MEMENTO

OF THE EMPLOYER 1

TOPIC

Cross-border employment in the European Union:
labour law and social security – Part I

PARTENA PROFESSIONAL

Kantoor van afgifte: Leuven MassPost | P705107

CROSS-BORDER EMPLOYMENT IN THE EUROPEAN UNION

LABOUR LAW AND SOCIAL SECURITY – PART I

The European Union has embarked on a fight against cross-border fraud, and Belgium is following suit. Our country recently transposed the applicable Directive 2014/67 of 15 May 2014 through the Act of 11 December 2016 laying down various provisions concerning the posting of workers. The Act entered into force on 30 December 2016[1], with a slight delay since the European Union set the deadline for transposition at 18 June 2016. The result: new legislation which does not replace the current legal framework but rather adds another cog to the system, thus rendering the system more complex.

Partena Professional provides more than an overview of the new developments: we will be explaining how they can be integrated into current regulations. Three different scenarios are detailed below: "**transfer**" and "**posting**", which will be examined in this first part, and "**simultaneous employment**" which will be examined in the second part. Finally, we will review the various employment documents as well as the old and new formalities.

01 INTRODUCTION

Entrepreneurship within an open economy such as Belgium's goes hand in hand with the cross-border employment of workers. Belgium is ranked tenth in the *World Economic Forum*'s top ten countries that promote cross-border trade[2]. Entrepreneurship in Belgium therefore also involves being in competition with foreign companies employing staff in Belgium. However, thanks to the European Union, it is relatively easy to post your own workers in other Member States.

A few figures to illustrate the complex relationship between economic reality and the legal system:

- In 2013, the other Member States of the EU submitted 134,340[3] A1 forms, certifying that the posted workers were often subject to social security of the sending State in question and were exempted from paying social security contributions for the duration of their temporary employment in Belgium.
- In 2014, the European Union recorded a total of 159,749 postings from other EU Member States to Belgium. The workers were employed under temporary contracts in Belgium, so that the wages and working conditions of their sending State continued to apply (a rule with significant nuances).

A complex relationship, because:

- The A1 form is only valid for social security. Income tax may be owed in Belgium. In addition, Belgian wages and working conditions (including the year-end bonus and simple or double holiday pay) may apply, and the employer must comply with applicable Belgian law on employment contracts and termination.
- Under employment law, a posting does not necessarily entail an exemption from paying social security contributions. A worker may be temporarily posted in Belgium, but most of their time shall be spent working within the sending State. If the worker moves to Belgium, they may be required to pay social security contributions in Belgium.

In the event of cross-border employment, it is necessary to determine which labour laws shall apply, which country may levy social security contributions, and the country in which income tax is owed. Different rules apply for each of these three crucial points. A Dutch national working in Belgium may be subject to Dutch social security, pay income tax in Belgium and in the Netherlands - based on a different wage component - and enjoy Belgian wages and working conditions. Finally, the matter of the national court with jurisdiction over disputes relating to labour law opposing the employer and the worker must be examined.

Answering all of these questions in a single article would be an ambitious project. This is why we will be focusing on cross-border employment within the European Union, and only on those aspects relating to labour law and social security. The European Union has established a framework for these two aspects, which is based on the free movement of people and services. As regards income tax, the European Union does not have jurisdiction over this matter, and the answer must be sought in a network of bilateral tax conventions.

02

THREE TYPES OF CROSS-BORDER EMPLOYMENT

We shall determine the applicable labour law and the Member State responsible for levying social security contributions in three typical situations of cross-border employment within the European Union.

SCENARIO 1: TRANSFER

A company established in the sending State posts a worker to another company established in the host State. The worker will then work solely in the host State.

The company established in the host State enters into a new employment contract with the worker. Within the sending State, the employment contract entered into by the first employer and the worker is suspended or terminated. In practice, companies often opt for this type of posting for permanent or long-term employment in the host State.

SCENARIO 2: POSTING

A company established in the sending State posts a worker to another EU Member State for the purpose of temporary employment of the worker within said State.

The employment relationship remains unchanged. The employment contract entered into by the company established in the sending State and the worker is neither suspended nor terminated. The worker does not enter into a new employment contract with a company established in the host State. During the posting, the worker is employed solely in the host State. Employment in the host State is only temporary. Sometimes, postings are initially planned to be short-term and are repeatedly extended. In such cases, it is necessary to examine whether posting remains the most appropriate scenario.

SCENARIO 3: SIMULTANEOUS EMPLOYMENT

The worker is employed in several EU Member States. The worker may have one or several employers. The employers may but need not necessarily be established in one of said Member States. In practice, this scenario is most often used for long-term employment.

