
- (ii) the currency to be used for the payment of remuneration;
- (iii) where appropriate, the benefits in cash or kind attendant on the employment abroad;
- (iv) where appropriate, the conditions governing the employee's repatriation.

It should be noted that Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union must be transposed into national law by 1 August 2022 (this Directive will replace the above-referred Directive 91/533/EEC) and, in accordance with its Article 7, before posting an employee to work abroad, the employer shall provide him/her with written information about:

- (i) the country or countries in which the work abroad is to be performed and its anticipated duration;
- (ii) the currency to be used for the payment of remuneration;
- (iii) the remuneration to which the worker is entitled in accordance with the applicable law of the host Member State;
- (iv) where applicable, the benefits in cash or kind relating to the work assignments;
- (v) where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging;
- (vi) the link to the official national website developed by the host member state

containing information about the rules of labour law applicable to posted workers;

- (vii) information as to whether repatriation is provided for, and if so, the conditions governing the worker's repatriation.

Important !!!

It is the posting employer who shall find out what working conditions and guarantees should be applied in the host country. That is your obligation. You have the right to get all the information necessary from your business partners, representatives of the company where you send your workers. In the case of posting of temporary workers, the receiving employer must be active and supply you, as the posting employer, with all the relevant information.

Under Article 5 of the Enforcement Directive 2014/67/EU, host Member States have the obligation to create and maintain updated a national website containing the information on the terms and conditions of employment applicable to workers posted to their territory. This information must be made generally available free of charge, in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means and in formats and in accordance with web accessibility standards that ensure access to persons with disabilities. The website should include, where possible, links to existing websites and other contact points, in particular, the relevant social partners.

Each EU Member State shall have at least one contact point to provide detailed information on the posting of workers abroad. Such contact points shall also cooperate and exchange information, monitor working conditions during posting and take subsequent actions if any violations of the rules are suspected. Links to the contact point of a specific country and its information are available here: http://europa.eu/youreurope/citizens/national-contact-points/index_en.htm?topic=work&contacts=id-611492

In Portugal – the State Labour Inspectorate (*Autoridade para as Condições do Trabalho*) is responsible for the provision of information about the working conditions applicable to the workers posted to Portugal. All necessary and relevant information as well as contact details of the persons who can provide you with additional information or help are available on the website of this institution:

[https://www.act.gov.pt/\(pt-](https://www.act.gov.pt/(pt-)

[PT\)/CentroInformacao/DestacamentoTrabalhadores/Destacamentodetrabalhadores/](https://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/Destacamentodetrabalhadores/)

[Paginas/default.aspx.](https://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/Destacamentodetrabalhadores/Paginas/default.aspx)

4.3. Social partnership and collective bargaining

Although the Directives on posting do not directly obligate social partners – trade unions and employer organisations – to participate in the processes relating to posting,

their role is, nevertheless, very important.

Posted workers may request information and advice from trade unions both in the company of their permanent employment and in the host company. The activities and the degree of engagement of trade unions in separate states and even in individual companies differs considerably. Do not be surprised if there is no trade union active in a company. In such a case, seek contact with trade unions operating on the industry, territorial or even national level. Contact details of trade unions are normally available on the internet and you should search for them. You may also look for information and contact details on the website of the trade union active on the European Union level: <https://www.etuc.org/en>

In **Portugal**, trade unions may function at company and/or professional sector levels, as well as at local, regional, and national levels.

Some of the most significant trade unions and employer associations are:

(i) Trade unions:

General Confederation of the Portuguese Workers (CGTP-IN): <http://www.cgtp.pt/>

General Union of Workers: <https://www.ugt.pt/>

Inter-Union Federation of the Metallurgical, Chemical, Electrical, Pharmaceutical Industries, Cellulose, Paper, Printing, Press, Energy, and Mines: <https://www.fiequimetal.pt/>

Union of Independent Trade Unions: <https://www.usi.pt/>

(ii) Employers' associations:

Business Confederation of Portugal: <https://cip.org.pt/>

Commerce and Services Confederation of Portugal: <https://ccp.pt/>

Tourism Confederation of Portugal: <https://www.ctp.org.pt/>

Farmers Confederation of Portugal: <https://www.cap.pt/>

Portuguese Confederation of Building and Real Estate: <https://www.cpci.pt/>

Portuguese Confederation of Small and Medium-Sized Enterprises: <https://www.cppme.pt/>

National Association of Metallurgical and Electromechanical Enterprises: <https://www.aneme.pt/site/>

Association of Metallurgical, Metalworking Industrials, and such of Portugal: <https://www.metalportugal.pt/>

(iii) Works councils:

Employees may also create works councils to represent them in the company's context.

