 Posted Workers Directive

Briefing for MEPs

March 2014

 Posted Workers Directive: proposals for reform in the EU and UK

Introduction

In 1996, the EU adopted the Posted Workers Directive. The purpose of this Directive was to improve the protection for migrant workers, who are posted temporarily to work in another member state. Due to the temporary nature of their postings, posted workers do not qualify for full equal treatment rights under the EU free movement principles.

The Posting of Workers Directive provides posted workers with a minimum core of rights including rights to be paid minimum rates of pay, working time entitlements health and safety and anti-discrimination rights (see Article 3 of the 1996 Directive). The Directive was designed to prevent social dumping and ensure that employers were not able to use posting arrangements to under-cut national employment standards and pay rates.

Decisions of the European Court of Justice in the *Viking* and *Laval* line of cases have seriously limited the level of protection afforded by the 1996 Directive. In particular, these judgements restricted the ability of governments to introduce national legislation, or for trade unions to negotiate collective agreements, to increase the level of protection for posted workers, which exceed the core rights contained in Article 3(1). The judgements also raised questions whether national authorities can always require foreign contractors to comply with social standards or collectively agreed terms and conditions set out in a public procurement contracts. For example, some employers seek to rely on these judgements to argue it is not possible for a government or local authority to require contractors to pay the living wage. The TUC disagrees with this restrictive interpretation.

These judgements have proved politically controversial and have created significant industrial tensions across the EU. As a result of pressure from trade unions and some national governments, the Commission decided to introduce proposals for a Posted Worker Enforcement Directive.

Whilst the Posted Workers Enforcement Directive does not represent an adequate substitute for fuller reforms, the TUC believed that the proposed Directive had the potential to increase compliance with the 1996 Directive and to improve working conditions for posted workers.

Posted Workers Enforcement Directive

The aim of the draft Posted Workers Enforcement Directive is to ensure that there is consistent application and more effective enforcement of posted workers rights contained in the 1996 Posting of Workers Directive. The draft Enforcement Directive is very limited in scope and principally focuses on requiring national enforcement agencies to co-operate and exchange information to ensure that posted workers’ rights are enforced.

The draft Directive has recently been the subject of negotiations between the EU Parliament, Council and Commission. The TUC is concerned that the proposed Directive has been rushed through the recent trialogue negotiations and that the outcomes will not provide effective protection for vulnerable workers.

There are three principal problems with the proposed text.

Definition of what amounts to a genuine posting (Article 3)

In recent years, there has been growing evidence of companies developing ‘sham’ arrangements to restrict the rights of posted workers, as a means of reducing costs. These include the use of ‘letter box companies’ in low paying economies and the use of bogus self-employment arrangements.

The draft Directive seeks to tighten the definition of a genuine posting. The TUC does not believe that the proposed text goes far enough. In our opinion, the Directive should specify than an individual’s employment status (i.e. whether they are self-employed or a worker) should be determined by looking at the reality of the employment relationship rather than only focusing on contractual terms which could be fictitious or a ‘sham’.

Following the trialogue negotiations, text relating to the combating of bogus self-employment has been included in Recital 5b. However, this will not be legally binding on national governments and therefore will have very limited effect. In the UK, the problem of false self-employment is now prevalent amongst migrant and posted workers in the construction sector. The TUC is therefore concerned that proposed text will not address this issue or deter the spread of such practices to other parts of the UK labour market.

Control measures (Article 9)

The TUC believes that member states should be have the ability to decide the level of control measures used in their own country to monitor the flow and working conditions of posted workers. In particular it is important that governments are able to adopt additional measures in response to change circumstances or new avoidance tactics by employers.

The TUC is therefore concerned that Article 9 of the Directive places restrictions the use of control measures by Member States. Whilst revised text adopts an ‘open list’ approach, permitting member states to adopt additional measures not specified in the Directive, it also states that all control measures will be subject to a proportionality test and will be supervised by the Commission.

In the UK, there are currently no control measures in place. To date the UK government has not formally monitored how many posted workers are in the UK at any one time or where they are working.

The UK government has argued that Member States' discretion to set their own control measures should be limited. They fear such measures will be used for protectionist purposes.

The TUC disagrees with this approach as it would weaken the enforcement of posted workers rights and lead to migrant workers being used to undercut pay and conditions of domestic workers.

For example, in the UK context, if member states are not permitted to adopt any new control measure not already foreseen by the Directive, the ability of the government to extend the remit of the Gangmasters Licensing Authority to a new sector with a high incidence of posted workers (for example the construction sector), might be limited. Foreign companies may argue that the requirement to attain a GLA licence is disproportionate and unduly restricts their ability to post workers to the UK.

Enforcement of rights through supply chains - joint and several liability (Article 12)

The TUC believes that there is a pressing need for improved enforcement of posted workers rights through supply chains. We are concerned however that the provisions subcontracting liability contained in Article 12 do not go far enough.

The draft Directive proposes that the main contractor should be liable if the first or main sub-contractor fails to comply with posted workers rights. However these provisions are largely optional for member states. In addition, contractors can avoid liability if they can demonstrate due diligence.

Following the trialogue process, the draft text requires governments to take some action to tackle fraud or abuse by sub-contractors in the construction sector. However, these measures may fall short of joint and several liability rules.

The TUC believes that the introduction of joint and several liability arrangements should be obligatory for all member states and that the rules should extend to all sectors. This is the most effective way of achieving a level playing field and fair competition for businesses across the EU. We also believe that joint and several liability should apply throughout the supply chain. For example, in the construction and service sectors it is not uncommon for numerous contractors to be involved in the supply of workers. If the joint and several liability rules only apply to the main sub-contractor means they are likely to have limited effect.

The UK government is vehemently opposed to the inclusion of any joint and several liability provisions.

Conclusion

In conclusion, the TUC is concerned that the Directive has been rushed through the trialogue process in advance of the European elections and that the outcomes from the negotiations will not effectively protect posted workers.

Whilst the proposed Directive may encourage increased co-operation and co-ordination between member states, it is unlikely to prevent the abuse of posted workers across the EU. There is a serious risk that employers will continue to use posted workers to undercut local pay rates and to drive down terms and conditions.

The TUC therefore continues to call for the current Directive to be strengthened and for a more wide-ranging reform of the 1996 Posted Workers Directive.