



EFFAT

Posting of workers in the European agricultural sector



Ten contributions for the protection of workers

Produced by



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Foreword by the EFFAT Agriculture President

Social rights and equal treatment for posted workers in the European agricultural sector

In 2010, EFFAT focused heavily on a certain group of workers in the European agricultural sector, namely, posted workers. After all, many important EU documents have highlighted that there are lots of posted workers in agriculture.

With this in mind, EFFAT conducted numerous surveys and held discussions in the various Member States, with its efforts supported not only by national trade unions but also by employer representatives, governments and social security institutions.

As we worked, it became clear that there are not that many posted workers in the agricultural sector at present. And yet over 4.5 million workers in European agriculture are working outside their countries of origin. They seek employment and income as seasonal workers, but frequently lose many important rights into the bargain. These workers often have no fixed employment contract with an employer for whom they provide a product or service in their countries of origin, so they are not posted workers.

EFFAT advocates social justice from farm to fork, so we call for social rights and equal treatment for all workers in the agricultural sector: as our motto goes, "the same pay for the same work in the same place".

The European labour market is increasingly being cut, like a cake, into small pieces, so in the end workers do not know whether they are posted workers, seasonal workers, temporary workers, cross-border workers, migrant workers or even bogus self-employed workers. I am convinced that this fragmentation of the labour market is only being used to reduce workers' rights.

I would like to thank EFFAT's member organisations, the FSI experts and all those who have supported our work for their cooperation and hope that our efforts will go some way towards strengthening workers' rights in the agriculture sector.

Brussels (Belgium) – Copenhagen (Denmark), November 2010

Peter Holm EFFAT Agriculture President

Foreword by the authors

Unions striving for preventive occupational health and safety



We wrote this guide at the request of the European agricultural workers' trade union (EFFAT), with the intention that it should serve as a practical aid for the workers affected by the issue and for the trade unionists wishing to advise them.

We would like to thank EFFAT and the many representatives of its member organisations, without whose practical collaboration this guide could not have been written.

We have taken various approaches to providing practical help, looking at:

- legislation applying to the posting of workers;
- interviews with partner organisations and public employment services and with other public bodies responsible for evaluating and monitoring conditions for the application of the Posting of Workers Directive;
- various public studies, most of which are available from the European Commission's website.

The guide takes into account that fact that "posted work" is a relatively unfamiliar term and concise, clear information on the subject is hard to come by. It was written during a period of change, so all the guides that have been published so far will probably need to be updated.

We would like to thank all the actors who allowed us to create this guide in a context where:

- it is still difficult to assess the extent of posting at European level;
- agriculture is affected by posting of workers but the share of posted workers and their conditions are largely unknown, even to those in charge of the sector;
- the Posting of Workers Directive is currently being revised.

Brussels (Belgium) – Pulversheim (France) – Berlin (Germany), November 2010

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1 Definition of posting of workers

Transnational posting of workers falls under freedom to provide services, a principle that allows service providers established in any EU Member State to provide a service, for a limited period, in another EU Member State without having to be established in that country.

Transnational posting of workers is what happens when a company based in one EU Member State sends its employees to another Member State to provide services there for a limited period. For the purposes of Directive 96/71/EC, the term "posted worker" means any worker who, for a limited period, is sent by their employer to another EU Member State to provide services there.

2 Who is affected by posting?

Three groups are affected:

1. posting companies (service providers);
2. posted workers (contract lasting no more than 12 months);
3. customers (service recipients).

Posting of workers can take one of three forms¹:

1. posting within the framework of a contract between the posting company and the service recipient;
2. posting of workers to a subsidiary or to a company owned by the group; or
3. posting of workers by a temporary employment agency to a user company that is established in a different country to the posting company.

3 What rules must be obeyed in the host country?

Posting companies must comply with the labour law provisions in force in the host country with regard to the following matters:

- maximum work periods and minimum rest periods;
- paid annual leave;
- minimum rates of pay, including overtime rates;
- conditions regarding the hiring out of workers, including supply of workers by temporary employment agencies;
- occupational health and safety;
- protective measures relating to the working and employment conditions of pregnant women and women who have recently given birth, children and teenagers;
- gender equality and other provisions relating to non-discrimination.

