



Being posted without being a posted worker - Legal uncertainty in practice*

Jens Arnholtz & Astrid Stampe Lovelady

Introduction

Jens Arnholtz is an associate professor at FAOS, University of Copenhagen, Astrid Stampe Lovelady is a specialist at SEGES Innovation.
jh@faos.dk
assl@seges.dk

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Posting underpins the internal market for services, but may put workers in precarious positions

Posting allows companies to send their employees abroad for a limited period to deliver services in another EU Member State rather than establish themselves in all the countries they operate in. Thus, posting contributes to developing the EU's internal market for services. Yet in some cases, posting is used as a way to channel labour around Europe while avoiding some of the national labour regulation that ensures decent working conditions (Arnholtz and Lillie, 2020; Lens et al., 2021). This gives rise to labour cost-based competition between Member States and companies, while putting workers in a precarious position. The Posting of Workers Directive (PWD)¹ is meant to increase the protection of posted workers, but it only applies to workers that “normally work” in the country where their employer is established.

This policy brief explores the discrepancies between the legal definition of posted workers and the patterns of mobility and status change of posted workers in practice. Plenty of workers are ‘hired for posting’ or have ‘posting careers’, where they continuously circulate between different countries, but such mobility patterns do not conform with the legal definition of posting. Such discrepancy between the legal definition and practice, we argue, places the workers in precarious situations. The mobility of workers seldom conforms to the legal categories of EU law. Many workers view posting as one among many employment opportunities, and they care less about formal requirements of returning home and working in the country of establishment. The problem

1 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.

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for the workers is twofold. First, their lack of knowledge about their own legal status makes them vulnerable to exploitation, because they are not covered by the relevant regulation. Second, when the workers do not comply with specific legal categories, they face difficulties with the national authorities. That is, the legal uncertainties about the workers' statuses may reinforce their precarity in the destination countries.

The brief is based on the findings of the Danish fieldwork research conducted under the auspices of the SMUG project – *Uncovering Gaps in the Social Protection of Posted Workers* (2021-2022). The project involved 1) a series of biographical interviews with posted construction workers conducted from May to October 2021; 2) a focus group interview with social partners, relevant stakeholders, and experts held in February 2022; and 3) discussions of key findings and future possible policy recommendations with project partners from other countries. The latter took place together with established international experts in the area of posted work.

The difficulties of defining a posted worker

The protection of the Posting of Workers directive requires posted workers to normally work in the country they are formally posted from

In the EU, companies have a right to post their worker to another Member State while retaining the employment relationship under the rules and regulations of the sending country. At the same time, the PWD grants the receiving Member State the right and obligation of imposing certain aspects of their labour law on posting companies – but only when posted workers, as understood by the directive, are concerned. The PWD defines a 'posted worker' as "a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works" (article 2, para 1). If workers do not conform to this definition, the PWD does not apply.

Much attention has been paid to the ambiguous nature of the temporariness implied by the reference to 'a limited period'. While social security regulation has set some limits for applying home country rules to posted workers up to 24 months², the PWD had no such limits regarding labour law until recently. However, with the 2018 revision of the PWD a limit of 12 months, with the possibility of a six-month extension, it has provided a clearer definition of the temporal limit of posting within the meaning of the directive.

However, another aspect of the PWD's definition of a posted worker concerns the phrase 'normally works'. An ideal typical understanding of a posted worker is a worker from country A, who is employed in a company established in country

² Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, article 12, para 1



A. The worker is sent by the company to provide a service in country B. When the work has been completed, the worker returns to country A to work in that same company.

In reality, situations are often much more complex. Firstly, workers may be “hired for posting”; that is, they may be recruited by a company in country A for the purpose of being posted to country B. The company may employ the worker for as long as the specific project lasts. Secondly, workers may be recruited from country A by a company from country B, and then be immediately posted to country C. Thirdly, knowing that the employment only lasts as long as the project, the workers may have no plans to return to either country A or B, but may instead find new employment in country C. The first question is whether such situations constitute cases of posted workers in the legal definition of the PWD?

