

L.N. 223 of 2016

**EMPLOYMENT AND INDUSTRIAL RELATIONS ACT
(CAP. 452)**

Posting of Workers in Malta Regulations, 2016

IN exercise of the powers conferred by article 31 of the Employment and Industrial Relations Act, the Minister for Social Dialogue, Consumer Affairs and Civil Liberties has made the following regulations:-

1. (1) The title of these Regulations is the Posting of Citation.
Workers in Malta Regulations, 2016.

(2) The object of these regulations is to give effect to the relevant provisions of EU Directive 96/71/EC and EU Directive 2014/67.

(3) These regulations aim to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services and establish a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71, including measures to prevent and sanction any abuse and circumvention of the applicable rules.

2. (1) In these regulations, unless the context otherwise Definitions.
requires:-

"Act" means the Employment and Industrial Relations Act; Cap. 452

"Commission" means the Commission of the European Union;

"comparable employee" means an employee in an undertaking located in Malta who is engaged in the same or similar work or occupation, due regard being given to other considerations including seniority, qualification and skills;

"competent authority in Malta" means the Department of Industrial and Employment Relations;

"foreign service provider" means a service provider which is established in a Member State other than Malta;

"Member State" means a Member State of the European Union or of the European Economic Area and the European Free Trade

Area;

"posted employee" means an employee of a foreign service provider who does not normally work in Malta but who for a limited period of time is sent by the foreign service provider to work in Malta;

"requesting authority" means the competent authority of a Member State which makes a request for assistance, information, notification or recovery of a penalty and, or fine;

"requested authority" means the competent authority in Malta, to which a request for assistance, information, notification or recovery of a penalty and, or fine is made.

(2) Subject to the provisions of sub-regulation (1), terms and expressions used in these regulations shall, unless the context otherwise requires, have the meaning assigned to them in the Act.

Applicability.

3. (1) These regulations shall apply to the extent that the foreign service providers referred to in the preceding regulation:

(a) send posted employees in Malta on their account and under their direction, under a contract concluded between the foreign service provider making the posting and the party for whom the services are intended, provided there is an employment relationship between the foreign service provider and the worker during the period of posting; or

(b) send posted employees to an establishment or to an undertaking in Malta which is owned by the foreign service provider, provided there is an employment relationship between the foreign service provider and the worker during the period of posting; or

(c) being temporary employment undertakings or placement agencies, hire out a worker to a user undertaking established or operating in Malta, provided there is an employment relationship between the temporary employment undertaking, or placement agency, and the worker during the period of posting.

Cap. 234

(2) These regulations shall not apply to personnel employed on vessels which fall under the provisions of the Merchant Shipping Act.

(3) Nothing contained in these regulations shall prevent application of terms and conditions of employment which are more

favourable to workers.

4. (1) For the purpose of implementing, applying and enforcing these regulations, the competent authority in Malta shall make an overall assessment of all factual elements which assist it in carrying out checks and controls and where there is reason to believe that a worker may not qualify as a posted worker in terms of these regulations.

Identification of a genuine posting and prevention of abuse and circumvention.

(2) The elements mentioned in this regulation are indicative factors in the overall assessment to be made and shall not be considered in isolation. The assessment of these elements shall be adapted to each specific case and shall take account of the specificities of the situation.

(3) In order to determine whether an undertaking, which is the service provider, genuinely performs substantial activities, other than purely internal management and, or administrative activities, the competent authority in Malta shall make an overall assessment of all factual elements characterising those activities. Such elements may include in particular:

(a) the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional licence or is registered with the chambers of commerce or professional bodies;

(b) the place where posted workers are recruited and from which they are posted;

(c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other;

(d) the place where the undertaking performs its substantial business activity and where it employs administrative staff;

(e) the number of contracts performed and, or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and small and medium sized enterprises.

