

EXPLANATORY MEMORANDUM TO
THE POSTED WORKERS (ENFORCEMENT OF EMPLOYMENT RIGHTS)
REGULATIONS 2016

2016 No. 539

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument implements provisions of the Directive 2014/67/EU on the Enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. A worker is ‘posted’ when, for a limited period of time, the worker carries out work in a Member State other than the State in which the worker normally works.
- 2.2 The instrument makes provision for a posted worker working in the construction sector to have the right to make a claim against their employer’s contractor for the non-payment of wages (up to the national minimum wage). Eligible individuals will be able to bring proceedings in an Employment Tribunal and may be awarded compensation. The Regulations also amend the Employment Tribunals Act 1996 to make the new proceedings created for posted workers subject to Early Conciliation.
- 2.3 The instrument also includes provisions to allow for cross-border enforcement of financial administrative penalties and/or fines. There is also provision for an information gateway with Her Majesty’s Revenue and Customs to allow for the exchange of information further to reasoned requests for information from competent authorities in other Member States.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The instrument is being made to implement Great Britain’s obligations under the Directive 2014/67/EU on the Enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (‘the Posted Workers Enforcement Directive’). A Transposition Note is attached. In general, a copy-out approach to transposition has been taken.
- 4.2 Directive 2014/67/EU was considered by the House of Commons European Scrutiny Committee on 12 March 2014 Thirty-Ninth report,

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxxvi/8302.htm>

- 4.3 The European Union Committee of the House of Lords cleared the proposal for Directive 2014/67/EU on 9 April 2014.
- 4.4 This instrument makes provision for a posted worker in the construction sector to bring a claim to an Employment Tribunal for unpaid wages (up to national minimum wage) against the contractor of whom the employer is a direct subcontractor.
- 4.5 Section 18 of the Employment Tribunals Act 1996 is a list of relevant proceedings for the purposes of Early Conciliation. A prospective claimant wishing to bring a claim for non-payment of wages in a posting situation in the construction sector must first contact the Advisory, Conciliation and Arbitration Service (ACAS) about their dispute before presenting a claim to an employment tribunal. This gives ACAS the chance to encourage the parties to resolve their differences through conciliation without the need for an employment tribunal claim to be made.
- 4.6 The right for a posted worker in the construction sector to bring a claim against a contractor can be exercised when that worker has not taken a claim to the Employment Tribunal or taken civil proceedings against their employer for unfair deductions from wages or the employer has not complied with the requirements of a notice of underpayment in respect of the national minimum wage.
- 4.7 The instrument also provides that where a posted worker makes a claim against the employer's contractor, the contractor can rely on a defence of due diligence. This means that where they can demonstrate they have carried out due diligence in appointing the posted worker's employer to discharge a contract, they will not be liable for claims against them for non-payment of wages. Guidance has been issued on the scope of the due diligence defence. This is intended to drive good practice in procurement and balance the rights of workers with burdens on business.
- 4.8 Chapter 6 of the Directive requires Member States to recover an administrative penalty and/or fine that has been imposed in accordance with the laws and procedures of the requesting Member State. To enable this cross-border enforcement, this instrument provides that such penalties are recoverable as if the sums were payable under domestic orders.
- 4.9 The Directive also requires that Member States provide each other with mutual assistance to facilitate the implementation, application and enforcement of both Directives. This instrument also enables HMRC to exchange information with the Department for Business, Innovation and Skills pursuant to a request for information from a competent authority in another Member State.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is Great Britain.
- 5.2 The territorial application of this instrument is Great Britain.

6. European Convention on Human Rights

- 6.1 The Minister of State for Skills and the Parliamentary Under Secretary of State for Courts and Legal Aid have made the following statement regarding Human Rights:

In our view the provisions of the Posted Workers (Enforcement of Employment Rights) Regulations 2016 are compatible with the Convention rights.

7. Policy background

What is being done and why

- 7.1 In early 2012, the European Commission published draft legislative proposals for a Posting of Workers Enforcement Directive following concerns raised by some Member States that the statutory protections in Directive 96/71/EC were not being fully complied with, particularly in the construction sector. Article 3 of Directive 96/71/EC requires that a worker employed in one Member State who is posted by their employer to fulfil a contract in another Member State is entitled to a set of statutory employment rights in the Member State to which they are posted, for the duration of the posting. The UK government invited views on the proposals and sought evidence of the potential impact on business from UK stakeholders. Overall, respondents agreed on the need to protect vulnerable workers and ensure that unscrupulous businesses should not be able to evade their responsibilities. Given, however, that Directive 96/71/EC is a single market measure to ensure a level playing field when businesses post workers, the views expressed also called for assurance that regulatory impacts on business should be proportionate. This feedback was used to inform the UK's negotiating position.
- 7.2 The Government's Call for Evidence and a summary of responses received can be found at:
<https://www.gov.uk/government/consultations/call-for-evidence-eu-proposal-for-a-posting-of-workers-enforcement-directive>
- 7.3 In 2014 the European Commission and Council of Europe adopted legislation on the enforcement of the rights of posted workers in Directive 2014/67/EU.
- 7.4 Directive 2014/67/EU does not replace Member States' existing enforcement and monitoring measures, but Article 12 makes an additional provision for Member States to create the right for all posted workers in the construction sector to make a claim against their employer's contractor for wages (up to minimum rates of pay) they were owed for the period when they were posted. This right did not previously exist in the UK.
- 7.5 Directive 2014/67/EU also strengthens the administrative mechanisms for cross-border co-operation between the Competent Authorities in Member States and the recovery of administrative penalties and fines related to the enforcement of the rights of posted workers.

