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L.N. 262 of 2020

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

Posting of Workers in Malta (Amendment) Regulations, 2020

IN EXERCISE of the powers conferred by article 48 of the Employment and Industrial Relations Act, the Minister within the Office of the Prime Minister as Minister responsible for Employment and Industrial Relations, has made the following regulations:-

Citation and
commencement.
S.L. 452.82.

1. (1) The title of these regulations is Posting of Workers in Malta (Amendment) Regulations, 2020 and they shall be read and construed as one with the Posting of Workers in Malta Regulations, hereinafter referred to as "the principal regulations".

(2) These regulations shall come into force on the 30th July, 2020.

Amends
regulation 1 of
the principal
regulations.

2. Regulation 1 of the principal regulations, shall be amended as follows:

(a) sub-regulation (2) thereof, shall be substituted by the following:

"(2) The object of these regulations is to give effect to the relevant provisions of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services as amended by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018, and the provisions of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').";

(b) in sub-regulation (3) thereof, the words "Directive 96/71" shall be substituted by the words "Directive 96/71 and Directive 2014/67"; and

(c) immediately after sub-regulation (3) thereof, there shall be added the following new sub-regulation:

"(4) These regulations shall not in any way affect the exercise of fundamental rights, including the right or freedom to strike or to take other legal action, and the right to negotiate, conclude and enforce collective agreements, or to take collective action."

3. In sub-regulation (1) of regulation 2 of the principal regulations, immediately after the definition "posted employee" there shall be added the following new definition:

Amends regulation 2 of the principal regulations.

" "remuneration" means all the constituent elements of remuneration rendered mandatory by the Act, orders or regulations issued thereunder;"

4. Sub-regulation (1) of regulation 3 of the principal regulations, shall be amended as follows:

Amends regulation 3 of the principal regulations.

(a) in paragraph (a) thereof, immediately after the words "for whom the services are intended, provided" there shall be added the word "that";

(b) in paragraph (b) thereof, immediately after the words "which is owned by the foreign service provider, provided" there shall be added the word "that"; and

(c) paragraph (c) thereof, shall be amended as follows:

(i) immediately after the words "operating in Malta, provided" there shall be added the word "that"; and

(ii) the words "during the period of posting." shall be substituted by the words "during the period of posting:" and immediately thereafter, there shall be added the following new provisos:

"Provided that the foreign service providers referred to in this paragraph shall guarantee the posted workers the terms and conditions of employment laid down in the Temporary Agency Workers Regulations, which apply to temporary agency workers hired out by temporary work agencies established in Malta, and the user undertaking shall inform the foreign service provider of these terms and conditions of employment:

S.L. 452.106.

Provided further that when a worker who has been hired out by a temporary employment undertaking or temporary placement agency to a user

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undertaking, established or operating in Malta in terms of this paragraph, carries out work in the framework of the transnational provision of services within the meaning of this regulation by the user undertaking in the territory of a Member State other than where the worker normally works for the temporary employment undertaking or temporary placement agency, or for the user undertaking:

(a) the worker shall be considered to be posted to the territory of that Member State by the temporary employment undertaking or temporary placement agency with which the worker is in an employment relationship;

(b) the temporary employment undertaking or temporary placement agency shall be considered to be the foreign service provider making the posting in terms of these regulations and shall fully comply with the provisions of these regulations; and

(c) the user undertaking shall inform the temporary employment undertaking or temporary placement agency which hired out the worker in due time before commencement of the work."

Amends
regulation 4 of
the principal
regulations.

5. Immediately after sub-regulation (5) of regulation 4 of the principal regulations, there shall be added the following new sub-regulation:

"(6) Where, following an overall assessment made in terms of this regulation, it is established that an undertaking is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of these regulations, that worker shall enjoy all rights relating to the terms and conditions of employment by virtue of the Act and the orders or regulations issued thereunder and by virtue of any applicable collective agreement."

Amends
regulation 5 of
the principal
regulations.

