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The posting of workers: An EU and Slovak Republic perspective

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The posting of workers in respect of the EU law and its impact on national legislation

The posting of workers can be considered as one of the most basic and important labour principles from the perspective of the European Economic Area. However, even today we are facing obstacles to the cross-border posting of workers in companies with an international concern, which are affected not only by European legislation, but often also by the national legislative regulation of several Member States.

The basic attribute of the posting of workers is the free movement of services, while the legal framework for the posting of workers consists of the following regulations of the EU:

- 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; and
- 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.

At the national level in the Slovak Republic, the following provisions regulate the posting of workers:

- Act No. 311/2001 Coll. Labour Code as amended effective from 18 June 2016 (the 'Labour Code'); and
- Act No. 351/2015 Coll. on Cross-Border Co-operation in Posting of Workers to Perform Work in the Provision of Services.

Pursuant to the amendments effective from 18 June 2016, the Labour Code also applies to the employment relationships of workers whose employers established in another Member State of the European Union post them to perform work in the provision of services from their territory to the territory of the Slovak Republic.

The transposition of the above EU Directives into the legal order of the Slovak Republic has enhanced cooperation between Member States of the EU in the field of posting of workers, in particular through enhanced information, control, notification and enforcement decisions by Member States' authorities imposing sanctions, across borders to provide services and to promote competition.

On the one hand, this has ensured continuity of posting from the perspective of workers, but on the other hand, the administrative burden on employers must also be mentioned.

For the purposes of the above Directives, the Labour Code defines the posting of an employee to perform work in the provision of services as cross-border in the following circumstances: (a) posting under the direction and under the responsibility of the posting employer under a contract between the posting employer as the cross-border service provider and the recipient of this service, if between the posting employer and the posted worker there exists an employment relationship during the posting period; or (b) temporary assignment to a user employer if there is an employment relationship between the posting employer and the worker during the posting period.

In order to clearly identify whether the activity of a worker of a foreign entity in the territory of the Slovak Republic fulfils the definition of the posting of a worker under the Labour Code, a comprehensive assessment of the facts of both the posting employer and the worker is required.

Posting a worker to perform cross-border services to the territory of another EU Member State is only possible on the basis of a written agreement between the home employer and the home worker, which must include the beginning and end date of posting, the type of posting, place of posting and pay conditions during the posting period.

In the case of the employer, the place where the employer is established, where taxes and levies are paid, the place where the employer recruits workers and the place from which they are posted, etc. must be monitored. In

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the case of workers, it must be checked in particular whether the worker in another EU country carries out the work or whether the worker carries out work in the Slovak Republic for a limited period, returning to another Member State from which he/she has been posted or continues to work in that other Member State upon completion of the posting, etc.

If the facts of a particular employment relationship indicate that it is a posting, the visiting and home employers must *inter alia* meet extensive reporting obligations to the National Labour Inspectorate in accordance with the Labour Code.

When posting to any EU country, it is necessary to find out in advance the regulation of national legal systems in relation to employment and whether, for example, different collective agreements do not apply to workers according to the type of work performed, which also automatically apply to posted workers.

Pursuant to Article 3 paragraph 1 of Directive 96/71/EC, the minimum working conditions of the country to which the worker has been posted – the so-called 'hard core' conditions – must be maintained at the State into which the worker has been posted, except that Article 3(7) of the Directive 96/71/EC and Section 5(3) of the Labour Code under which the conditions which are more favourable to the worker shall apply, with the benefit being assessed separately for each employment relationship.

Non-compliance with the conditions for cross-border posting of workers required by the Slovak Republic's legal system may be penalised by the imposition of a fine by the National Labour Inspectorate in the range of EUR 2,000 to EUR 200,000. This penalty shall be imposed on the business which receives a job or service from an employer who would itself commit the offence through a natural person it is employing illegally if:

a. for the cross-border provision of a service the offence is committed for a period exceeding five days within a period of 12 months from the first provision of the service; or
b. the offence is committed in respect of national or cross-border labour supply.

Such a penalty may be imposed within two years from the date of discussion of the protocol on the outcome of the inspection, and no later than three years from the date of breach of the prohibition.