03

SCENARIO 1: TRANSFER

A. THE CONTRACT

The contract entered into with the sending company is suspended or terminated. The termination may be effected by mutual agreement between the employer and the worker, immediately and without pay in lieu of notice. The company established in the host State enters into a new employment contract with the worker.

An alternative option involves suspending the employment contract entered into by the worker and the first employer established in the sending State. In such cases, the contract suspending the employment relationship shall state that the services in the form of work are no longer provided under the authority of the first employer. In future, the worker may no longer claim their wage from said employer. In the contract of suspension, the first employer and

the worker may nevertheless agree that secondary components, such as a confidentiality, non-competition or tutoring clause continue to apply. The first employer and the worker may also define in the contract what will happen at the end of the contract entered into with the second employer established in the host State. The parties may agree on a return guarantee stipulating that the original employment contract will once again take effect upon the expiry of the new employment contract.

B. WHICH LABOUR LAW? THE RULES OF ROME I DETERMINING APPLICABLE LAW [4]

WHICH LABOUR LAW? THE RULES OF ROME I DETERMINING APPLICABLE LAW [5]

In principle, the parties (employer and worker) shall determine by mutual agreement which labour law shall govern the employment relationship. The labour law in force within the State of employment shall therefore not apply automatically.

The parties may explicitly lay down this choice in the employment contract. It may also implicitly arise from other provisions of the contract or from the performance of the contract by the parties. In the event of doubt, an implicit choice is excluded. It is therefore recommended to explicitly state the applicable labour law in the employment contract. The choice is not final; the parties may modify their choice during the course of the employment relationship. In the event of a change in the situation, this choice must be reassessed.

RULE NO. 2: COUNTRY OF HABITUAL EMPLOYMENT

The worker and the employer are not obliged to determine the applicable law themselves. Failing a choice made by either party, the employment contract shall be governed by the law of the country in which the worker habitually performs their work[6].

There are no strict criteria for determining when a Member State becomes the place of habitual employment. However, case law uses the following two criteria as a basis:

1) Quantitative criterion: in which Member State does the worker spend most of their working time? [7]
2) Qualitative criterion: in which Member State does the worker carry out most of their obligations with respect to their employer? Where is the actual centre of the worker's professional activities? [8]

In practice, the quantitative criterion is simpler to apply than the qualitative criteria. The latter is often more vague and less predictable as all circumstances must be taken into account.

The quantitative and qualitative criteria may of course each refer to a different Member State. In such cases, the common intention of the employer and the worker shall be decisive[9]. The intention of the parties shall also take precedence over the contract, which is particularly important in the event of a transfer. When the parties' intention is unclear, the qualitative criteria shall be decisive.

What about when the worker is temporarily employed outside of their country of habitual employment? In truth, this does not make any difference. In the event of a temporary posting to another EU Member State, the sending State shall remain the country of habitual employment[10]. However, there are two notable exceptions to this rule. The two exceptions will be further examined in the section on posting (scenario 2).

RULE NO. 3: RESTRICTIONS TO THE FREEDOM OF CHOICE OF THE PARTIES

It is wise for the parties to specify the applicable law in the contract. The rules determining the applicable law are complex, and this helps to prevent any misunderstandings.

However, the freedom of choice of the parties is not absolute. The worker is considered the weaker party and enjoys additional protection. When the parties opt for the labour law of a different Member State to the country of habitual employment (Rule No. 2), the worker may nevertheless invoke the binding provisions of the legislation of the country of habitual employment (or of the country in which the employer is established). The binding provisions are referred to as being "objectively applicable".

What are the objectively applicable "binding provisions"? They are provisions which may not be derogated from in the contract (e.g. protection against dismissal). The exact scope of the protection varies from one country to the next. Most legal writers hold that the objectively applicable binding provisions only apply if they provide the worker with better protection than that provided for by the chosen labour law. They form a type of minimum protection.

Therefore, workers and employers must always compare the different labour laws in order to determine which provides the best protection. This is

a particularly complex task in practice, considering that national regulations evolve over time, further complicating the task.

C. WHERE ARE THE SOCIAL SECURITY CONTRIBUTIONS LEVIED? REGULATION NO. 883/2004 ON THE COORDINATION OF SOCIAL SECURITY SCHEMES [11]

BASIC RULE: THE PRINCIPLE OF THE STATE IN WHICH THE ACTIVITY IS CARRIED OUT [12]

Under the principle of the "State in which the activity is carried out", the worker is subject to the social security scheme of the country in which they work. There is no freedom of choice in this regard.