In other words, the Posting of Workers Directive enshrines the principle of equal treatment of workers in the same place, regardless of their status (posted or otherwise) and regardless of the Member State in which the company is established.

¹ Article 1(3) of Directive 96/71/EC

The company providing the service must only obey these rules if they are set down:

- in laws, regulations or administrative provisions in the country where the service is provided;
- and/or in collective agreements or arbitration awards that have been declared universally applicable to construction activities.

However, the directive allows Member States to require national companies and companies from other Member States to apply working and employment conditions set down in collective agreements or arbitration awards that are universally applicable to activities other than construction.

The rules of the host country may be disregarded if posted workers are subject to similar or more favourable rules in the sending country.

4 Contractual relationship between posting company and posted worker

A legally posted worker is a worker who is posted by a company in one Member State to a company in another Member State to do work there. The estimated duration of the work may not be more than 12 months. The work may not be continued by another posted worker at the end of the 12-month period. This is the maximum period for which a worker may be posted, but shorter periods are allowable too. The maximum period may only be extended beyond the normal duration, to no more than 24 months, in the event of unforeseeable circumstances. This 24-month limit may be exceeded in exceptional cases, mainly in the case of long-term work².

Another important point, in addition to the time limit on posting assignments and the fact that posted workers may not replace other workers, is that a posted worker must be permanently employed at the posting company. The existence of permanent employment is recognised when:

- there is an employment contract between the posted worker and the posting company, and both parties signed it by choice;
- meaning that the posting company is the only company that may end the contract by dismissing the worker;
- meaning that the posting company may determine the general work carried out by the posted worker, but not all details of how the work is done. The worker has been posted with a view to preparing a product or providing a service;
- meaning that the posting company must compensate the posted worker for the work performed.

The procedures to be applied may differ from one Member State to another.

A website created by the social partners for the construction sector lists all of these processes in two languages: the language of the relevant Member State and English. Although the site was created for the construction sector, the information could also be used for posted workers in the agricultural sector.

The website designed by the social partners for the construction sector: www.posting-workers.eu

² Regulation (EEC) no. 1408/71 of 14 June 1971, S. 17

5 ***Exceptions: agency workers and temporary workers***

(Employing workers in one Member State with the intention of posting them to another Member State)

This applies primarily – but not exclusively – to temporary employment agencies. Due to the specific nature of this area of activities, companies might apply the directive incorrectly or circumvent it (letterbox companies). The European Court of Justice has stressed that companies must have meaningful business activities in the sending country to be allowed to post workers, so a company that only exercises internal administrative activities in the sending country would not be entitled to post workers. The ECJ judgments on this matter aim to prevent fictitious relocation of jobs.

The existence of *meaningful business activities* in the sending country can be established on the basis of a series of objective criteria. Although it cannot possibly be exhaustive, given the diverse nature of the activities in question, the list below contains a few key points in this regard:

- administrative headquarters of the posting company;
- the number of administrative staff employed by the posting company in the sending country and the receiving country (if the company only employs administrative staff, and no others, in the sending country, posting provisions may not be applied);
- the place where the workers to be posted were hired;
- the place where most contracts with clients are concluded;
- which country's laws are applicable to contracts concluded between the posting company and its clients and employees;
- the turnover achieved, over a short period, in the sending country and the receiving country. For example, a share of around 25% of the turnover could be a significant indicator. Cases where turnover is less than 25% should be assessed individually;
- since the conditions of "habitual and significant business activities" may be fulfilled in the territory of the sending country, the companies must also have carried out activities in that country for a certain time. This criterion is viewed as having been met if activities have been carried out there for at least four months. If this is not the case, an individual assessment is performed on the basis of all the other criteria.
- ***It seems that this phenomenon is more prevalent in the agricultural sector than other forms of posting. With this in mind, and given the large number of incorrect applications, we would recommend that the action plan to be created by EFFAT include monitoring of these companies.***

6 Social security issues

Who deals with the procedure?