(4) In order to assess whether a posted worker temporarily carries out his work in Malta, all factual elements characterising such

work and the situation of the worker shall be examined by the competent authority in Malta. Such elements may include in particular:

- (a) the work is carried out for a limited period of time in Malta;
- (b) the date on which the posting starts;
- (c) the posting takes place to Malta as a Member State other than the one in or from which the posted worker habitually carries out his work according to Regulation (EC) No 593/2008 (Rome I) and, or the Rome Convention;
- (d) the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted;
- (e) the nature of activities;
- (f) travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
- (g) any previous periods during which the post was filled by the same or by another worker.

(5) The failure to satisfy one or more of the factual elements set out in this regulation shall not automatically preclude a situation from being characterised as one of posting.

Equality of
treatment.

5. (1) The conditions of work which are given to posted employees who have notified their intention to work in Malta shall not be less than the minimum conditions of work given to a comparable employee by virtue of the Act, or any regulations issued thereunder or by virtue of any other legislation regulating the class of employment of the posted employee in the same place of work:

Provided that any allowances specific to the posting granted to the posted employee, shall be considered to be part of the wage payable to a comparable employee, unless they are paid as reimbursement of expenses actually incurred on account of the posting, including expenditure on travel, board and lodging.

(2) All posted employees covered by these regulations shall be entitled to receive equality of treatment as the comparable employees and in particular they shall have equal access to employment rights

and health and safety rights under Maltese law.

(3) The term "equality of treatment" shall, for the purposes of these regulations, consist of:

(a) maximum work periods and minimum rest periods as applied to various classes of employees;

(b) minimum paid annual holidays as applied to various classes of employees;

(c) minimum rates of pay, including overtime rates as applied to various classes of employees;

(d) equality of treatment between men and women and other provisions of non-discrimination in accordance with the laws of Malta;

(e) protective measures with regards to terms and conditions of employment protecting pregnant women or women who have given birth a short while before;

(f) protective measures in accordance with the laws of Malta with regards to terms and conditions of employment protecting children and young people;

(g) measures in accordance with the laws of Malta relating to health, safety and hygiene at work;

(h) the conditions of hiring out of workers, in particular the supply of workers by temporary employment undertakings:

Provided that in cases of initial assembly and, or first installation of goods where such activity is an integral part of contract for the supply of goods necessary for taking the goods supplied into use and carried out by the skilled and, or specialist workers of the supplying organisation, sub-regulation (3)(b) and (c) shall not apply if the period of posting does not exceed eight days, so long as the work involved is not related to all building work relating to construction, repair, upkeep, alteration or demolition of buildings, and in particular excavation, earth moving, actual building work, assembly and dismantling of prefabricated elements, fitting out or installation, alterations, renovation, repairs, dismantling, demolition, maintenance, upkeep, painting and cleaning work and improvements:

Provided further that sub-regulation (3)(c) shall not

apply in the cases referred to in regulation 3(1)(i) and (ii) when the length of the posting does not exceed one month.

(4) The length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting: Provided that for the purpose of such calculation, account shall be taken of any previous periods for which the post has been filled by a posted worker.

(5) When a worker is posted to Malta, the inspection of terms and conditions of employment which must be complied with in accordance with this regulation is the responsibility of the competent authority in Malta in cooperation, where necessary, with that of the Member State of establishment in terms of these regulations:

Provided that inspections shall be based primarily on a risk assessment which may identify the sectors of activity in which the employment of workers posted for the provision of services is concentrated. The carrying out of large infrastructural projects, the existence of long chains of subcontractors, geographic proximity, the special problems and needs of specific sectors, the past record of infringement, as well as the vulnerability of certain groups of workers may in particular be taken into account.

(6) Where Malta is the member state of establishment of the service provider, the competent authority in Malta shall assist the Member State to which postings takes place to ensure compliance with EU Directive 96/71/EC and EU Directive 2014/67. This shall not prejudice the powers of the Member State to which the posting takes place to monitor, control or take any necessary supervisory or enforcement measures.