This general rule applies to workers performing a salaried activity (and to self-employed workers). This enables equal treatment to be guaranteed for all individuals working on the territory of a Member State.[13]

D. APPLICATION

1. TRANSFER FROM ANOTHER MEMBER STATE TO BELGIUM

The contract entered into with the company operating the posting is terminated or suspended. The Belgian company enters into a new employment contract with the worker. The Belgian contract may take different forms, depending on the situation:

a. An employment contract for an indefinite period – the transfer is planned for a long period of time, or may even be permanent: the worker will almost certainly not return to work in the sending State;
b. A fixed-term employment contract, entered into no later than the time at which the workers enters into the Belgian company's service[14] – the date of the end of employment in Belgium is known to both parties.

The consequences with respect to labour law may vary depending on the type of contract. It should by now be clear that this will depend on concrete circumstances and the intention of the parties. Various typical situations are detailed below.

The rules regarding social security are less complex. The worker is subject to Belgian social security. Social security contributions will be levied and paid by the Belgian employer. The type of employment contract entered into in Belgium is of no importance.

Employment contract for an indefinite period

The worker and the Belgian employer enter into an employment contract for an indefinite period. The contract entered into in the sending State is terminated. The worker will almost certainly not return to work in the sending State.

Belgium becomes the new place of habitual employment. Therefore, Belgian labour law shall apply.

The contract entered into will most often be a "standard" Belgian employment contract. However, the parties may include a reference to the previous employment in the sending State. This can be useful for determining contractual seniority. At the end of the Belgian employment contract, the parties shall take into account the seniority acquired with the former employer in the sending State.

It may be advisable to specify the chosen labour law in the Belgian employment contract. At first glance, it is true that the parties have little reason to opt for the labour law of another EU Member State. Regardless, this explicit choice is a clear signal, including with respect to the worker. The worker could believe that the new employment contract was governed by the labour law of the sending State.

In some cases, it may be tempting to opt for the labour law of the sending State. For instance, Belgian labour law is stricter than that of the United Kingdom. Therefore, a worker posted to Belgium from the United Kingdom will likely not object to British labour law continuing to apply after the termination of the contract. Despite this (partial) choice in favour of British labour law, the worker will be protected by Belgian labour law in the event of dismissal. Belgium would be the country of habitual employment (Rule No. 2) and the freedom of choice may not prejudice the protection guaranteed by the binding rules (Rule No. 3).

Fixed-term employment contract
The worker and the Belgian employer enter into a fixed-term employment contract. The employment contract entered into in the sending State is not terminated, but rather suspended. It is clear to all parties that the worker will return to work in the sending State. At the end of the Belgian employment contract, the employment contract entered into in the sending State shall once again take effect.

In this context, the following question must be answered: is the employment in Belgium habitual or temporary? Setting a period could provide an answer to this question. In practice, the Belgian Labour Court will declare Belgian labour law to be the applicable law.

- The Belgian Posting Act[15] imposes compliance with all the wage and working conditions under penalty of punishment under criminal law (including the CLAs made mandatory)[16]. This encompasses almost all of Belgian labour law, except the Employment Contracts Act.
- In practice, it is possible that the Belgian courts also apply the Employment Contracts Act. To the best of our knowledge, there is no case law for a court ruling that Belgian employment contracts cannot be applied during a transfer in Belgium because of the temporary nature of the employment in Belgium.

2. TRANSFER FROM BELGIUM TO ANOTHER EU MEMBER STATE

The contract entered into with the Belgian company is terminated or suspended. The company established in the host State enters into a new employment contract with the worker. The form of the contract is generally determined by the host State's labour laws.

Once again, the concrete circumstances and the intention of the parties shall determine the applicable labour law. Various typical situations are detailed below.

In this context as well, the rules on social security are less complex: the worker is subject to the social security scheme of the host State. The Belgian employer is not required to levy and pay social security contributions.

Employment contract for an indefinite period
The worker enters into a new employment contract for an indefinite period with the company established in the host State. The Belgian employment contract is terminated. The worker will most certainly not return to work in Belgium.

The host State becomes the new place of habitual employment. Belgian labour law therefore ceases to apply. Nevertheless, it may be wise to explicitly opt for the host State's labour law.

Fixed-term employment contract
The worker and the new employer established in the host State enter into a fixed-term employment contract. The Belgian employment contract is not terminated but rather suspended. It is clear to all parties that the worker will return to work in Belgium. At the end of the employment contract entered into in the host State, the Belgian employment shall once again take effect.

Given the attractiveness of Belgian wage and working conditions and solid protection afforded by the Belgian Employment Contracts Act, workers are often tempted to request the application of Belgian labour law in the event of a transfer to an EU Member State which provides less protection. In such cases, the answer to the question regarding whether the employment in Belgium is habitual or temporary is of crucial importance to the Belgian company.

Setting a time limit could help provide an answer to this question. Any period over two years, for instance, could make the employment in the host State habitual. In the event of a period under two years, the sending State would be considered the place of habitual employment.