Employers handle the formalities relating to posting. In principle, they should do so by contacting the organisations with which the workers are affiliated. However, employers may conduct the necessary formalities with the organisation to which they themselves are affiliated instead, rather than having to make arrangements with the different funds to which the workers in question are affiliated.

Legal basis: Regulation (EEC) no. 1408/71 and Article 12 (new) of Regulation (EC) no. 883/2004, which replaced Article 14 of Regulation (EEC) no. 1408/71 on 1 May 2010. *(The regulation applies to workers – self-employed or employed – who are nationals of a Member State or a third country or who are stateless/refugees and are resident in the territory of a Member State and who are subject to the laws of one or more Member States, and to their family members and survivors. It also applies to survivors of these workers, regardless of the workers' nationality, civil servants and people treated like these workers, in accordance with the applicable legislation. The regulation also applies to people who are studying or following vocational training and their family members.)* Regulation (EC) no. 883/2004 makes it compulsory for the Member States' administrative bodies to electronically exchange information from the date of the regulation's entry into force.

Membership of a social security system:

For workers to be posted to another Member State, they must be correctly registered in the social security system of the sending country and their employer must ask the responsible bodies for a certificate (A1, formerly E101) that documents the retention of social security in the country of origin and confirms the workers' presence as part of a posting arrangement. Under the legislation of the country in which the service is being provided, failure to hold such a certificate may lead to prosecution for illegal work. Inspectors in the host countries are allowed to ask to see this certificate. We would like to reiterate that posted workers may remain members of the social security system in the country of origin for the limited period covered by their posting assignment.

7 The situation in the agricultural sector

During the work accompanying the project, it became clear that posting (as understood and analysed by the European institutions) is not the main form of mass transnational employment in the agricultural sector. Rather, seasonal work – particularly transnational seasonal work – is the sector's answer to an alternative form of employment outside of workers' countries of origin.

The project highlights a range of obstacles to understanding and tackling the situation with regard to posting of workers in the agricultural sector.

- There is little awareness of the issue, and it contradicts texts on the mobility of workers within the EU. Moreover, an EU directive is currently being drafted that focuses more on the trend of seasonal employment of third-country workers. Bear in mind that this directive uses a broader definition of "seasonality" than usual.

Nonetheless, this project made it possible to hold meetings between the individual actors who should eventually conduct exchanges and take actions that will contribute to clarifying the role of the social partners in the future. As such, some practices from the sector may influence the agricultural trade unions – see **European Institute for Construction Labour Research - Jan Cremers, *In search of cheap labour in Europe – Living and working conditions of posted workers***, available at www.clr-news.org.

Furthermore, some practical exchanges have led to the development of cooperation agreements between trade unions in different Member States. These form a basis for cross-sectoral collaboration at European level (see expert report).

8 Criticism of the directive's implementation

The European Commission³ has repeatedly referred to the problems with the directive's implementation in the Member States:

- the European Commission pointed out that the main problem with the directive's implementation is the lack of information given to posted workers about their rights, as well as insufficient monitoring by labour inspectorates;
- there are difficulties imposing sanctions, despite the fact that these are provided for in the directive;
- the enforcement of fines levied by one Member State against a company in the territory of another Member State remains problematic.

9 Criticism of the directive

Trade unions such as EFFAT call for the following:

