



Luxembourg newflash

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New law regarding the posting of workers and its implications for posting companies

The Luxembourg Parliament adopted on 14 March 2017 a new law regarding the posting of workers (the “**Law**”) which entered into force on 24 March 2017¹.

The Law implements into national law Directive 2014/67/EU of 15 May 2014 (the “**Enforcement Directive**”) on the enforcement of Directive 96/71/EC (the “**Posting Directive**”) concerning the posting of workers in the framework of the provision of services. It is to be noted that some provisions of the Law also have implications for local employments, outside the framework of secondments.

A revision of the Posting Directive became necessary after it proved that the Posting Directive contained numerous pitfalls in the past. In some cases it turned out that companies posting employees were only “letterbox companies” without any substance. In other cases, situations where concerned employees’ rights were being circumvented were unveiled.

The new Enforcement Directive was introduced in order to enforce the Posting Directive by supporting the abolition of potential obstacles to the free movement of services within the European Union and the promotion of cross border provision of services by creating a climate of fair competition while at the same time guaranteeing an appropriate level of protection of the rights of posted workers.

The Law foresees, amongst others, the introduction into national law of a joint and several liability of the companies within subcontracting chains, the obligation for all employers to maintain a detailed work time register, as well as new administrative requirements and additional supervisory measures which should ease the administrative burden in case of posting of workers while at the same time preventing further abuses. Moreover, the Law provides for a better cooperation between the different local authorities in addition to the introduction of a complaint mechanism for posted employees. Finally, in order to secure in the most effective way the posted workers’ rights, an efficient penalty mechanism enforceable beyond national borders has been implemented.

The main features of the Law may be summarised as follows:

¹ The law of 14 March 2017 amending the Labour Code and amending Article 3 of the law of 17 June 1994 laying down measures to safeguard employment, price stability and business competitiveness (published in Mémorial A n° 300 de 2017)

I. General amendments applicable to all employment relationships in Luxembourg

A) Introduction of a joint and several liability of the companies within subcontracting chains

As the compliance with the applicable rules in the field of posting and the effective protection of workers' rights is a matter of particular concern in subcontracting chains, the Law introduces a mechanism of direct subcontracting liability, in addition to the liability of the employer with respect to the employee's rights.

The Law foresees that the project owner (*maître d'ouvrage*) and the principal (*donneur d'ordre*) who entered into a service agreement with a service provider must inform the Labour Inspectorate (*Inspection du Travail et des Mines*) about the said service agreement. In case the project owner or the principal is informed by the Labour Inspectorate (i) that the service provider did not pay the posted workers' salary or (ii) of a violation of the public order provisions by the service provider, it must request the service provider by registered letter to immediately remedy this situation.

The service provider is consequently required to confirm by registered letter and within a reasonable period of time (at the latest within 15 days), that it has addressed the situation. In case the service provider does not respond to the injunction, the project owner or the principal must inform the Labour Inspectorate.

In case the project owner/the principal does not comply with the above-mentioned information and injunction obligations, it will be held jointly liable with the service provider with respect to the outstanding wages and social security contributions. The project owner and the principal may further be subject to an administrative fine, the amount of which may vary from EUR 1,000.- to EUR 5,000.- per posted worker (with a cap of EUR 50,000.-).

B) Obligation to maintain a detailed work time register

With the entry into force of the Law all employers are required to maintain a detailed register which tracks the beginning, the end and the total work duration of each employee employed within the company. The performance of overtime work and work performed on Sundays or on public legal holidays or during night time must be indicated in the register, including the financial compensation given in this respect. The register must be presented to the Labour Inspectorate upon request.

C) Additional power for the Labour Inspectorate in case of violations of labour law provisions

Moreover, the Law foresees that the Labour Inspectorate may take emergency measures in case it notices a violation of the labour law provisions. In cases of serious infringement to the labour law provisions, the Labour Inspectorate may, amongst others, decide the immediate standstill or even the complete shutdown of the company's activity.