The current rules determining the applicable labour law do not (yet) provide for such a time limit. The worker is considered to be temporarily employed in the host State when they are expected to return to work in Belgium at the end of their assignment abroad. It is therefore the intention of the parties which takes precedence. The form of the contract is only an indication. The termination of the employment contract in the sending State (at the start of the transfer) or the signing of a new employment contract in Belgium (upon their return, at the end of the transfer) do not prevent the employment abroad from being considered temporary . The guarantee of returning may also indicate the intention of considering the employment abroad as temporary. Why else would it be specified that the initial Belgian employment contract would once again take effect after the end of the foreign employment contract?

A clear and specific time limit could be applied in the future. The European Commission has put forward a proposal: when employment in the host State exceeds 24 months, the host State will be considered

the place of habitual employment . The aim is to have an applicable time limit in the event of a posting (the employment contract entered into with the employer in the sending State remains unchanged, see Scenario 2). In practice, it is possible that the time limit would also have repercussions in the event of a transfer. After a posting for a period of 24 months, the host State would already be considered the place of habitual employment, even if the employment contract entered into with the employer in the sending State remains unchanged. Therefore, why would this not be the case when the worker enters into an employment contract with a company in the host State?

04

SCENARIO 2: POSTING

A. THE CONTRACT

The employer, established in the sending State, temporarily posts the worker in the host State. The employment contract entered into with the employer in the sending State remains unchanged. The worker does not enter into an employment contract with a company established in the host State.

The employer and the worker concerned are advised to enter into a posting contract which will be attached to the employment contract. In the posting contract, the parties shall define the wage and working conditions applicable during the posting.

The preservation of the exclusive organisational link between the worker and the employer posting the worker must be specified in the posting contract. The posted worker remains under the sole authority of the employer posting said worker, and the employer shall also be legally liable for payment of the wages.

The posting contract must contain various clauses, in particular:

- the start and end date of the posting;
- the practical arrangements for moving the worker and their family;
- the wage and working conditions, as well as the specific expenses reimbursed during the posting;
- the consequences in the event of (early) interruption of the posting;
- the consequences in the event of termination of the employment contract during the posting;
- repatriation of the worker and their family at the end of the posting;
- reinstatement of the worker at the end of the posting;
- freedom of choice of the parties.

The employer may post the worker in another company in the host State:

- either a company that belongs to the same group;
- or a client in the framework of a contract for the provision of services.

In the first case, the employer posting the worker and the company hosting the worker shall also enter into a contract in order to define the practical arrangements for the posting. The contract shall specify, in particular:

- which company shall bear the (wage) cost of the posting;
- the extent to which the host company may give instructions to the posted worker, without undermining the existing organisational link between the worker and the employer posting them.

The employer may also post the worker in the host State without it being necessary to have a host company. This is the case, in particular, when a sales representative is posted in order to prospect new clients in the host State.

B. WHICH LABOUR LAW? THE RULES OF ROME I DETERMINING THE APPLICABLE LAW [19]

1. BASIC PRINCIPLES: FREEDOM OF CHOICE OF THE PARTIES [20] AND COUNTRY OF HABITUAL EMPLOYMENT [21]

As in the case of a transfer, the freedom of choice of the parties regarding applicable law is the starting point in the event of a posting (see Rule No. 1).

Through the posting contract, the employer attempts to get as close as possible to the wage and working conditions applicable within the sending State. In this regard, it seems logical to opt for the labour law of the sending State.

However, this freedom of choice is limited. The worker cannot lose the protection that they enjoy under the applicable labour law in the country in which they are habitually employed (see Rule No. 2).

When does the host State become the country of habitual employment? In order to answer this question, it may be useful to set a time limit. It could be after six or twelve months, for instance. It is difficult to define an exact time limit.

In the future, a clear and specific time limit could apply. The European Commission has formulated a proposal: when the (effective or supposed) duration of the posting exceeds 24 months, the host State shall be considered the worker's place of habitual employment[22]. After a posting of 24 months, the worker shall be considered as being habitually employed within the host State. The rule determining the applicable labour law will be adapted according to the maximum period of posting for social security. This additional protection is limited, however. Even in the case of a posting of one year, for instance, the Labour Court could rule that the worker is habitually employed in the host State.

In practice, the labour law of the host State plays a more important role than the rules determining the applicable labour law imply. This is the case, in particular, for the wage and working conditions, due to Rule No. 4 (see above), even when employment in the host State is only temporary.

2. RULE NO. 4: MANDATORY RULES OF THE COUNTRY OF TEMPORARY EMPLOYMENT[23] AND POSTING DIRECTIVE 96/71

In the event of temporary employment in another country (the host State) than the country of habitual employment (the sending State), the "mandatory rules" of the host State must be complied with.

