



Update implementation reform of the Posting of Workers Directive and proposal EU minimum wages

As of 30 July 2020, posted workers are entitled, among others, to equal pay for equal work in the host country. EU Member States have had more than two years to implement the Revision of the Posting of Workers Directive (2018/957/EU), including the "equal pay for equal work" rules. In this Law Alert we provide a practical overview of the most important changes as a result of the Reform Directive, as well as a transposition status update. It is clear that the Reform Directive will likely have a significant impact on the existing global mobility practice. Furthermore, on 28 October 2020 the European Commission published a directive proposal for EU minimum wages for employees and bogus self-employed persons.

1 The most important changes: are you ready for it?

What are the most important elements of the Reform Directive and what is the impact of the implementation of these rules into national legislation for your company?

- 1) Equal pay for equal work in the host country
- 2) Applicable labor law in the host country
- 3) Equal treatment of agency workers in the host country

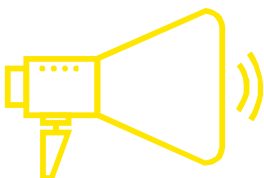
Below you find a brief elaboration per abovementioned change. In paragraph 5 you find an overview of the transposition status of the Reform Directive in the EEA Member States and Switzerland.

2 Equal pay for equal work

An important rule (and aim) of the Reform Directive is equal pay, but does this mean?

- ▶ The service provider must pay the posted worker a remuneration equal to that received by an employee in the host country for equal work. Importantly, this equal treatment does not have to be met per remuneration element, but the final total should cover an equal pay. Therefore, a package comparison will have to be made between the (gross) salary paid to the posted worker and the (gross) salary to which the posted worker is entitled under the labor and employment law of the host country.
- ▶ Posted workers will be entitled to all remuneration elements that are mandatory under the labor and employment law of the host country, including (also) on the basis of any applicable collective labor agreement.

This means that, in addition to the (minimum) wage, posted workers may also be entitled to other remuneration elements, such as overtime compensation or a thirteenth month's pay. For countries such as the Netherlands, in which the right to equal pay had already been extensively implemented, this will in theory not bring about any far-reaching change. In our experience, however, many foreign companies were not familiar with the existing equal pay practice in the Netherlands. As a result, for many workers posted to the Netherlands, equal pay will still have to be determined and paid as soon as possible. Failure to comply with this obligation can result in high penalties, but also wage claims.



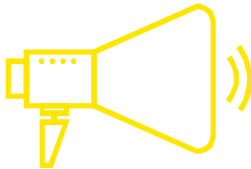
Action: Make sure that you are well aware of the mandatory remuneration elements in the host country prior to the posting. If the total mandatory remuneration is higher than the remuneration normally paid to the employee, then at least pay your worker the mandatory remuneration under the labor and employment law of the host country. Always check whether you have to apply a collective labor agreement.

- ▶ Allowances

Pay attention to the special rules regarding allowances that (also partly) relate to costs that the posted worker (possibly) incurs. Only remuneration elements count in the package comparison. Do you also reimburse and/or pay cost allowances to your posted workers? Such cost allowances should be disregarded when determining the equal remuneration amount. If it is not clear which part of a surcharge relates to a compensation of costs

and which part can be seen as remuneration, than the entire surcharge qualifies as a cost allowance and therefore does not count in the package comparison.

Moreover, posted workers are also entitled to at least the same allowances or expenses for travel, meals and accommodation from the host country as host country workers who are away from home on a professional basis are entitled to. The same applies to costs incurred by posted workers when travelling to and from their usual place of work in the host country.



Action: Ensure that an inventory and calculation of mandatory (equal) pay and/or cost allowances are made in advance in the host country and adjust the latter (if any) accordingly. Also ensure that the documentation, such as assignment agreements and global mobility policies, are reviewed and adjusted if necessary.