Additionally, failure to comply with the legal conditions for posting of workers may not only have the characteristics of illegal employment within the meaning of labour law, but may also fall within the ambit of the criminal law framework.

Problems in practice

In practice one problem in this area arises when a worker of a business entity of another Member State performs work and/or provides a service in the territory of the Slovak Republic for a domestic business entity. From the perspective of labour law, it is not clear whether all such cases are considered according to the above-mentioned Directives as posting of workers or whether they are considered as illegal employment by domestic business entities receiving work from foreigners.

For example, an entity established in the Slovak Republic orders a service from an entity established in the Czech Republic under a commercial contract. The Czech entity provides this service by concluding 'Contracts of Work' according to the Labour Code of the Czech Republic with citizens of the Slovak Republic who usually work in the territory of the Slovak Republic and who do not prove their affiliation to the Czech social insurance system by an A1-certificate, and therefore should be enrolled in the Slovak social security system. As the workers are not actually enrolled in the Slovak social insurance system, the definition of illegal employment under the Slovak Act on Illegal Work and Illegal Employment by persons working in the Slovak Republic is fulfilled.

Given that such a procedure has been in many cases requested by an entity in the territory of the Slovak Republic, it is co-responsible for compliance with the legislation on illegal work and illegal employment in the territory of the Slovak Republic and the Labour Inspectorate will impose a penalty on it.

At the same time, it is also a matter of providing protection to Slovak citizens performing work in the territory of the Slovak Republic on the basis of Czech agreements and Czech entities as their employers are not paying social and pension contributions for them.

Another example of a problem in this area is when third-country workers are employed by an employer from another Member State in which the conditions of the national legislation are more favourable to employers and, consequently, such employer provides a service in another Member State to which it is posting its third-country worker.

The aim of the above-mentioned Directives can be assessed positively, since the aim is to protect those workers who normally move across borders because of their job description. On the other hand, it should not be forgotten about the administrative obligations of employers, which the EU Directives place on employers and where failure to comply with such obligations is heavily sanctioned.

Despite the adopted legislation, the difference between the posting of an employee and a border-crossing business trip is still a discussed topic. Posting a worker abroad and a border-crossing business trip are not the same under the law. The border-crossing business trip is one that means sending the worker to the territory of another EU Member State to work on behalf of and for the benefit of their employer. However, in the case of posting the service is provided by the worker for the benefit of a foreign entity.

A border-crossing business trip is not a cross-border provision of services. Although the worker carries out

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work for the benefit of their employer, it is generally not for the benefit of a third party/foreign entity.
Another important factor within the cross-border business trip is that the worker can be sent on a cross-border business trip without their formal agreement. There is no need to conclude a posting agreement with them, as is the case for posting. Another difference is that the worker has working conditions abroad that they have agreed with their domestic employer. It is not necessary to modify the working conditions of the worker in order to comply with the working conditions abroad in the country where they are on the business trip, as it is when they are posted.

Impact on the social security system of posted workers

The social security of workers posted from one Member State to another is equally a fundamental question.
The social security of posted workers is regulated by Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and Regulation (EC) No. 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems.
The worker who is posted by their employer to another Member State to carry out work there shall continue to be subject to the social security legislation of the home Member State if the duration of such work does not exceed 24 months and they are not posted to replace another person.
The maximum duration of domestic social insurance for a posted worker is two years. After that period, it is possible to remain in the territory of a Member State, but there is an obligation to register and pay statutory contributions to the local social security system. The home employer is obliged to withdraw the worker from its applicable mandatory social insurance. The Social Insurance Agency in Slovakia recommends that both employers and workers enquire about their social security obligations and rights in the Member State in which they operate.
Finally, it is noteworthy that in Slovakia the National Labour Inspectorate detects annually approximately 2,500 illegally employed natural persons. In such cases, workers are deprived of the protection provided by labour legislation and at the same time they are not entitled to pension rights or social and health insurance.

Conclusion

In the field of labour law relations, in particular with reference to the different labour standards of individual EU Member States, many controversial facts still arise, which also causes diversity of EU case law on labour law. On the one hand, it causes workers to move across borders in order to work in another EU Member State with more favourable conditions applicable to them and, on the other hand, it causes the speculative nature of employers seeking to avoid strict national regulations to increase.

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