(7) In the cases where facts indicate possible irregularities, the competent authority in Malta shall, on its own initiative, communicate to the Member State concerned any relevant information without undue delay.

(8) When a worker is posted to Malta, the competent authority in Malta may ask the competent authority of the Member State of establishment, in respect of each instance where services are provided or each service provider, to provide information as to the legality of the service provider's establishment, the service provider's good conduct, and the absence of any infringement of the applicable rules.

(9) When Malta is the country of establishment of the service provider, the competent authority in Malta shall provide the information contained in sub-regulation (8) in terms of regulation 7.

(10) Without prejudice to the right to request Member States where a worker is posted to carry out checks and controls, nothing in this regulation shall impose an obligation on the competent authority in Malta, in cases where Malta is the country of establishment, to carry out factual checks and controls in the territory of the host Member State in which the service is provided.

(11) Service providers established in a non-Member State shall not be given more favourable treatment than service providers established in a Member State.

6. (1) It shall be the duty of the service provider posting the worker to Malta to notify the competent authority in Malta of the intention to post a worker to Malta prior to the date of posting of the worker, at the latest at the commencement of the posting, which notification shall contain the relevant information necessary in order to allow factual controls at the workplace. This notification, effected in the English language, shall include:

Administrative requirements and control measures.

- (a) the identity of the service provider;
- (b) the address in the country where the worker habitually carries out his work;
- (c) the anticipated number of clearly identifiable posted workers;
- (d) the name, date of birth and nationality of the posted worker;
- (e) the persons referred to sub-regulations (6) and (7);
- (f) the anticipated duration, envisaged beginning and end date of the posting;
- (g) the nature of the services justifying the posting, including the type of work to be carried out; and
- (h) the name and address of the undertaking in Malta to which the worker is to be posted.

(2) A copy of the notification referred to in sub-regulation (1), together with updated records sufficient to show that the provisions of these regulations are being complied with, shall be kept at the undertaking in Malta making use of the services of the posted worker.

(3) It shall be the duty of the service provider posting the worker to Malta to keep, to make available and to retain copies, in

paper or electronic form, of the employment contract or an equivalent document within the meaning of Council Directive 91/533/EEC, including, where appropriate or relevant, the additional information referred to in article 4 of that Directive, payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in the undertaking making use of the services of the posted worker.

(4) It shall be the duty of the service provider posting the worker to Malta to deliver the documents referred to in sub-regulation (3) of this regulation, after the period of posting, at the request of the competent authority in Malta, within a reasonable period of time.

(5) It shall be the duty of the service provider to provide a translation of the documents referred to in sub-regulation (3) into the English language.

(6) It shall be the duty of the service provider to designate a person to liaise with the competent authority in Malta, and to send out and receive documents and, or notices, where appropriate.

(7) It shall be the duty of the service provider to designate a contact person, who may be different from the one designated in terms of sub-regulation (6), to act as a representative in Malta through whom the social partners may seek to engage the service provider to enter into collective bargaining during the period in which the services are provided. It is not required that such contact person is present in Malta but he has to be available on a reasonable and justified request.

(8) The obligations imposed in terms of this regulation are to be disseminated as required by regulation 7(8), and shall be deemed to be fulfilled in case where they are complied with by electronic means.

Administrative
cooperation.

7. (1) The competent authority in Malta shall be responsible for the enforcement of the provisions of these regulations and for liaising and cooperating with the Commission and the authorities having corresponding responsibilities in other Member States on issues relating to the implementation, application and enforcement in practice of Directives 96/71/EC and 2014/67. To this effect, the competent authority in Malta shall work in close cooperation and provide the corresponding authorities in other Member States with assistance without undue delay. Such mutual administrative cooperation and assistance shall be provided free of charge, and shall

be implemented through the Internal Market Information System (IMI) established by Regulation 1024/2012.