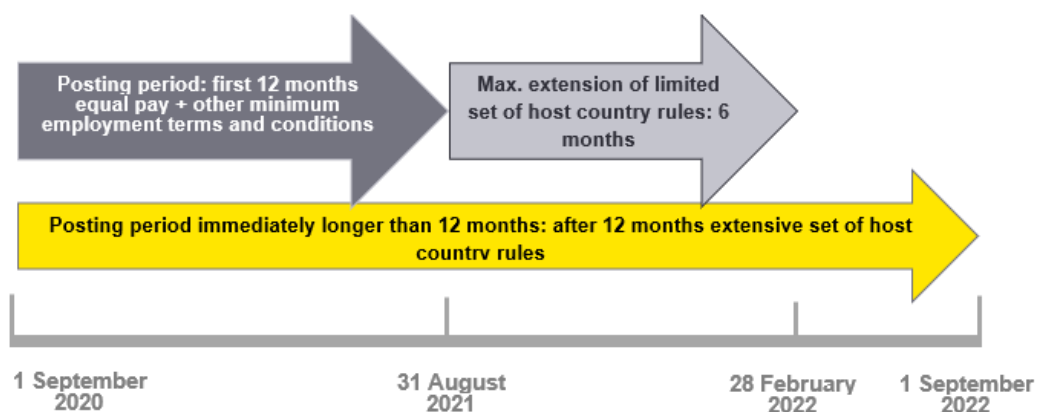
Example package comparison equal pay

Below you will find an example of a package comparison of equal remuneration, also based on the Practical Guide on Posting of the European Commission.

Eligible gross remuneration based on the local host country legislation		Actually paid gross amount	
Wage based on wage scale applicable collective labor agreement	€ 1,700	Wage	€ 800
Compensation travel expenses	€ 150	Posting surcharge	€ 500
		Compensation accommodation expenses	€ 550
Total	€ 1,850	Total	€ 1,850

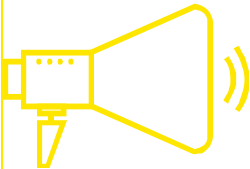
This is an example of a package comparison that is not in line with the requirements of the implementation of the Reform Directive. In fact, compensation for accommodation expenses should not be included, with the result that the total remuneration paid is less than the amount due. The posting surcharge can, however, be included if it is described as not being a compensation of costs. In short, this employer runs a high risk of a wage claim by the posted worker, as well as penalties for non-compliance with the mandatory remuneration rules of the host country.

3 Applicable labor law in the host country



As of 30 July 2020, the limited set of rules of the applicable labor and employment law of the host country only applies during the first 12 months of posting, which may be extended by maximally 6 months. Previously, this maximum term did not apply.

Postings that last longer than 12 months as of 30 July 2020 or that are extended for a longer period during the posting will be governed by the full labor and employment law of the host country after that period of 12 or 18 months, with the exception of dismissal law and supplementary pension schemes.



For the extension by 6 months, the employer must, however, give a 'reasoned notification' to the local authority in the host country. However, this extension is not possible if it was already clear in advance that the posting would exceed the period of 12 months: in the event of a posting of two years for instance, the extensive set of rules of labor and employment law of the host country will therefore simply apply as from 12 months onwards.

An interesting aspect for now is then what transitional law will apply: what applies to existing postings? In the Netherlands, for posting that currently last 12 months or longer on 30 July 2020, the more extensive application of Dutch labor and employment law will automatically be postponed until after 18 months. However, for postings that already last longer than 18 months, the more extensive application will apply at the same time as of 30 July 2020.

Finally, in determining the first 12-month period, periods in which a new posted worker takes over the position of the previous posted worker are added together: thus, preventing the more extensive application of the labor and employment law of the host country through rotation of posted workers is not possible.

Action: Assess when the more extensive application will apply to existing postings, and be aware of this for new long-term postings. Also assess the impact of the application of the applicable labor and employment law of the host country on the (desired) posting, as well as whether the posting may then have to be designed differently in order to avoid undesirable consequences.

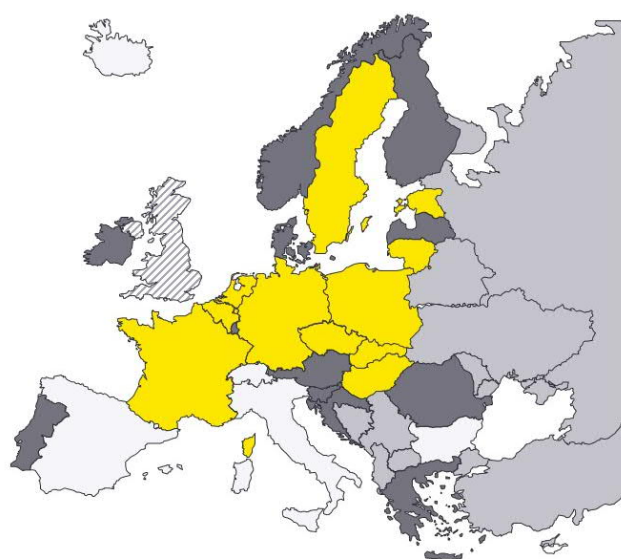
4 Equal treatment of agency workers in the host country