II. New administrative requirements and additional supervision measures

The Law introduces several new measures aiming at avoiding and fighting social dumping and fake secondments.

A) Improved access to information by way of the electronic platform

The electronic platform which the Labour Inspectorate has already put in place in 2013 is improved and extended with the Law. This mechanism should improve the accessibility of the relevant information and provide the required information about posted employees in a clear and precise manner.

After having provided the Labour Inspectorate with all the required information via the electronic platform, the Law provides that the posted employees will receive a so-called “social badge” which contains all relevant information with respect to their posting.

Whereas in the past it was further foreseen that the posting entity must provide a contact person who holds all the necessary documentation with respect to the given posting, the Law now foresees that the posting entity must designate a contact person in Luxembourg to liaise with the Labour Inspectorate and the other authorities in case of queries regarding the posting of workers.

B) Identification of genuine posting and prevention of abuse and circumvention

One of the main goals of the Enforcement Directive is to prevent any misuse by so-called “letterbox companies” by way of monitoring which posting company genuinely performs substantial and real activities in its home Member State.

In order to serve the said purpose, the Law foresees that in case the Labour Inspectorate has doubts about the reality of the posting, it will carry out an overall assessment of all factual elements which it considers necessary in order to determine the temporary nature of the posting and whether the concerned employer has its factually confirmed registered office in the Member State from which the posting is made.

The Law further explicitly specifies that the posting company must exercise a real and substantial activity in its country of origin.

The Law foresees that four additional documents need to be communicated to the Labour Inspectorate, next to the documents already foreseen in the past. The posting entity will need to submit to the Labour Inspectorate, amongst others, a copy of the employment contract of the posted workers, the pay slips of the posted workers as well as the proof of payment of the salary during the whole period of the posting (which also applies to local employers outside a secondment scenario), a register containing the work duration during the total period of the posting, a copy of the residence permit of any third country national posted to Luxembourg and a copy of the pre-employment medical certificate.

This additional documentation should allow the Labour Inspectorate to efficiently verify whether the social rights of the posted workers are respected as well as to verify whether they are all in possession of the necessary administrative authorisations to legally reside and take up work in Luxembourg.

III. Enhanced cooperation and judicial proceedings

The Enforcement Directive provides that the Member States should not only guarantee a good cooperation between the different local authorities but also take appropriate measures in the event of failure to comply with the obligations laid down in the Posting Directive, including administrative and judicial proceedings.

The Law provides for increased cooperation between the different Luxembourg ministries and administrations in order to guarantee an increased control of the rights of the posted workers and to monitor genuine posting.

The Law further foresees the possibility for a posted worker to file a complaint against his/her employer or even to engage in judicial or administrative proceedings in case he/she considers having suffered a prejudice due to the non-compliance by the employer with the applicable rules. The Law even provides for the possibility for trade unions claiming general national representativeness to engage in legal proceedings in the name and on behalf of the posted workers whose rights have been violated, provided that they have received the approval of the concerned employee to act in his/her name.

IV. Additional sanctions and enforcement measures

The Law introduces new administrative sanctions as well as new provisions with respect to the cross-border enforcement of said sanctions.

A) Introduction of new administrative sanctions

The Law provides for administrative sanctions ranging from EUR 1,000.- to EUR 5,000.- per posted worker (with a cap of EUR 50,000.-) in case of infringements of the provisions relating to the posting of workers.

B) Cross-border enforcement of financial administrative penalties and fines

As the disparities between the systems of the Member States for enforcing imposed administrative penalties and/or fines in cross-border situations are prejudicial to the proper functioning of the European Union market, the Enforcement Directive considered that a mutual recognition of administrative penalties and/or fines needed to be addressed.

The Law introduces a special chapter into the Luxembourg Labour Code dedicated to the cross-border enforcement of financial administrative penalties and fines. The given chapter sets out in detail the applicable procedure for the recognition and execution of decisions addressed to Luxembourg by another Member States or vice versa, besides designating the Labour Inspectorate as the relevant authority for the recognition and enforcement of the decision of another Member States or towards another Member States.

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