- a. The goals of the Posting of Workers Directive, namely to guarantee fair competition and respect for workers' rights, which are currently only mentioned in the preamble to the directive, must be stated more clearly and appear in the main text of the directive. Mentioning the social policy aims set down in Articles 136 and 137 of the EC Treaty, with an explicit reference to the aim of improving workers' living and working conditions, would contribute to clearer interpretation of the directive. Besides, the directive deserves a broader legal basis, e.g. Article 137 of the EC Treaty.
- b. The fundamental right to collective bargaining and collective measures should be viewed as a starting point and a means for trade unions to apply pressure with a view to persuading local and foreign companies to improve workers' living and working conditions and demanding equal treatment of workers who do similar work at the same place, regardless of their nationality and their employer's country of establishment. This should be made clearer through the addition of an extra provision to the main text of the directive, following the example of the Monti clause.
- c. A more precise definition of free movement of workers should be included in the scope of the Posting of Workers Directive to emphasise that it covers clear-cut situations of short-term assignments whereby a worker is sent by a service provider to provide a service abroad for a limited period, but the worker's main place of employment and residence is still the sending country and the worker will return there at the end of the assignment. Moreover, it is also essential to have a clearer definition of what constitutes a transnational service and what does not, with a view to preventing companies from getting around applicable laws and standards by setting up letterbox companies.
- d. The directive's role as a minimum standard should be restored, namely, the idea that the directive offers minimum protection (i.e. standards that must be applied) and that standards may be adopted – whether in laws or collective agreements – that offer the affected workers better working conditions (standards that may be applied), as long as it is guaranteed that national and foreign companies are treated the same and there is no discrimination.

³ See Commission Communication of 13 June 2007

- e. The directive should more clearly take account of the different models for employment relationships in the Member States. It should also recognise collective bargaining as a flexible and dynamic process that – in the interests of employers and workers, and society as a whole – cannot and should not be viewed as just another form of regulation. Moreover, more flexible criteria should be applied when it comes to determining whether a collective agreement can be upheld in respect of a foreign service provider, e.g. in situations where most local companies are bound by the collective agreement in practice.
- f. In their capacity as public authorities that award public contracts (public procurement), the Member States should be allowed to require local and foreign companies submitting bids for public contracts to provide remuneration and working conditions that are in line with local collective agreements. This could be achieved through the inclusion of social clauses.
- g. With respect to the Member States' role as legislators, very restrictive interpretations of provisions on public policy should be revised to include social aims and protection of workers.
- h. The Member States and social partners must be allowed to apply effective monitoring and enforcement measures with a view to determining, for example, whether the posted workers really are normally resident in the sending country and that they will return there at the end of their posting assignment.
- i. The formal criteria for a meaningful business activity (see p. 9) and, more generally, the opinions voiced during meetings with the relevant institutions (which are also summarised in the report) should be taken into account.
- j. Effective placement instruments for the organisation of European mobility should be created, especially in the agricultural sector. These should make it possible to guarantee respect of workers' rights. The Agripass, which is integrated into the EURES system, could be one of these effective instruments, if coupled with multilingual information on workers' rights and the conclusion of an employment contract in the languages of the employer and the worker.
- k. The award of a label could be made compulsory. This could be done in the framework of a collective agreement declared to be universally applicable, or could take the form of a permit, following the model created by British government agency the Gangmasters Licensing Authority. The social partners could be involved in the process.

10 More information

- Directive 96/71/EC: Official Journal L 018 of 21 January 1997, pp. 1 to 6 (can be found using a search engine)
- Regulation (EEC) no. 1408/71 and Article 12 (new) of Regulation (EC) no. 883/2004 (can be found using a search engine)
- Communication on the posting of workers in the framework of provision of services: maximising its benefits and potential while guaranteeing the protection of workers (COM (2007) 304 final)
- Eurofound study: www.eurofound.europa.eu - Posted workers in the European Union
- European Labour Law Network, dealing with aspects of law relating to individual or group work: ANNUAL LEGAL SEMINAR – 28 November 2008 – working papers on posted work

- Launch of a European observatory on cross-border temporary agency work - Eurociett
- www.posting-workers.eu
- www.av.se (guide by the Swedish public employment service, in English)
- www.crd-EURES-lorraine.org
- www.etuc.org (Guide for mobile European workers) + ETUC position on the revision of Directive 96/71/EC
- http://ec.europa.eu/employment_social/progress/index_en.html
- CLEISS (Centre of European and International Liaisons for Social Security)
- Liaison offices and authorities responsible for monitoring working and employment conditions, as per Article 4 of Directive 96/71/EC (last updated: 1 February 2011) – list of offices in each country
- www.effat.org – various working papers and opinions, report on mobility
- www.agri-info.eu – information on the social situation in the European agricultural sector

For more information on the posting of workers you can consult the website:

<http://agri-employment.eu>