Posted agency workers are entitled to the same national standard of equal treatment as host country temporary agency workers and ordinary employees are entitled to based on host country legislation. This already applied in the Netherlands, as a result of which the hirer's remuneration already applied to posted agency workers. This means that the equal treatment principle in the Netherlands is more extensive than the equal pay principle for ordinary posted workers: wage components included in applicable collective labor agreements other than collective labor agreements that have been declared universally binding will also apply. Additionally, if a collective labor agreement that has been declared universally binding applies, posted agency workers are entitled to almost all employment terms and conditions included in that collective labor agreement. Posted agency workers are therefore subject to an even broader set of rules of the applicable labor and employment law of the host country than other ordinary posted workers from the first day of the posting.

5 Implementation status EEA Member States and Switzerland

The deadline for implementation by Member States of 30 July 2020 has passed. The overview below shows that a significant number of Member States have not yet started the implementation of the Reform Directive (6) or are still in the process of implementation (12).

Reform EU Posted Worker Directive — Transposition status



● Transposed

Belgium	Lithuania
Estonia	Malta
France	Netherlands
Czech Republic	Poland
Germany	Slovakia
Hungary	Sweden

● In Progress of Transposition

Austria	Luxembourg
Croatia	Norway
Denmark	Portugal
Finland	Romania
Greece	Slovenia
Ireland	Latvia

○ No Transposition process started yet

Bulgaria	Spain
Cyprus	Switzerland (1)
Iceland	
Italy	

Information status — last updated on 28 October 2020

(1) Not being part of the EEA, Switzerland will not implement the Reform Directive

Despite recent attempts to convince the European Commission to postpone the date of entry into force of the revised rules by one year (in view of the COVID-19 pandemic), the European Commission has not responded to this request. This implies that as of 30 July 2020 you have to comply with, among others, the equal pay obligation.

6 New proposal on European rules on minimum wages

On 28 October 2020 the European Commission published a directive proposal for minimum wages in the EU which should apply to employees, but also a typical new forms of work such as bogus self-employed persons.

The explanatory memorandum to the proposal states that many workers within the European Union are not protected by adequate minimum wages. Statutory minimum wages are often not sufficient for a decent standard of living, and employees in Member States with a collective bargaining system may fall outside the scope of collective agreements.

The directive would not impose a European minimum wage, but obliges Member States to set conditions that ensure adequate statutory minimum wages. Part of this obligation entails that Member States should promote collective bargaining between social partners on wages. In addition, Member States with statutory minimum wages

must establish clear criteria for determining the level of minimum wages, sectoral differences must be minimized and workers must be protected from unjustified or disproportionate deductions. Furthermore, Member States must ensure compliance and effective enforcement.

If national measures would be implemented following the described obligations, the implementation of the Reform Directive would ensure that posted workers would also benefit from the results of any additional protective measures.

7 Strategic planning and preparation

It is clear that the Reform Directive will have a massive impact on the posting of workers model for many companies. The equal pay obligation applies, in principle, to all posted workers and not only to workers earning approximately the legal minimum wage of a host country. Not only does the service provider have to verify what the applicable posting rules are in the host country, but also whether it is obliged to (partially) apply a certain collective labor agreement. Employers must also verify whether the length of the standard posting is still appropriate, and even whether the posting model is still interesting for each desired posting. It is possible that a transfer of the employee under an employment agreement in the host country will be more beneficial than a posting.

If you would like to know more about the content and consequences of the Reform Directive for your organization, please contact us. Our specialized international labor and employment law team will be pleased to assist you with all your questions regarding the Dutch posting rules, but also those of the other EU Member States (including the other EEA Member States and Switzerland).

What HVG Law can do for you

International labor law is very complex and it becomes even more complex due to recent European regulations. Due to significant penalty risks and reputational damage it is paramount to be compliant. We can assist you with that.

We would be happy to have a conversation with you to discuss the (re)design of your global mobility practice.

On our web page regarding posted workers you can find more information:
hvglaw.nl/pwd/



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About HVG Law

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