VERŻJONI ELETTRONIKA

L.N. 432 of 2011

IMMIGRATION ACT
(CAP. 217)

Minimum Standards on Sanctions and Measures against Employers of Illegally Staying Third-Country Nationals Regulations, 2011

IN exercise of the powers conferred by article 36 of the Immigration Act, the Minister of Justice and Home Affairs has made the following regulations:-

Citation and scope.

1. (1) The title of these regulations is the Minimum Standards on Sanctions and Measures against Employers of Illegally Staying Third-Country Nationals Regulations, 2011.

(2) These regulations transpose the provisions of Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals.

(3) These regulations shall be without prejudice to the provisions of article 32 of the Act.

Interpretation.

2. In these regulations, unless the context otherwise requires:

"the Act" means the Immigration Act; Cap. 217.

"employer" means any natural person or any legal entity, including temporary work agencies, for or under the direction and, or supervision of whom the employment is undertaken;

"employment" means the exercise of activities covering whatever form of labour or work regulated under Maltese law or in accordance with established practice for or under the direction and, or supervision of an employer;

"illegal employment", for the purposes of these regulations, means the employment of an illegally staying third-country national;

"illegally staying third-country national" means a third-country national present in Malta, who does not fulfil, or no longer fulfils, the conditions for stay or residence in Malta;

"legal person" means any legal entity having such status under applicable Maltese law, except for States or public bodies exercising State authority and for public international organisations;

"Minister" means the Minister responsible for immigration;

"national minimum wage" means the wage published by means of a national minimum wage national standard order under the Employment and Industrial Relations Act;

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"particularly exploitative working conditions" means working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers' health and safety, and which offends human dignity;

"remuneration of illegally staying third-country national" means the wage or salary and any other consideration, whether in cash or in kind, which a worker receives directly or indirectly in respect of his employment from his employer and which is equivalent to that which would have been enjoyed by comparable workers in a legal employment relationship;

"temporary work agency" means any natural or legal person who, in compliance with Maltese law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;

"third-country national" means any person who is not a citizen of the Union within the meaning of Article 20(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code);

"Treaty" means the Treaty on the Functioning of the European Union.

Prohibition of illegal employment.

3. (1) An employer shall be prohibited from employing any illegally staying third-country national.

(2) Infringements of this prohibition shall be subject to the sanctions and measures laid down in these regulations.

(3) The prohibition referred to in sub-regulation (1) shall not apply to illegally staying third-country nationals whose removal has been postponed and who are allowed to work in Malta.

Obligations on employers.

4. (1) An employer shall be obliged to:

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(a) require that a third-country national, before taking up the employment, holds and presents to him a valid residence permit or other authorisation for his stay;

(b) ensure that the third-country national is in possession of a valid employment licence;

(c) keep, for at least the duration of the employment, a copy or record of the residence permit or other authorisation for stay available for possible inspection by the competent authorities.

(2) An employer who has fulfilled his obligations set out in sub-regulation (1) shall not be held liable for an infringement of the prohibition referred to in regulation 3 unless the employer knew that the document presented as a valid residence permit or another authorisation for stay was fraudulent.

Financial sanctions and other measures.

5. (1) An employer shall be liable, on conviction and in addition to any penalty imposed by the Court of Magistrates (Malta) or the Court of Magistrates (Gozo), as the case may be, to pay:

(a) any outstanding remuneration to the illegally employed third-country national. The agreed level of remuneration shall be presumed to have been at least equivalent to the national minimum wage, unless either the employer or the employee can prove otherwise;

(b) an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines;

(c) where appropriate, any cost arising from sending back payments to the country to which the third-country national has returned or has been returned; and

(d) the costs of return of illegally employed third-country nationals in those cases where return procedures are carried out.

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(2) The provisions of article 45(1)(f) of the Employment and Industrial Relations Act shall, *mutatis mutandis*, apply to the penalties imposed on the employer under these regulations.

(3) In the application of sub-regulation (1)(a) and (b), it shall be presumed that the employment contract shall be of at least three months' duration, unless the employer or the employee can prove

otherwise.