What are these "mandatory rules"? Posting Directive 96/71 defines the concept[24] and lays down a "focal point" of protective rules for each Member State of the EU:

- maximum working periods and minimum rest periods;
- minimum duration of annual paid leave;
- the minimum wage, including that increased for overtime, this point does not apply to supplementary professional pension schemes;
- the conditions for the making available of workers, in particular by temporary work agencies;
- health, safety and hygiene in the workplace;
- the protective measures applicable to working and employment conditions of pregnant women and women who have recently given birth, children and young people;
- equal treatment of men and women, as well as other provisions on non-discrimination.

Therefore, only a portion of the host State's labour law is applicable (see Figure 1). The form (law, Royal Decree or CLA) is of no importance in this context.

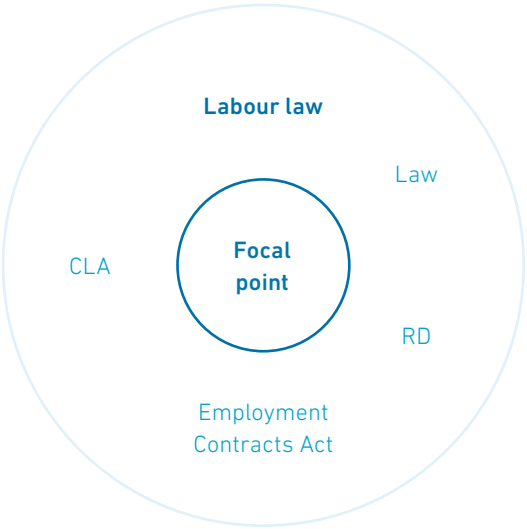

Figure 1: Posting Directive 96/71 – Focal point

The posted worker is protected by this focal point, even if the employment contract is subject to the sending State's legislation. The protection granted by the host State's labour law only applies when it is more advantageous for the worker than the provisions of the law of the sending State.

Posting Directive 96/71 not only guarantees minimum wage and working conditions for posted workers, it has also become a form of maximum protection. EU Member States may not guarantee posted workers any protection beyond this "focal point". It is therefore not permissible to impose on employers any extra or stricter wage and working conditions. Otherwise, the host State would impede the free movement of services[25]. (Below, we will see that the Belgian Posting Act exceeds the focal point).

3. NEW: THE POSTING CONDITIONS OF THE APPLICABLE DIRECTIVE [26]

The host State may use two criteria to determine whether the employment is actually a posting:

- The employer must carry out substantial activities in the sending State ;
- The posting must be temporary, although no specific time limit has been defined. All the facts must be taken into account, as well as certain criteria[27]:
  - Is the posting for a fixed period?
  - Is the worker posted from a State in which they habitually perform their work?
  - Will the worker return to the sending State after the posting? Are they supposed to resume their activity in the sending State?
  - Will the employer bear the costs of travel, food and accommodation during the posting?
  - Is it the first posting, or has the same posted worker or another posted worker performed the tasks in question during previous periods?

  Any negative to one of these questions indicates that it is not a posting.

The Act of 11 December 2016 introduced these criteria into the Posting Act. If these criteria are not met, the employment in the host State is no longer considered temporary but rather habitual. In principle, the entirety of the host State's labour law applies, and not just the focal point.

C. WHERE ARE THE SOCIAL SECURITY CONTRIBUTIONS LEVIED? REGULATION NO. 883/2004 ON THE COORDINATION OF SOCIAL SECURITY SCHEMES

Posting is an exception to the principle of the State in which the activity is carried out. For a (relatively) short period, the worker may carry out an activity in the host State while remaining subject to the sending State's social security legislation.

1. EXCEPTION: POSTING [28]

A person carrying out a salaried activity in a Member State on behalf of an employer normally carrying out its activities in said State, and which said employer posts for the purpose of performing work on its behalf in another Member State, remains subject to the legislation of the first Member State, provided that the foreseeable duration of said work does not exceed twenty-four months and that the person is not posted to replace another person.

A posting always involves sending a worker to a specific Member State. In the event of employment in two or more Member States, this becomes simultaneous employment (see scenario 3 part II).

- Consequently, the posted worker may perform work with one or more companies in the sending State – either successively or simultaneously – without this affecting the posting.[29]
- Consecutive postings in different Member States must be considered new postings[30]. The organisational link between the worker and the sending company must, however, be maintained.

2. POSTING CONDITIONS

The worker shall remain subject to the sending State's social security legislation when the following five posting conditions are met:

a. the worker is subject to the sending State's legislation;
b. the organisational link between the worker and the sending company is maintained during the posting;
c. the sending company carries out substantial activities in the sending State;
d. the worker is not posted to replace another worker;
e. the posting is temporary.