Collective bargaining. As demanded by the Directive, posted workers (except temporary agency workers which are bound by the collective agreements applicable in the user undertaking) shall be subjected to the collective agreements that have been given general applicability by the competent authorities.

In the absence of, or in addition to, a system for declaring collective agreements or arbitration awards to be of universal application, Member States may, if they so decide, impose the observance of collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.

The host country shall determine which agreements fulfil the aforementioned criteria and shall, therefore, be applicable to posted workers. This data must be published in the national official website that contains information on the working conditions applicable to posted workers. However, Member States are not obliged to publish the texts or summaries of such collective agreements. Therefore, you should contact not only the host employer, but also trade unions, in particular the ones operating in the receiving country, on this particular matter.

In Portugal administrative extension ordinances widen the subjective scope of application of collective agreements, making them applicable to employees and employers not affiliated with the signatory parties. Workers posted in Portugal will be entitled, regarding the conditions enshrined in Article 7 of the Portuguese Labour Code, to the more favourable conditions contained in collective agreements subjected to such an extension.

Do you know that?

The posting employer may be approached by the trade unions of the host Member State to engage into a collective bargaining on working conditions for the posted workers. Therefore, Directive 2014/67/EU allows the host Member State to require the designation of a contact person through whom the relevant social partners may seek engagement in collective bargaining within the host Member State.

4.4. Social security rules applicable to posted workers

The workers posted for temporary employment to another EU Member State continue using the social security system of the country they have been employed before posting – pay social insurance contributions and are entitled to social security benefits.

The employee posted to another EU Member State normally retains social insurance in the country of his/her permanent employment provided that the period of posting to another state does not exceed 24 months and provided that the employee has not

been posted to that state in order to replace another employee.

The employer who posts an employee for work in another state must request a special Certificate A1, which is issued by the social security authority of the country where the employees have insurance. Certificate A1 confirms that the posted employee has been registered in the social security system of the employer's country and that he/she does not have to pay any contributions in the host country.

Certificate A1 confirms that the employee temporarily employed in another Member State has insurance in the country where the company of his/her permanent employer has been registered and where he/she has permanent employment.

Certificate A1 is not, in itself, a permit to post an employee. It only confirms that the posted employee continues participation in the social security system of the state of his/her permanent employment.

Important !!!

Certificate A1 shall in all cases be the responsibility of the employer who sends out a posted employee. In the meantime, Certificate A1 is issued in paper format, one copy whereof is normally given to the employee.

In Portugal - The authority that issues the A1 Certificate is the Social Security. More information available at https://europa.eu/youreurope/citizens/work/social-security-forms/index_pt.htm#a1form and https://www.seg-social.pt/documents/10152/14971/N49_destacamento_trabalhadores_portugal_outros_paises/8cc3f642-e286-4ef1-8210-d86bb3833a0b.

Medical assistance. Medical assistance. If medical assistance is necessary in the host country, the posted worker can get it in the same way as any other worker of that country. The costs of medical assistance shall be paid by the country where the person has health insurance.

4.5. COVID-19 and posted workers

After the outbreak of the COVID-19 pandemic, the European Commission outlined the relevant information for mobile workers – “COVID-19 information for frontier workers and posted workers”.¹ As far as posted workers are concerned, this document notes that irrespective of the COVID-19 situation, all employment guarantees for posted workers continue to apply during posting. However, all posted workers must comply with the restrictions imposed in the host country as a result of COVID-19 (for example, isolation,

¹ 30 Kovo 20201 #coronavirus:
https://europa.eu/youreurope/citizens/files/Covid_FrontierPostedWorkers_en.pdf

remote work, etc.).

