

# Part I -> The definition of 'posting' and 'posted worker', including 'long term posting'

- What makes posting special?
- Rules at a glance (timeline)
  - \* What is posting?
  - \* What is a posted worker?
  - \* What is long term posting?



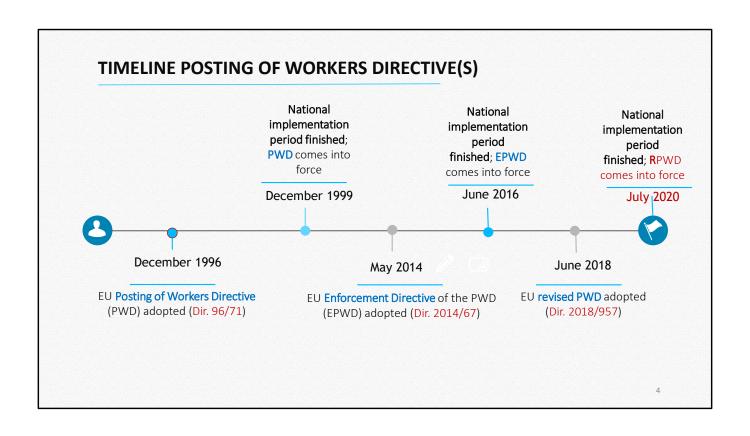
# (1) WHAT MAKES POSTING SPECIAL?

Posted workers are different from EU mobile workers in that they remain in the host Member State temporarily and do not integrate in its labour market.

On the contrary, EU mobile citizens who go to another Member State to seek work and are employed there, are entitled to equal treatment with nationals in access to employment, working conditions and all other social and tax conditions

http://ec.europa.eu/social/main.jsp?catId=471

www.yourwebsite.com



#### (1) WHAT IS POSTING?

Pursuant to Article 1(3) PWD, three types of posting can be distinguished:

- Posting based on a services contract (type A),
- Posting within a group (type B)
- Hiring out through a TWA or placement agency (type C).

To ensure the genuine nature of the posting, focus on:



'Limited period of time' (Art. 2)
Link with habitual place of work and with sending state?
Distinction between passive and active mobility

Specific attention necessary:
Postings of very short duration (how to distinguish from 'business trips'?)
Temp Agency worker
(Transport worker)

(1) DEFINITION OF A POSTED WORKER

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#### Art. 2(1) PWD:

Posted worker is, for the purposes of this Directive, a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works

- Magdalena is posted for a period of 23 months by her Polish employer to a care house for elderly people in Belgium. This is followed by an unpaid leave of 3 months in Poland, after which she is posted again to the same place for another period of 23 months.
- Does she (still) qualify as a posted worker?

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# (1) POSTINGS OF LONG DURATION

• Recital 9 revised PWD: "Posting is temporary in nature and the posted worker usually returns to the country of origin after the completion of the work for which he has been posted. (...) However, in view of the long duration of some postings and in acknowledgment of the link between the labour market of the host Member State and the workers posted for such long periods, where posting lasts for periods longer than 12 (or 18) months", an additional set of host state terms and conditions of employment should be mandatorily applicable 'on an equal treatment basis'



**Exception:** rules relating to procedures, formalities and conditions that address the conclusion and termination of the employment contract, including non-competition clauses and supplementary pension schemes (Art. 3(1)(a) revised PWD).

• Also covered: workers who are posted to replace other posted workers performing the same task at the same place, to ensure that such replacements are not used to circumvent the otherwise applicable rules.

# (1) INFO Obligations re all workers posted for a consecutive period of more than four weeks (Dir. 2019/1152)

- . the country or countries in which the work abroad is to be performed;
- . the anticipated duration of the work abroad;
- . the currency to be used for the payment of remuneration;
- . where applicable, the benefits in cash or kind relating to the work assignments;
- . information as to whether repatriation is provided for, and if so, the conditions governing the worker's repatriation.
- . the remuneration to which the worker is entitled in accordance with the applicable law of the host Member State;
- . where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging;
- . the link to the single official national website developed by the host Member State  $\,$

# Part II -> The hard core of host state labour conditions

- Content of the 'hard core'
- Focus on 'renumeration':
  - \* What is covered?
  - \* How to compare the wages / wage components?
  - \* Complexity -> What difficulties are involved for host states (actors) and sending employers?



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# (2) 'HARD CORE' OF HOST STATE LABOUR STANDARDS

**Art. 3(1) PWD**: "Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) PWD guarantee workers posted to their territory the terms and conditions of employment covering the following matters..."