Consolidation

- 7.6 This instrument makes one small amendment to the Employment Tribunals Act 1996. It is not intended to consolidate at this time.

8. Consultation outcome

- 8.1 In considering how best to implement Directive 2014/67/EU in the UK, in 2015 the government consulted on proposals to amend existing legislation so that a posted worker can make a complaint to the Employment Tribunal against a contractor for the non-payment of wages (up to the national minimum wage). The Government recommended this as the most appropriate way of introducing the requirements of Article 12 of Directive 2014/67/EU, aligning with the UK's existing legislative framework of enforcing individual employment rights.

- 8.2 As part of the consultation process, the Government also published a draft Impact Assessment and invited comments as well as any further evidence to improve the data available on workers posted to and from the UK.
- 8.3 A copy of the consultation paper, full Impact Assessment and the Government's response can be found at:
<https://www.gov.uk/government/consultations/posted-workers-enforcement-directive>
- 8.4 The Government received nine written responses to the consultation. These covered replies from a range of organisations including business representative bodies, the legal community and trade unions. The consultation ran for 10 weeks and closed on 24 September 2015. The responses identified that the business representative bodies who responded largely wanted to see limits placed on posted workers' rights so did not favour an expansive interpretation of Directive 2014/67/EU. The trade unions welcomed Directive 2014/67/EU and wished to see subcontracting liability applied beyond the construction sector. The legal community bodies made a number of suggestions, in particular regarding how posted workers' rights might be protected to best effect. Having considered the responses, the Government's approach to implementing Directive 2014/67/EU is to continue to minimise burdens on business and to work within the existing regime for enforcing employment rights, in line with the requirements of Directive 96/71/EC and Directive 2014/67/EU. It balances the rights of both workers and the burdens on the businesses that employ them. There are three areas where the government is acting:
- By creating an individual right for a posted worker in the construction sector to bring a claim against a contractor in an Employment Tribunal;
 - By issuing guidance to ensure that employers and employees are aware of the minimum rights for workers and how they can be enforced; and
 - By making sure that UK competent authorities cooperate and collaborate on cross-border issues.

9. Guidance

- 9.1 Guidance on the posting of workers and the implementation of Directive 2014/67/EU is available on the gov.uk website.
- 9.2 Stakeholders who are affected by this instrument are being kept informed about the changes and the guidance related to this instrument.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is estimated at a cost of £23,600 per annum in respect of addressing claims for unpaid wages.
- 10.2 The net impact on the public sector is estimated at a cost of £22,100 per annum for the administration of the award and recovery of unpaid wages.
- 10.3 An Impact Assessment is submitted with this memorandum and is available on the government's legislation.gov.uk website. It is also available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484926/BIS-15-683-posted-workers-impact-assessment.pdf

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 The legislation applies to small businesses as this instrument creates a right for eligible individuals who are employed and posted to work in the construction sector in the UK to bring an individual claim for unpaid wages up to the level of the National Minimum Wage against a contractor in an Employment Tribunal if they are not paid by their employer. The public consultation on proposed policy was open to businesses of all sizes and written submissions were received from business and industry bodies. The Government, in deciding not to exclude small businesses from this legislation, assessed that small businesses are not being disadvantaged and it would be inappropriate to exempt them from a measure designed to protect individuals. The Government noted that the contractor would be able to guard against financial liabilities by taking out warranties and indemnities against the possibility of being sued. In recognition of the fact that this will impose a new burden on the contractors, which could disproportionately impact small businesses, the Government will allow for a due diligence defence, such that a contractor that establishes that they have done sufficient/appropriate due diligence will have no liability for claims of unpaid wages up to the national minimum wage.
- 11.3 The potential impact of this instrument on small business has been considered and is detailed at Section H of the Impact Assessment published on www.legislation.gov.uk

12. Monitoring & review

- 12.1 The Department for Business Innovation and Skills will undertake a review of this instrument within 5 years of implementation.

13. Contact

- 13.1 Andrew Miller (andrew.miller@bis.gsi.gov.uk or 020 7215 6198) and Deborah Persaud (deborah.persaud@bis.gsi.gov.uk or 020 7215 1695) at the Department for Business, Innovation and Skills can answer any queries regarding the instrument.