

## **WORKERS WITHOUT BORDERS**

**Commission(s) in charge of the Session/Workshop:**

**Labour Law and Immigration Commission**

**Munich, 2016**

**National Report of Belgium**

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## BIBLIOGRAPHY

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- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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## INTRODUCTION

Global mobility is on the rise. More and more companies increasingly operate on a cross-border scale. However, companies assigning their employees to another or multiple countries are often confronted with an increase of formalities and requirements affecting the cross-border employment. At first glance, only the work place of the employee temporarily changes. However, many other legal issues come into play and employees must comply with the rules and regulations governing immigration, employment and labour and social security law of each of those countries.

The aim of the present questionnaire is to outlining the legal aspects and issues affecting the temporary assignments of employees within and outside the European Economic Area (EEA).

### 1. Immigration

The first question employers should consider is whether the employee needs an authorization to work and reside in the country to which he/she is (temporarily) assigned.

Within the European Union, freedom of movement of persons is one of the main fundamental principles, guaranteeing EEA nationals the right to live and work freely in another EEA member state.

Non-EEA nationals in principle need an authorisation to work within the EEA. Does this obligation also apply to EEA nationals assigned by their employer outside the EEA?

### 2. Labour and employment law

Secondly, assuming the employee is allowed to work and reside in the relevant country, it is important knowing which law is governing the employment relationship during the assignment period. Is it the law of the employer (home country) or the law of the country where the employee will be assigned (host country)?

Within the European Union, the Rome Convention and the Rome I EC Regulation are the two sources dealing with this matter. Does these sources also apply when a non-EEA national is assigned to an EEA country and when an EEA employee is assigned outside the EEA? Can the employer and employee choose the law applicable to their employment relationship? Which law applies in case no law has been chosen? Can the employee also invoke the protection of statutory provisions of the country where he/she will be assigned?

The labour and employment law part of this questionnaire also includes a part on the strict rules on the 'lease of personnel' in assignment situations. Finally, we will look into (the content of) the assignment letter and the early termination of the assignment and employment relationship.

### 3. Social Security

The third part of this questionnaire deals with the social security aspects linked to assignments, as it is relevant and important to know in which country the social security must be paid during the assignment.

### 4. Other obligations and formalities

We will look into possible other obligations and formalities to be complied with in your countries in case of assignments of employees to your countries (e.g., prior notifications, drafting and keeping of social documents, etc.).

### 5. Social inspection

The last part of this questionnaire is based on whether or not cross-border assignments are a priority for the social inspectorate.

## QUESTIONNAIRE

### 1. IMMIGRATION

1.1. Who needs a work permit to work in your country? Are there types of employees exempted (e.g., based on their nationality or type of work performed (business trips, etc.)?)

1.2. Are there different types of work permits in your legal system? Are there work permits for highly educated/qualified employees? If so, what are the conditions and what is the procedure to be followed? Who needs to file for the application and where? Which information and documents are to be provided to the competent authorities? What is the timing? What is the duration of the work permit? Can it be renewed? Is it possible to apply for permanent status after a certain period of time under the work permit?

1.3. Is a separate residence permit required/ granted via the work permit? Please explain.

**1.4. Who can be sanctioned in case of illegal employment in your country (e.g., the employer, the employee, the host company, etc.)? What are the sanctions (civil and/or criminal) in case of illegal employment?**

**1.5. Did your country implement the European Blue Card Directive 2009/50/EC? If so, please explain the scope, conditions, application process and validity of the blue card?**

**1.6. Did your country implement the European Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer? If so, please briefly describe and explain importance and impact?**



## 2. LABOUR AND EMPLOYMENT LAW

### 2.1. In your country, how is the applicable law governing the employment contract during the assignment period determined?

Based on article 3 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) an employment contract shall be governed by the law chosen by the parties. By their choice the parties can select the law applicable to the whole or to part only of the contract. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable.

If no choice of Law is made, article 8 of Rome I stipulates that the following laws are applicable:

- the laws of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country;
- if the employee does not habitually carry out his work in any one country, the laws of the country where the business which engaged the employee is situated; unless
- if it appears from the circumstances that the contract is more closely connected with another country, in which case the laws of that other country apply.

If a choice of law is made, such choice of law may not deprive the employee of the protection afforded by the mandatory rules of the above mentioned laws.

### 2.2. Which local employment laws of your country are determined as mandatory minimum laws/ minimum hardcore protective rules and working conditions? Please explain. Is there relevant case law?

There is a wide variety of protective rules of a mandatory nature under Belgian law which may limit the application of the law chosen by the parties. The employer who employs posted employees must respect the remuneration and employment conditions that are sanctioned by criminal law (minimum remuneration, working time, etc.).

Based upon prior case law, the following mandatory rules can be referred to:

- rules regarding the notice period to be respected in the case of termination and the power of the courts to fix the notice period in certain cases;

- rules regarding the calculation of salaries;
- rules regarding termination for serious cause;
- rules regarding the grounds for the suspension of an employment contract;
- rules regarding minimum salaries, annual vacation and vacation allowance; and
- rules regarding post-term non-competition obligations.