(2) The co-operation with other authorities referred to in sub-regulation (1) shall include:

(a) replying to reasoned requests for information, including information with respect to a possible recovery of an administrative penalty and, or fine, or the notification of a decision imposing such a penalty and, or fine as contemplated in these regulations; and

(b) carrying out checks, inspections and investigations with respect to the situations of posting referred in regulation 3, including the investigation of any non-compliance or abuse of applicable rules on the posting of workers.

(3) The co-operation with other authorities referred to in sub-regulation (1) may include the sending and service of documents.

(4) For the purpose of responding to a request for assistance from competent authorities in another Member State, the competent authority in Malta shall ensure that service providers established in Malta supply the latter with all the information necessary for supervising their activities, failing which the service providers shall be guilty of an offence.

(5) In the event of difficulty in meeting a request for information or in carrying out checks, inspections or investigations, the competent authority in Malta shall, without delay, inform the requesting authority with a view to finding a solution.

(6) The information requested to the competent authority in Malta by corresponding authorities in other Member States or by the Commission shall be supplied by electronic means within the following time limits:

(a) in urgent cases requiring the consultation of registers, such as those on confirmation of the VAT registration, for the purpose of checking an establishment in Malta, as soon as possible and up to a maximum of two working days from the receipt of the request:

Provided that the reason for the urgency shall be clearly indicated in the request, including facts to substantiate the urgency:

Provided further that the registers mentioned in this

paragraph shall be consulted by other competent authorities if such registers are listed by the Member States in the Internal Market Information System established by Regulation 1024/2012;

(b) in cases of all other requests for information, up to a maximum of twenty five working days from the receipt of the request, unless a shorter time limit is mutually agreed between the competent authority in Malta and the corresponding competent authority in the other Member State.

(7) Any information exchanged or transmitted in terms of this regulation:

(a) shall be used only in respect of the matter or matters for which it was requested; and

(b) shall not preclude the competent authority in Malta from taking measures to investigate and prevent alleged breaches of these regulations.

(8) The competent authority in Malta shall facilitate access to information on the terms and conditions of employment referred to in regulations 5 and 6, which are to be applied and complied with by service providers by:

(a) making such information generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means, in formats and in accordance with web accessibility standards that ensure access to persons with disabilities;

(b) ensuring that the applicable terms and conditions and the relevant laws are indicated clearly, in a detailed and user-friendly manner and in an accessible format on a single official national website and by other suitable means;

(c) ensuring that the information is easily-available to workers and service providers free of charge in English, which information shall include the main labour conditions applicable, the description of the procedures to lodge complaints and upon requests in formats accessible to persons with disabilities, further detailed information on the employment and social conditions applicable to posted workers;

(d) improving the accessibility and clarity of the relevant information, particularly that found on the single

official national website;

(e) indicating a contact person in charge of dealing with requests for information and indicating the bodies and authorities to which workers and undertakings can turn for general information on the applicable law; and

(f) keeping all the information up to date.

8. (1) This regulation shall apply to the cross-border enforcement of financial administrative penalties and, or fines, including fees and surcharges, imposed by competent authorities or confirmed by administrative or judicial bodies, on a service provider established in Malta for failure to comply with the applicable rules on posting of workers in another Member State.

Cross-border enforcement of financial administrative penalties and, or fines.

(2) At the request of a requesting authority, the competent authority in Malta, hereinafter referred to as the 'requested authority', shall recover an administrative penalty and, or fine that has been imposed by a decision in accordance with the laws and procedures of the requesting member state by a competent authority or confirmed by an administrative or judicial body, which decision constitutes *res judicata*.