In the event of non-compliance with one of these posting conditions, the social security contributions must be paid in the host State (application of the principle of the State in which the activity is carried out). In practice, the employer must almost always

be affiliated to the host State's social security scheme.[31]

a. The worker is subject to the sending State's legislation
The worker must already be subject to the sending State's social security legislation during the period immediately preceding the posting.

The worker must have been affiliated to the sending State's social security scheme for at least one month during the period immediately preceding the posting[32]. The National Social Security Office requires the salaried worker to have been insured under the sending State's social security scheme during the 30 days immediately preceding the posting.

However, this does not mean that the worker must have been in the employer's service for a minimum period determined before the start of the posting. The posting is also open to workers who were recruited for the purpose of being posted to another Member State.[33]

b. During the posting, an organisational link must be maintained between the worker and the company that posted them
During the posting, the sending company must remain the worker's sole and exclusive employer. The organisational link shall be maintained if it may be deduced from all the circumstances of the employment that the worker was placed under the authority of said company.[34]

The company posting the worker must retain a power of (legal) decision regarding the following facts:[35]
- responsibility for recruitment;
- responsibility for employment contracts;
- responsibility for (setting) wages, without prejudice to any agreements between the employer in the sending State and the company in the host State concerning payment of wages to workers;
- responsibility for dismissals;
- the power to determine the nature of the work.

Posting is not possible if:
- the employment contract entered into by the sending company and the worker is suspended;
- a working relationship arises between the hosting company and the posted worker.

c. The sending company carries out substantial activities in the sending State
In order for there to be a posting, the sending company must carry out substantial activities in the sending State. This means that the employer must carry out substantial activities (other than activities of pure internal administration) on the territory of the Member State in which it is established.[36]

d. The worker is not posted for the purpose of replacing another worker
The worker may not be posted for the purpose of replacing another worker. This helps to prevent certain positions always being filled by posted workers. It is not prohibited to replace a posted worker with a new posted worker but, in such cases, the principle of the State in which the work is performed shall apply in full for the latter worker.

It is difficult to verify compliance with this condition, in particular when positions and duties are not stable.

In practice, the National Social Security Office shows some flexibility in applying this prohibition in principle. The posting periods of successive posted workers are pooled; a new posting will only be refused if the total duration exceeds five years.[37]

EXAMPLE

A worker whose posting is prematurely interrupted due to illness, for instance, may be replaced by a colleague.

e. The posting is temporary
The duration of the posting is limited to 24 months. In principle, the posting may not be carried out if the foreseeable duration of the posting exceeds 24 months.

This restriction in time concerns the worker's employment in the host State and therefore not the duration of the sending company's project in the host State.[38]

In practice, most EU Member States consider the maximum duration of a posting to be five years[39]. The sending State and the host State must then come to a mutual agreement that the posted worker shall be subject to the sending State's social security legislation for a period of five years.
- Contrary to the initial period of 24 months, the extension of the period during which the worker

is subject to the sending State's legislation to the following years is not an obligation
- In certain specific circumstances, an extension beyond five years is possible, most often for the purpose of completing the ongoing project, when the worker is at the end of their career, or in the event of drastic and unexpected restructuring.

3. THE A1 FORM AS EVIDENCE

The A1 form suggests that all posting conditions have been met.

In the event of a posting, the employer shall inform the relevant institution in the sending State. An A1 form may be requested in the sending State as evidence of the extension of the period during which the worker is subject to the sending State's legislation for the duration of the posting. The A1 form is binding on the other Member States provided that the document has not been withdrawn or declared invalid by the Member State in which it was issued. The A1 form is binding for the social security institutions and the courts of the other Member States of the EU.[40]

D. APPLICATION

1. POSTING FROM ANOTHER MEMBER STATE TO BELGIUM

The employer, established in the sending State, posts the worker in a Belgian company. The employment contract entered into with the employer in the sending State remains unchanged. The employer posting the worker and the worker enter into an addendum to the employment contract. The posting contract defines the applicable wage and working conditions during the temporary employment in Belgium. In the contract, the worker and the employer make the following choice: the sending State's labour law continues to apply.

No Belgian social security, but
Belgian wage and working conditionsn

The employer obtains an A1 form from the social security authorities of the sending State. The worker is therefore not subject to Belgian social security, and the employer does not need to deduct and pay social security contributions.

In spite of this choice, the worker shall be entitled to the wage and working conditions applicable in the joint bargaining committee to which the Belgian company belongs. Figure 2 shows the particularly broad transposition of Posting Directive 96/71. The Belgian Posting Act broadened the "focal point" to include all of the provisions of the Labour Code which must be complied with under penalty of punishment under criminal law, including:
- Extra pay and compensatory time off (Labour Act);
- Statutory holidays and double holiday pay (Annual Holidays Act);
- All of the wage conditions laid down in CLAs made mandatory: scales, end-of-year bonuses and meal vouchers, for instance.

