

LEGAL REGIME: POSTING OF EMPLOYEES

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In an era of globalization, the posting of employees has become increasingly important. The main objective of the legal regime applicable to the posting of employees is to allow the free circulation of employees while ensuring the protection of their labour rights, as well as the protection of competition between companies operating in the same market.

I. Posting to Portugal

a) Scope

The Portuguese Labour Code defines the posting of employees, providing for the possibility of an employee hired by a company established in another State to carry out his/her activity in the Portuguese territory, as well as the reverse situation of a Portuguese employee, hired by a company established in Portugal, being posted to carry out his/her activity in another State.

With regards to the posting in Portuguese territory, this is only admissible in one of the following situations:

- i. In the execution of a contract between the employer and the beneficiary who carries out the activity, provided that the employee remains under the authority and direction of the latter;
- ii. In the establishment of the same employer, or in the company of another employer with which there is a corporate relationship of reciprocal shareholdings, control or group (e.g. in the case of occasional assignment);
- iii. In the service of a user, at whose disposal the employee was placed by a temporary employment agency or another company; or
- iv. In the situations referred to in points (i) and (ii) above by a user established in another State under its national legislation, provided that the employment contract subsists during the posting.

The posting in Portuguese territory is not applicable to navy personnel in the mainland.

b) Applicable legal regime

In case of posting, the Labour Code sets forth rules of necessary application, that is, without prejudice to more favourable regimes established by law or employment contract, the posted employee has the right to the working conditions provided for by Portuguese law and in generally applicable collective labour regulations that respect:

- i. Job security;

CONTACTS

GUILHERME DRAY

GDRAY@MACEDOVITORINO.COM

CLÁUDIA TORRES

CTORRES@MACEDOVITORINO.COM

RITA SARAMAGO

RSARAMAGO@MACEDOVITORINO.COM

- ii. Maximum working hours (not covering the posting in construction activities aimed at the construction, repair, maintenance, alteration or elimination of buildings, namely excavations, landfills, construction, assembly and disassembly of prefabricated elements, arrangement or installation of equipment, transformation, renovation, repair, conservation or maintenance, namely painting and cleaning, dismantling, demolition and sanitation);
- iii. Minimum rest periods;
- iv. Holidays;
- v. Minimum wage (the minimum wage includes the subsidies or allowances granted to the employee due to the posting that do not constitute reimbursement of expenses incurred, in particular for travel, accommodation and food);
- vi. Payment of overtime;
- vii. Assignment of employees by temporary employment agencies;
- viii. Occasional assignment of employees;
- ix. Safety and health at work;
- x. Protective measures for parents and minors; and
- xi. Equal treatment and non-discrimination.

The Law expressly foresees that the referred rule regarding holidays, minimum wage and payment for overtime is not applicable to the posting of a qualified employee by a company supplying a good, to carry out the initial assembly or installation essential to its operation, provided that this is included in the supply contract and its duration does not exceed eight days in a period of one year.

c) Communication duties to the Labour Authority

The employer must, until the beginning of the posting, report the same to the competent labour authority (Autoridade para as Condições do Trabalho – ACT) by filling a form with the following information:

- i. The identity of the service provider;
- ii. The number and identification of the workers to be posted;
- iii. The identification of the liaison person (the employer is required to appoint a liaison person with ACT and, if applicable, to liaise with the social partners);
- iv. The estimated duration and estimated dates for the start and end of the posting;
- v. The address(es) of the work-place; and
- vi. The nature of the services justifying the posting.

During the entire period of the posting, the employer must keep hard copies or in electronic format of the employment contract, payslips and proof of payment, and

records of working time in an accessible place and clearly identified in the Portuguese territory.

The aforementioned documents must be submitted to the ACT, upon request, within one year after the end of the posting, in Portuguese or accompanied by a certified translation.