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(4) The provisions of regulations 4 and 5 of the Permission to Reside for Victims of Trafficking or Illegal Immigration who co-operate with the Maltese Authorities Regulations shall apply in respect of criminal offences falling under the provisions of regulation 7(c) and (e).

(5) For the purposes of these regulations, the Court of Magistrates (Malta) or the Court of Magistrates (Gozo), as the case may be, may, in its judgment, also order that an employer be subject to the following measures:

(a) exclusion from entitlement to some or all public benefits, aid or subsidies, including EU funding managed by the Government of Malta, for up to five years;

(b) exclusion from participation in a public contract as provided in any public procurement regulations on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, for up to five years; and

(c) recovery of some or all public benefits, aid, or subsidies, including EU funding managed by the Government of Malta, granted to the employer for up to twelve months preceding the detection of illegal employment.

(6) The provisions of sub-regulation (5) shall not apply where the employer is a natural person and the employment is for his private purposes.

Subcontracting.

6. (1) Where the employer is a subcontractor, the contractor of which the employer is a direct subcontractor may, in addition to or in place of the employer, be liable to pay any financial sanction imposed, and any back payments due, in accordance with regulation 5.

(2) Where the employer is a subcontractor, and where the main contractor and any intermediate subcontractor knew that the employing subcontractor employed illegally staying third-country nationals, they may be liable to make the payments referred to in sub-regulation (1) in addition to or in place of the employing subcontractor or the contractor of which the employer is a direct subcontractor.

(3) A contractor who has undertaken due diligence obligations as defined in terms of article 1032 of the Civil Code shall not be liable

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under sub-regulations (1) and (2).

Aggravating circumstances.

7. The offences referred to in regulation 3 shall be considered to be aggravated when:

(a) the infringement continues or is persistently repeated;

(b) the infringement is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals;

(c) the infringement is accompanied by particularly exploitative working conditions;

(d) the infringement is committed by an employer who, while not having been charged with or convicted of an offence of traffic of persons, uses work or services exacted from an illegally staying third-country national with the knowledge that he is a victim of trafficking of persons; and

(e) the infringement relates to the illegal employment of a minor:

Provided that when the criminal offence is aggravated by one or more of the aggravated circumstances referred to in this regulation, the punishment shall be increased by one or two degrees.

Liability of legal persons.

8. (1) Where the person found guilty of an offence under these regulations is the director, manager, secretary or other principal officer of a body corporate or is a person having a power of representation of such a body or having an authority to take decisions on behalf of that body or having authority to exercise control within that body and the offence of which that person was found guilty was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of these regulations be deemed to be vested with the legal representation of the same body corporate which shall be liable to the payment of a fine (*multa*) not exceeding two thousand and five hundred euro (€2,500).

(2) The provisions of sub-regulation (1) shall apply where a person is found guilty of an offence under these regulations sohowever that the body corporate shall for such offence, without prejudice to any other penalty that may have been incurred under any other law, be liable to the punishment of a fine (*multa*) not exceeding two thousand and five hundred euro (€2,500).

(3) A body corporate may be held liable where the lack of

supervision or control, by a person referred to in sub-regulation (1), has made possible the commission of the criminal offence referred to in these regulations for the benefit of that legal person by a person under its authority.

(4) Liability of a legal person under sub-regulations (1) and (2) shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in any of the offences referred to in these regulations.

(5) Without prejudice to any other punishment to which the offence may be liable under any other law, where the offender is a body corporate liable to punishment under the provisions of sub-regulations (2) and (3) the Court of Magistrates (Malta) or the Court of Magistrates (Gozo), as the case may be, may, at the request of the prosecution, order -

(a) the suspension or cancellation of any licence, permit or other authority to engage in any trade, business or other commercial activity;

(b) the temporary or permanent closure of any establishment which may have been used for the commission of the offence;

(c) the compulsory winding up of the body corporate.

Inspections.

9. For the purposes of these regulations, inspections shall be carried out by the competent authorities as may be prescribed by the Minister.

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