The Act of 11 December 2016 makes no changes in this regard. In practice, it is often difficult to reconcile the wage and working conditions applicable in the sending State with the mandatory Belgian wage and working conditions. Although the annual total of the wage package largely exceeds Belgian wage conditions, the wage package itself is rarely a true reflection of said Belgian wage conditions, thus making the employer vulnerable. The intention of the employer and the worker to ensure the continuity of the wage and working conditions of the sending State (which results from the choice made concerning the applicable law) offers sufficient protection.

The Belgian Posting Act has no impact on the application of the Employment Contracts Act (e.g. in the event of dismissal). As a general rule, the application of the Employment Contracts Act is governed by rules 1 to 3 determining the applicable law (see above). The parties' choice excludes the application of the Employment Contracts Act, unless Belgium is the country of habitual employment.

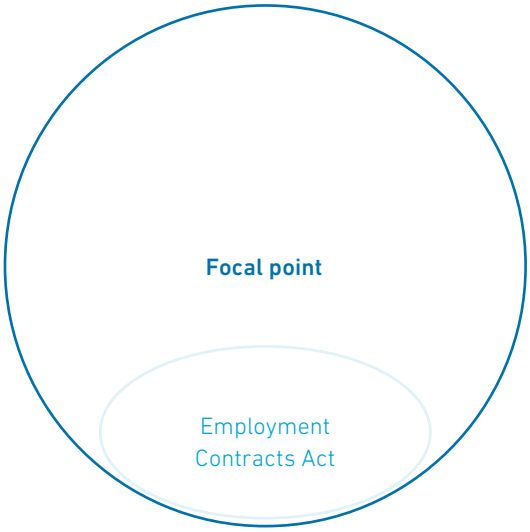

Figure 2:
Belgium – Transposition of Posting Directive 96/71

EXAMPLES

Wage indexation
Can a worker posted in Belgium demand for their wages to be automatically adjusted to the increase in the cost of living? Linking wages to the consumer price index is not prescribed by law but is governed by CLAs made mandatory. Accordingly, wage indexation is part of the "focal point" of the Belgian Posting Act. Nevertheless, the answer to this question is "no". European case law does not allow the indexation of all wages. However, it is permissible to link minimum wages to the cost-of-living index[41]. This is a clear example of how the minimum conditions of Posting Directive 96/71 have also become maximum conditions.

Holiday pay
A worker posted to Belgium demands payment of the Belgian double holiday pay. Their annual wage package largely exceeds the minimum wage imposed within the industry but it is paid in twelve equal instalments. The employer argues that each monthly payment includes a portion of the holiday pay. Not only is this not generally tolerated by Belgian case law[42], the sending State's labour law does not impose the granting of double holiday pay. The Belgian labour courts nevertheless grant double holiday pay, including in cases when the posting lasted less than 24 months in total.[43]

2. POSTING FROM BELGIUM TO ANOTHER MEMBER STATE

The employer posts a worker from Belgium to a company in another EU Member State. The employment contract entered into with the employer remains unchanged. The employer posting the worker and the worker enter into an addendum to the employment contract. The posting contract defines the applicable wage and working conditions during the temporary employment in the host State. The worker and the employer make the following choice in the posting contract: Belgian labour law continues to apply.

a. Belgian social security, wage and working conditions more advantageous than in Belgium?
The employer obtains an A1 form from the National Social Security Office. The worker therefore remains subject to Belgian social security. The employer must continue to deduct and pay social security contributions. No social security contributions need to be paid in the host State.

The parties' choice to retain Belgian labour law as the applicable law may not prevent the host State from becoming the place of habitual employment. It will therefore be necessary to check whether employment contract legislation and the wage and working conditions of the host State offer the worker better protection. In addition, even if the host State does not become the place of habitual employment, the worker is entitled to the minimal protection granted by the "focal point" of Posting Directive 96/71. The Belgian protection will therefore need to be compared with that granted by the host State's labour law.

b. The posting contract
When a worker is posted abroad for a period exceeding one month, the employer must inform them of the following in writing:[44]

- The duration of employment in the host State ;
- The currency in which the wages are paid;
- The benefits linked to posting;
- The conditions of return.

The posting contract must contain all of these items. It is also recommended that other provisions be agreed with the worker. More details on this matter can be found in the section entitled "The contract".

The worker's agreement prevents the (temporary) change of place of employment resulting in implicit dismissal due to unilateral modification of an essential item of the employment contract.

The period of employment abroad must be taken into account to calculate the worker's years of service. The working relationship between the worker and the employer remains intact during the posting.