(3) At the request of a requesting authority, the requested authority shall notify:

(a) a decision imposing an administrative penalty and, or fine in accordance with the laws and procedures of the requesting Member State by a competent authority or confirmed by an administrative or judicial body, which decision constitutes *res judicata*; and

(b) any other relevant document related to the recovery of the aforementioned penalty and, or fine, including the judgment or final decision, which may be in the form of a certified copy, that constitutes the legal basis and title for the execution of the request for recovery.

(4) In order for the requested authority to be able to carry out its obligations in terms of sub-regulations (2) and (3), the requesting authority's request for recovery of an administrative penalty and, or fine or the requesting authority's request for notification of a decision imposing such a penalty and, or fine shall:

(a) be made in accordance with the laws, regulations and administrative practices in force in the requesting authority's Member State;

(b) only be made when the requesting authority is unable to recover or notify in accordance with its laws, regulations and administrative practices; and

(c) relate to a penalty and, or fine, and to an underlying claim and, or instrument permitting its enforcement in the requesting member state which are not contested or challenged in that Member State.

(5) The request of the requesting authority for recovery of an administrative penalty and, or fine as well as the notification of a decision concerning such a penalty and, or fine shall be carried out without undue delay by means of the Internal Market Information System established by Regulation 1024/2012 and shall include:

(a) the name and known address of the addressee, and any other relevant data or information for the identification of the addressee;

(b) a summary of the facts and circumstances of the infringement, the nature of the offence and the relevant applicable rules;

(c) the instrument permitting enforcement in the requesting Member State and all other relevant information or documents, including those of a judicial nature, concerning the underlying claim, administrative penalty and, or fine;

(d) the name, address and other contact details regarding the competent authority responsible for the assessment of the administrative penalty and, or fine, and, if different, the competent body where further information can be obtained concerning the penalty and, or fine or the possibilities for contesting the payment obligation or decision imposing it;

(e) in the case of a request for notification of a decision, the purpose of the notification and the period within which it shall be effected; and

(f) in the case of a request for recovery, the date when the judgment or decision has become enforceable or final, a description of the nature and amount of the administrative penalty and, or fine, any dates relevant to the enforcement process, including whether, and if so how, the judgment or decision has been served on the defendant and, or given in default of appearance, a confirmation from the requesting authority that the penalty and, or fine is not subject to any

further appeal, and the underlying claim in respect of which the request is made and its different components.

(6) Unless the requested authority decides to invoke any of the grounds of refusal provided in sub-regulation (9), the requested authority, upon receipt of a request to recover or to notify in terms of this regulation, shall recognize it without any further formality being required and shall take all the necessary measures for its execution, and that request to notify or that request to recover shall be deemed to have the same effect as if it had been made by the requesting member state:

Provided that the requested authority shall take all the necessary steps to notify the service provider of the request for recovery or of the decision imposing an administrative penalty and, or fine and of the relevant documents, where necessary, as soon as possible but not later than one month of receipt of the request.

(7) The requested authority, shall, by means of a judicial letter served on the service provider by whom the administrative penalty and, or fine is due, require the service provider to pay the administrative penalty and, or fine in terms of this regulation. Upon the service of such a judicial letter, the claim of the requested authority contained in such judicial letter shall, after the lapse of ten days from such service, constitute an executive title for the purpose of Title VII of Part I of Book Second of the Code of Organization and Civil Procedure. Cap. 12

(8) The requested authority shall as soon as possible inform the requesting authority of:

(a) the action taken on its request for recovery and notification and, more specifically, of the date on which the addressee was notified; and

(b) the grounds of refusal referred to in sub regulation (9) of this regulation, in the case where the requested authority refuses to execute a request for recovery of an administrative penalty and, or fine or to notify a decision imposing an administrative penalty and, or fine.