COVID-19-related restrictions in Portugal – Measures on labour matters and on the entry and stay of foreigners in Portugal have been varying since March 2020. In labour terms, compulsory telework has already been in force, being merely recommended since the end of January 2022. The measures applicable in these matters are regularly published on the website <https://covid19estamoson.gov.pt/#>.

5. Inspections by competent authorities

The Enforcement Directive (2014/67/EU) states that coordination between the Member States' competent authorities and cooperation at European level on combating fraud relating to the posting of workers should be strengthened. The Directive aims to improve the implementation and enforcement of Posting of Workers Directive in practice by setting a framework for measures and control mechanisms. The Enforcement Directive aims to improve the implementation, application and enforcement of the Posting of Workers Directive. For this purpose, the Internal Market Information System (IMI) is used. IMI plays a key role in supporting the strengthened administrative cooperation underpinning the Directive.

Important !!!

The internal market information system (IMI) may be used only by registered users, i.e. only by representatives of competent national authorities.

General principles for mutual assistance of the Member States' competent authorities are described in Article 6 which also introduces legal deadlines for replying to information requests. Article 7 describes the roles of the host Member State and the Member State of establishment in the framework of administrative cooperation. To help ensure enforcement, Chapter VI of the Directive foresees mutual assistance between authorities, where needed, to notify decisions and recover administrative penalties and/or fines, through what is referred to as a uniform instrument generated via the IMI system.

The European Labour Authority (ELA) also takes part in the control of the posting of workers, coordination of cross-border cooperation and joint inspections. The ELA aims to facilitate information about workers' rights and support cooperation between Member States in cross-border enforcement of relevant Union law. For more about ELA, read: https://www.ela.europa.eu/sites/default/files/2021-07/LT_Guidelines-for-concerted-and-joint-inspections.pdf

In **Portugal**, compliance with labour law, including that on posting, is monitored by the Authority for Working Conditions, which is responsible for assessing compliance with the rules on the posting of workers and for cooperating with the labour conditions monitoring services of other Member

States of the European Economic Area, in particular as regards requests for information in this field. More information available at [https://www.act.gov.pt/\(EN-PT\)/CENTROINFORMACAO/DESTACEMENTOTRABALHADORES/Paginas/default.aspx](https://www.act.gov.pt/(EN-PT)/CENTROINFORMACAO/DESTACEMENTOTRABALHADORES/Paginas/default.aspx).

6. Sanctions

Directive 2014/67/EU imposes on Member States to put in place appropriate and effective checks and monitoring mechanisms, on a non-discriminatory and proportionate basis. It also provides that Member States must have in place penalties applicable in the event of infringements of national provisions adopted pursuant to the Directive and must take all the necessary measures to ensure that they are implemented and complied with. The penalties provided for shall be effective, proportionate and dissuasive.

In **Portugal**, violation of the working conditions of posted workers makes the person responsible incur administrative offence liability. Fines for failure to comply with labour standards may vary according to the seriousness of the offence and the company's turnover.

7. More information

1. European Commission official information on Posted Workers: <https://ec.europa.eu/social/main.jsp?catId=471>
2. National liaison offices and authorities: https://europa.eu/youreurope/citizens/national-points/index_en.htm?topic=work&contacts=id-611492
3. State Labour Inspectorate from Portugal (*Autoridade para as Condições de Trabalho*): [https://www.act.gov.pt/\(PT-PT\)/CENTROINFORMACAO/DESTACAMENTOTRABALHADORES/Paginas/default.aspx](https://www.act.gov.pt/(PT-PT)/CENTROINFORMACAO/DESTACAMENTOTRABALHADORES/Paginas/default.aspx)
4. Posting of workers before national courts: <https://www.etui.org/publications/books/posting-of-workers-before-national-courts>
5. The international project STEP UP – “Stepping up the European cooperation and communication among Public & Private organizations for the PROTECTION of posted worker’s rights”: <https://stepup-protection.com/about-project/>

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