6. Sub-regulations (1), (2) and (3) of regulation 5 of the principal regulations, shall be substituted by the following:

"5. (1) Without prejudice to the provisions of paragraph (c) of sub-regulation (1) of regulation 3, the foreign service providers referred to in regulation 3, shall guarantee, on the basis of equality of treatment, workers who are posted to

Malta the terms and conditions of employment covering the following matters laid down in the Act, or in any regulations or orders issued thereunder:

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

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

(c) remuneration, including overtime rates as applied to various classes of employees:

Provided that supplementary occupational retirement pension schemes shall be excluded from such remuneration;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

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

(f) protective measures with regard to the terms and conditions of employment protecting pregnant women or women who have recently given birth;

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

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

(i) the conditions of workers' accommodation where this is provided by the employer to workers who are away from their regular place of work;

(j) allowances or reimbursement of expenditure to cover travel, board and lodging expenses where this is provided by the employer to workers away from home for professional reasons:

Provided that this paragraph shall apply exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to

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travel to and from their regular place of work in the Member State to whose territory they are posted to Malta, or where they are temporarily sent by their employer from that regular place of work to another place of work.

(2) Allowances specific to the posting shall be considered to be part of the remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. Without prejudice to paragraph (j) of sub-regulation (1), the employer shall reimburse the posted worker for such expenditure in terms of any applicable law:

Provided that, where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure.

(3) In cases of initial assembly and, or first installation of goods where such activity is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and, or specialist workers of the supplying organisation, paragraphs (b) and (c) of sub-regulation (1) shall not apply if the period of posting does not exceed eight (8) days:

Provided that this exclusion shall not apply to activities in the field of building work, including but not limited to work related to the 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.

(3A) Paragraph (c) of sub-regulation (1) shall not apply in the cases referred to in paragraphs (a) and (b) of sub-regulation (1) of regulation 3 when the length of the posting does not exceed one (1) month."

Adds new regulation to the principal regulations.

7. Immediately after regulation 5 of the principal regulations, there shall be added the following new regulation:

"5A. (1) Without prejudice to the provisions of

paragraph (c) of sub-regulation (1) of regulation 3, where the effective duration of a posting exceeds twelve (12) months, the foreign service providers referred to in regulation 3 shall guarantee, on the basis of equality of treatment, workers who are posted to Malta, in addition to the terms and conditions of employment referred to in sub-regulation (1) of regulation 5, all the applicable terms and conditions of employment by virtue of the Act, or any regulations or orders issued thereunder:

Provided that this shall not apply to:

(a) the terms and conditions related to the conclusion and termination of the employment contract; and

(b) supplementary occupational retirement pension schemes.

(2) Where the foreign service provider submits a motivated notification, the competent authority in Malta shall extend the period referred to in sub-regulation (1) to eighteen (18) months.

(3) Where the foreign service provider replaces a posted worker by another posted worker performing the same task at the same place, the duration of the posting shall, for the purposes of this regulation, be the cumulative duration of the posting periods of the individual posted workers concerned:

Provided that for the purposes of this sub-regulation, the concept of "the same task at the same place" shall be determined taking into consideration, inter alia, the nature of the service that shall be provided, the work that shall be performed and the address or addresses of the workplace."

8. In paragraph (f) of sub-regulation (8) of regulation 7 of the principal regulations, the words "keeping all the information up to date." shall be substituted by the words "keeping all the information up to date:" and immediately thereafter, there shall be added the following new proviso:

Amends
regulation 7 of
the principal
regulations.

"Provided that when the information on the single official national website does not indicate which terms and conditions of employment shall be applied, that circumstance shall be taken into account when imposing the penalties laid down in regulation 12, to the extent necessary to ensure the proportionality thereof."

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Amends
regulation 12 of
the principal
regulations.

9. In regulation 12 of the principal regulations, the words "Any person contravening the provisions" shall be substituted by the words "Without prejudice to the proviso to sub-regulation (8) of regulation 7, any person contravening the provisions".