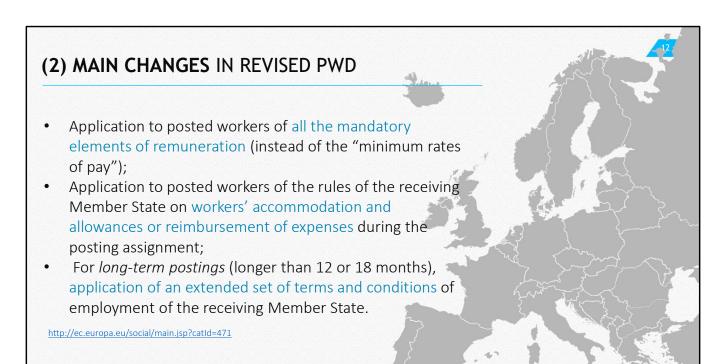
if... laid down in mandatory law or extended collective agreement (see also Art. 3(8) PWD)

if... more favourable (Art. 3(7) PWD)

Art. 3(8) revised PWD: 'In the absence of, or in addition to, a system for declaring collective agreements universally applicable...

#### 'HARD CORE'

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual leave;
- (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, or by collective agreements which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8.
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e)
- (f)
- (g)
- the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work;
- (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.
  - Point (i) shall apply exclusively to travel, board and lodging expenditure incurred by 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 by their employer from that regular place of work to another place of work.



# (2) WHAT SHOULD BE PAID DURING A POSTING PERIOD? EXAMPLE • Jakub resides and normally works in Poland. • He is posted to a German factory: • German collective agreement provides for hourly wage level, based on job classification & pay-scales. • A bonus for hard labour is also provided for by the collective agreement, as well as a right to occupational pensions.

## (2) FROM MINIMUM RATES OF PAY to REMUNERATION...

- Article 3(1)(c) PWD: overtime included but **occupational pension** schemes not
- CJEU in C-396/13: The definition of 'minimum rates of pay' is a matter for the host country; its constituent elements may include job classification & pay-scales
- Art. 3(1) Revised PWD extends 'core employment matters' to:
- remuneration: constituent elements of remuneration include e.g. thirteenth month allowances for travel expenses, or compensation for work during public holidays or night work.
- Conditions of workers' accommodation and allowances or reimbursements for travel, board and lodging cost for workers away from home for professional reasons

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#### COMPLEXITY OF THE EMPLOYMENT CONDITIONS OF POSTED WORKERS

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Lisa Berntsen, PhD Thesis, 2015:

" So every time you have to figure out exactly what is the law that applies to this person.

You know, does he have a Dutch contract? Does he have a Polish contract or a Romanian contract? Is he even under EU law?

And that makes it almost impossible for us to really organise these people."

FNV official 1



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## (2) HOW TO COMPARE?

- Recital 18/ Article 3(7) PWD: when comparing the actual remuneration paid
  to a posted worker and the remuneration due in the host Member State, the
  gross amount of remuneration should be taken into account, rather than the
  individual constituent elements of remuneration which are rendered
  mandatory as provided for by this Directive.
- Unless the allowances specific to the posting concern expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging, they should be considered to be part of the remuneration and should be taken into account for the purposes of comparing the total gross amounts of remuneration.

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## (2) TRANSPARENCY REQUIREMENTS...

- Recital 18 revised PWD: (...) in order to ensure transparency and to assist the competent authorities and bodies in carrying out checks and controls it is necessary that the constituent elements of remuneration can be identified in enough detail.
- Article 5 EPWD 2014: Member State shall indicate which terms and conditions of employment apply on its territory, published on an up-to-date website.
- Article 3(1) Revised PWD: Where, contrary to Article 5 of Directive 2014/67/EU, the information on the single official national website does not indicate which terms and conditions of employment are to be applied, that circumstance shall be taken into account, in accordance with national law and/or practice, in determining penalties in the event of infringements of the national provisions adopted pursuant to this Directive, to the extent necessary to ensure the proportionality thereof.

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# (2) 'POSTED' TEMP AGENCY WORK (if time allows ©)

- Revised PWD links the
  protection of posted agency
  workers to the
  'equal treatment provision' of the
  Temporary Agency Work Directive
  2008/104 (Art. 5), stipulating equal
  treatment of temporary agency
  workers
  in the user company.
- \* Full equal treatment is optional (Art. 3(9) revised PWD).

- Chain posting
- A temporary work agency established in Member State A hired out a worker to a user undertaking in Member State B. One month later, the user undertaking posts the same worker to Member State C in the context of a contract of services. In such a case, the authorities of Member State C must consider that it is the temporary agency established in Member State A that has made the posting.