05

TO BE CONTINUED

Through these first two scenarios – "transfer" and "posting" - this first part sets out the basic rules for determining the applicable labour law and the country in which social security contributions must be paid in the context of cross-border employment. A third scenario will be examined in the second part – "simultaneous employment" – using the rules for determining the applicable law commented upon in this first part as a starting point.

The Act of 11 December 2016 has a significant impact on the obligations of foreign employers. We shall therefore also provide an overview of the different employment-related documents, as well as of the former and new formalities.

Yves Stox
Senior Legal Counsel

1 The 10th day after publication in the Belgian Official Gazette on 20 December 2016.
2 https://www.weforum.org/agenda/2016/11/top-10-global-enabling-trade-report-2016/.
3 HIVA, December 2014.
4 The applicable labour law is determined by Regulation No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I). The Rome I Regulation applies to contracts entered into after 17 December 2009. This Regulation replaces the Rome Convention as regards employment contracts entered into from 18 December 2009.
5 Art. 3 Rome I.
6 Art. 8.2 Rome I.
7 Weber
8 Mulox - Rutten
9 Weber, §§53-54
10 Art. 8.2 Rome I.
11 Regulation No. 883/2004 of 29 April 2004 on the coordination of social security schemes has been in force within the European Union since 1 May 2010. The rules for the implementation of Regulation 883/2004 are defined in Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down detailed rules for the application of Regulation (EC) No. 883/2004 on the coordination of social security schemes (the "applicable regulation").
12 Art. 11.3.a) of Regulation No. 883/2004.
13 Recital 17 of Regulation No. 883/2004.
14 Art. 9 of the Employment Contracts Act.
15 Act of 5 March 2002 transposing Directive 96/71 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 introducing a simplified scheme for the keeping of employment-related documents by companies posting workers in Belgium.
16 Regulation No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the European Union http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A32011R0492.
17 Recital 36 Rome I.
18 Proposal for a Directive amending 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 (COM(2016) 128 final).
19 The applicable law is defined by Regulation No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I). Rome I applies to contracts entered into after 17 December 2009.
20 Art. 3 Rome I.
21 Art. 8.2 Rome I.
22 Proposal for a Directive amending 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 (COM(2016) 128 final).
23 Art. 9 Rome I.
24 Recital 34 Rome I; Recital 10 of Posting Directive 96/71.
25 ECJ 18 December 2007, C-341/05, Laval, point 80.
26 Directive 2014/67 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
27 Art. 7 of the Act of 11 December 2016.
28 Art. 12.1 Regulation No. 883/2004.
29 Art. 3.a), subparagraph 1 Decision A2 of 12 June 2009.
30 Art. 3.a), subparagraph 2 Decision A2 of 12 June 2009.
31 An employer which does not have operating offices in the Member State whose legislation is applicable and the salaried worker may agree that the latter carries out the obligations of the employer. The employer shall nevertheless remain liable for payment of social security contributions (Art. 21 Applicable Regulation). Belgium does not accept this system, unlike other Member States.
32 Art. 1, subparagraph 4 Decision A2 of 12 June 2009.
33 Art. 14.1 Applicable Regulation.
34 ECJ 10 February 2000, Fitzwilliam, C-202/97.
35 See art. 1, subparagraph 3 Decision A2 of 12 June 2009.
36 Art. 14.2 Applicable Regulation.
37 B. DE PAUW, "De detachering van werknemers van en naar België: Inhoudelijke voorwaarden (II)", Or. 2000, 49.
38 ECJ 5 December 1967, Van der Vecht, C-19/67.
39 Art. 16 Regulation No. 883/2004.
40 ECJ 10 February 2000, Fitzwilliam C-202/97, point 53; ECJ 30 March 2000, Banks, C-178/97, point 40; ECJ 26 January 2006, Herbosch Kiere, C-2/05.
41 ECJ 19 June 2008, C-319/06, Commission vs. Luxembourg, points 44-45.
42 Concerning holiday pay on variable wages, see C. Cass. 15 January 1990; C. Cass. 25 October 1999.
43 Brussels Labour Court, 18 June 2013, JTT 2013, 425.
44 Art. 20bis of the Employment Contracts Act.

COLOPHON

Partena – Non-profit-making association – accredited Payroll Office for Employers by ministerial decree of 3 March 1949 under no. 300
Registered office: 45, Rue des Chartreux, Brussels, 1000 | VAT BE 0409.536.968

Responsible editor: Alexandre Cleven. Hoofdredacteur: Francis Verbrugge, fverbrugge@partena.be, tel. 02-549 32 23.
Contributors: Yves Stox, Philippe Van den Abbeele.

Monthly, except in July and August.

39th year – Monthly review