**2.3. Does your country foresee specific rules on the ‘lease of personnel’? Is there a principle prohibition of ‘lease of personnel’? Please explain and provide examples. What are the sanctions and penalties? Is there a possibility to reduce the risk? Please explain. Is there relevant case law dealing with this matter?**

With the exception of temporary or interim work, natural or legal persons are not authorized to put their employees at the disposal of users, whereby the latter exercise authority over those employees. However, the user will not be deemed to exercise authority over the worker in as far as he complies with the applicable obligations relating to the worker's well-being at the workplace and in as far as he regulates working hours and or instructs the worker in the performance of his work.

The Law of 24 July 1987 on temporary work, temporary employment and posting of workers for the benefit of users (the Law) regulates the posting of workers.

The Law contains exceptions with regard to instructions that a third party (user) may give to the posted employees of the posting employer without being considered as the exercising of employer’s authority over these employees. This is an important criterion for the purpose of determining whether the actual situation can be considered as a prohibited form of “posting of workers” within the meaning of Article 31 of the Law:

*“A natural or legal person may not, otherwise than in accordance with the rules laid down in Chapters I and II, carry on any activity which consists in making workers recruited by that person available to third parties who hire those workers and exercise in relation to them any part of the authority normally vested in an employer.*

*Is not considered as the exercise of an authority in the sense of this article, the third party who observes his obligation concerning the well-being at work, as well as instructions which are given by third parties in the execution of the agreement with the employer, both concerning labour- and resting times as well concerning the implementation of the agreed work”.*

The wording “given by third parties in the execution of the agreement with the employer” gave rise to abuse and, in practice, was almost impossible to control.

Therefore, the legislator has decided to include additional clauses in Article 31 §1 of the Law. These additional clauses specify that instructions which are given by third parties in the execution of a written agreement with the employer are not considered as the exercising of employer's authority, if the written agreement provides explicitly and in detail which instructions the third party can give to the posted employee, that this right of the third party to give instructions does not replace the employer's authority in any way and that the factual execution of the agreement between the third party and posting employer completely corresponds with the explicit provisions of the written agreement.

Are considered as the exercising of employer's authority by third parties, any other instructions than those determined in the previous paragraph, which are given without a written agreement between the third party and the posting employer or if the written agreement between the third party and the posting employer does not comply with the conditions set forth in the previous paragraph or if the factual execution of the written agreement does not correspond with the explicit provisions of said agreement.

If an agreement is concluded between the third party and the posting employer in which it is determined which instructions the third party can give in the execution of the written agreement, the third party needs to inform its Works Council of the existence of such agreement. Upon request of the Works Council, the third party must provide a copy of the agreement to the Works Council. If the third party refuses to provide such a copy to its Works Council (or to its Committee for Prevention and Protection on the Work Floor (CPPW) if there is no Works Council; or to the trade union delegation if there is no CPPW), the agreement will be considered as non-existent.

**2.4. If you were asked by one of your clients to draft an assignment letter (secondment agreement between the original employer in the home country and the employee), which clauses would you include? What should the assignment letter cover? Is this foreseen by a specific law or based on case law? Please explain.**

It is important to determine the actual employer and ensure that the organic link with the posting employer must remain intact.

Therefore the assignment letter should reflect the following:

- That the employee continues to work under employment contract with the company in country of origin (organizational and subordinated link)
- Which entity has the power to hire and fire, power to call back, who decides upon the employment conditions/salary increase, etc.
- Also the following provisions could be included:
  - Temporary nature of the assignment;
  - The applicable social security scheme;
  - The benefits which relate to the assignment;
  - Tax status;

- Provisions regarding work permit/required documents;
- Provisions regarding termination of assignment;
- Etc.

**2.5. Please explain the applicable and most relevant rules of your country in case the employer wishes (1) to early terminate the assignment and (2) to terminate the employment relationship (e.g., is there a right to return? Should the assignment allowances be included in the calculation of the notice indemnity? Etc.). Is there relevant case law?**

If the employer wish to terminate the employment relationship with the employee during the assignment in Belgium, it is possible that the Belgian termination rules will be applied based on the fact that these are considered to be mandatory rules and therefore the, for the employee, most beneficial rules will be applied.

In principle, the assignment allowances should not be included in the calculation of the notice indemnity, except is these allowances are no compensation for an occurred additional cost of the employee due to his assignment.

If the assignment is stopped and the employee is recalled, the employee willreturn to the employing entity. If the employer is not able to provide a similar function to the returning employee, the employee could claim that the employer unilaterally terminated the employment agreement and thus, claim a notice indemnity.

### **3. SOCIAL SECURITY**

**3.1. Provide a short overview of the level of social security charges in your country. What are the employer social security contributions? What are the employee social security contributions? Is there a cap/ maximum? Please briefly explain.**

**3.2. In case of assignments from outside the EEA to your country or from your country to non-EEA countries, with what countries has your country signed a social security agreement?**

#### **4. OTHER OBLIGATIONS AND FORMALITIES**

**4.1. Are there other relevant formalities and obligations in your country in case of assignments to your country (e.g., prior notification to the authorities, drafting and keeping social documents, etc.)?**

**4.2. What are the penalties and sanctions in case these formalities and obligations are not complied with? Who can be sanctioned? Is there relevant case law?**

## **5. SOCIAL INSPECTION**

**5.1. Are cross-border assignments a priority in your country for the social inspection? Please explain.**