(9) The requested authority shall not execute a request:

(a) for recovery or notification if the request does not contain the information required in sub-regulation (5), is incomplete or manifestly does not correspond to the underlying decision;

(b) for recovery if:

(i) following inquiries by the requested authority, it is obvious that the envisaged costs or resources required to recover the administrative penalty and, or fine are disproportionate in relation to the amount to be recovered or would give rise to significant difficulties; or

(ii) the overall financial penalty and, or fine is less than three hundred and fifty euro (€350) or the equivalent to that amount; or

(iii) the fundamental rights and freedoms of defendants and legal principles that apply to them in accordance with the law of the requested member state are not respected.

(10) Disputes concerning the enforcement measures taken in Malta or concerning the validity of a notification made by the requested authority shall be brought before the Maltese Courts in accordance with Maltese Law.

(11) Any amounts recovered in terms of this regulation shall accrue to the requested authority. The latter shall recover the amounts due in Euros. If necessary, the requested authority shall convert the penalty and, or fine into the currency of the requested state at the rate of exchange applying on the date when the penalty and, or fine were imposed.

(12) Member States shall not claim from each other the reimbursement of costs arising from any mutual assistance which they grant each other in terms of these regulations.

Defence of
rights.

9. (1) When a posted employee alleges that he has been treated in a manner which infringes any right conferred on him by these regulations, such employee may submit a written request to the employer to provide him with a written statement in which shall be listed the reasons, if any, for any difference in treatment and such statement shall be provided by the employer within ten working days from the date of the request.

(2) Without prejudice to any other right regarding the institution of proceedings in another state, a posted worker shall have the right to institute proceedings in the courts of Malta to safeguard any right granted to him by virtue of these regulations, even after the relationship in which the alleged infringement has occurred has ended and even where the posted worker has left Malta.

(3) Any correspondence referred to in sub-regulation (1) shall be admissible in proceedings brought before the courts, and if it appears to the court that the respondent deliberately, and without reasonable excuse, omitted to reply within ten working days of the date of receipt of such notification or that his reply was evasive or equivocal, the court may draw any inference from that fact that it considers just and equitable to draw, including an inference that he committed an unlawful act.

(4) The provisions in sub-regulation (1) requiring the respondent to submit a reply shall not apply if, on the date that the request was made, proceedings had already been initiated on the matter in front of the Courts of Law.

(5) Any employer who grants unfavourable treatment to a posted worker who has brought judicial proceedings in terms of this regulation shall be guilty of an offence according to these regulations.

10. In any civil proceedings instituted by the posted worker with respect to the set of rights granted by regulation 5, where there is a subcontracting chain, the posted worker can hold the contractor of which his employer is a direct subcontractor civilly liable in addition to or in place of the employer:

Subcontracting liability.

Provided that the liability referred to in this regulation shall be limited to the posted worker's rights acquired under the contractual relationship between the contractor and his subcontractor.

11. Nothing shall prevent any association, organization or other legal entity, having a legitimate interest in ensuring that these regulations are complied with, to engage itself either on behalf of or in support of the posted worker or his employer, with his approval, in any judicial procedure which is provided for the enforcement of obligations under these regulations.

Representation.

12. Any person contravening the provisions of these regulations shall be guilty of an offence and shall, on conviction, be liable to a fine (*multa*) of not less than one hundred and seventeen euro (€117) and not more than one thousand, one hundred and sixty-five euro (€1,165):

Offences.

Provided that in the institution of criminal proceedings in terms of the Act, where the employer is convicted of:

(a) having failed to pay the posted worker in terms of regulation 5(3)(c);

(b) having unduly withheld back-payments, refund of

taxes or social security contributions from the posted worker's salaries; or

(c) having withheld or deducted from the posted worker's salaries excessive costs for accommodation,

the court shall, at the request of the prosecution, besides awarding the punishment imposed by this regulation, order the offender, on proof of the amount, to refund or pay to the posted worker the said amount due by him:

Provided further that nothing in this regulation shall derogate from any right of the posted worker to recover by any other means any amount due to him, including in terms of regulation 9.

Repeal.
S.L. 452.82

13. The Posting of Workers in Malta Regulations are hereby repealed.