2. Posting outside Portugal

a) Scope

The posting to another State occurs when a Portuguese employee, hired by a company established in Portugal, carries out his/her activity in another State in any of the situations mentioned in points (i) to (iv) above.

b) Applicable legal regime

The employee posted to another State, outside Portugal, is entitled to the working conditions provided for in item b. of the previous paragraph (“Applicable legal regime” in the case of posting to Portuguese territory), without prejudice to more favourable arrangements set out in the applicable law or the employment contract.

Moreover, in addition to the usual information obligations to be provided by the employer to the employee, there are additional communication obligations, that is, if the employee whose employment contract is regulated by Portuguese law carries out his/her activity in the territory of another State for a period exceeding one month, the employer must provide him/her, in writing and before his/her departure, with the following additional information:

- i. Identification of the State or States where the work is to be performed and the expected duration of the period of work to be performed;
- ii. Currency and place of payment of cash benefits and, if applicable, benefits in kind;
- iii. Possibility of repatriation and respective conditions;
- iv. Access to health care;
- v. Remuneration to which he/she is entitled under the law applicable in the host State, in situations of posting;
- vi. Allowances inherent to the posting and reimbursement of travel, accommodation and food expenses, where applicable; and
- vii. Official website of the host State, created under the specific legislation applicable to posting.

Considering the various rules applicable to posting and the different legal regimes in the different countries, employers and employees must, before initiating any posting, inform themselves of their respective legal duties and rights, including before the labour authorities (in Portugal, “Autoridade para as Condições do Trabalho” – ACT) and Social Security in the destination country and the country of origin. Tax aspects should also

not be overlooked. Note, inclusively, that there are special rules, for example, for the posting of drivers.

c) Communication duties to the Labour Authority

In the case of posting to another State, outside Portugal, the employer must notify the labour authority ACT five days in advance of the identity of the employees to be posted abroad, the user, the place of work, the expected start and end of the posting.

It is also recommended in this case to maintain the documents referred to in item c. above (“Communication duties to the Labour Authority” in the case of posting to Portuguese territory) within the referred terms to be presented to the authority whenever requested.

3. Social Security

In terms of Social Security, the general rule is that an employee is subject to the Social Security legislation of the country in which he/she works. Hence, the posting constitutes the main exception to this rule, allowing the employee to continue to be subject to the Social Security legislation of the country of origin as long as the requirements imposed for this purpose by the Social Security of the countries in question are met.

The referred requirements vary depending on whether the posting is to or from Portugal or other countries of the European Union, the European Economic Area, Switzerland, the United Kingdom, countries with bilateral/multilateral agreements/conventions at the level of Social Security or third countries without any agreements/conventions. The location of the establishment, staff, turnover and invoicing of the companies in question may also constitute an essential requirement, among others to be assessed by Social Security on a case-by-case basis.

The posting must be temporary and of limited duration, with the maximum duration depending on the Social Security regime of the countries involved. For example, the posting of an employee from Portugal to another Member State of the European Union can be for a maximum of 24 months (only in exceptional and duly authorised situations may it be extended up to a maximum period of 5 years).

Notwithstanding the above, the duration of the posting may also be subject to more restricted periods provided for in the Labour Code, as is the case of posting through occasional assignment (the duration of the assignment may not exceed one year, being renewable for equal periods up to a maximum of five years and being subject to various requirements and formalities).

The Employer must, in advance, request to Social Security to issue the legally mandatory documentation for the posting, inter alia, in the aforementioned case of posting from Portugal to a Member State for a period of up to 24 months, the issuance of the Portable Document A1 must be requested, certifying that the employee is subject to a mandatory Social Security system (in this case, he/she is covered by Portuguese Social Security legislation).

Finally, it should be noted with regard to the posting regime that Social Security has already clarified that teleworking situations are not considered posting, as the

legislation of the Member State where the employee is physically carrying out the activity applies

4. Conclusion

Given the multitude of potentially applicable rules, it is essential to assess in advance which legal rules apply to each specific case, before any posting is initiated.

Breach of legal rules on posting may constitute a serious offence and result in the employer incurring significant fines.