It can be difficult to determine which rules covers posted workers that do not work normally in the country they are formally posted from

The Enforcement Directive³ provides a list of elements that authorities should take into account when assessing whether a situation constitutes genuine posting. The list includes:

- whether the worker works abroad for a limited period;
- whether the worker habitually works in another country; and
- whether the worker is expected to resume working in the country he is posted from after the work has been completed

The Enforcement Directive also makes it clear that none of these factors can determine whether a posting is genuine or not. This requires an assessment of ‘all factual elements characterising such work and the situation of the worker’ (Article 4, para 3). It can therefore be uncertain whether a posted worker is a posted worker in the meaning of the PWD, and thus is entitled to the protections granted by that directive.

A second question is, therefore: which rules apply if a posted worker does not fall under the definition of the PWD. Article 8 of the Rome I Regulation⁴ outlines several options:

- First, the employee and employer may decide among themselves which country’s law applies, as long as this does not give the employee poorer protection than the protection offered by other options outlined by the article;

³ 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.

⁴ 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)



- Second, the rules of the country where the worker habitually works apply. If, for instance, a worker is only formally posted from country A to country B, but actually works in country B all the time, the regulation of country B applies;
- Third, if the normal working country of the worker cannot be determined, the rules of the company's country of establishment applies. This could be the case if the worker is constantly relocated from country to country; and
- Fourth, the circumstances of the situation may indicate that the contract is more closely connected with another country

It is, therefore, also quite uncertain – and depending on the circumstances of each individual situation – which rules apply. However, the more unclear it is in which country the worker habitually or normally works (as per the Rome I and the PWD respectively), the more likely it is that the applicable rules will be those of the posting company's country of establishment. The rules of the posting company's country of establishment (the sending country) also applies in situations of posting within the definition of the PWD, but the main difference is that the PWD allows the host country to apply core elements of its own labour law to posted workers within its territory. If a worker falls outside of the PWD's definition, the protection offered by the host country's rules might not apply.

Posting in construction

In the European construction sector, workers are often hired for posting and thus do not necessarily work normally in the country they are posted from

In the European construction sector, posting conforming to the described ideal type does occur. A company may get a small contract in another Member State and send some regular employees to perform the job. A company may even operate across borders on a more continuous basis, posting its regular workers from time to time to undertake jobs in different countries. Especially specialised construction firms may get contracts all over the European construction market based on their unique set of competencies.

However, within the European construction sector posting also occurs in ways that differ from the posting ideal type, typically in connection with the recruitment practices described above. Often, these types of postings take place in connection with larger construction projects. When winning a tender as a main contractor or a large subcontractor on a major construction project, companies will typically have to hire new employees or employ them via subcontracting chains. Few companies already have hundreds of workers in redundancy, and hiring and firing workers is an inherent part of the sectors labour market (Belman et al., 2021). In such situations, a search for labour is often done in



a larger part of the European labour market, and sometimes extends to third countries. The workers are recruited with the sole purpose of being posted to the new construction site, and their contracts will be terminated as soon as the project is done, unless the company obtains a new contract.

There are several concerning aspects to this process of hiring. Firstly, this search for labour typically involves workers recruited by temporary employment agencies, subcontractors or other types of recruitment actors that may facilitate the hiring of self-employed workers on a large scale (Cremers, 2011). This makes the relations of employment difficult to manage, disentangle and control. Secondly, even when workers are employed directly by a large subcontractor, this situation typically does not resemble the ideal type of posting previously outlined, because the workers are hired for posting. Workers may be recruited in one country, become formally employed in another and then posted to a third country where the construction project takes place. In such situations, it is difficult to determine which country the worker normally works in, and it is therefore difficult to determine which rules should regulate the employment conditions.

Actual patterns of worker mobility

Interviews shows that posted workers often move and are recruited in ways that do not conform with legal definitions of posting

In the interviews conducted in the SMUG project, it is clear that the posting job is not just a continuation of the employment relationship interviewees already had in the sending country, but often a separate job. Many of the posted workers view their postings as an opportunity to improve their livelihoods in one way or the other. Their biographies reflect that they are active agents seeking new opportunities to improve their lives.

In its case law, the European Court of Justice has argued that posted workers “return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State” (Case C-113/89 Rush Portuguesa, para 15). However, posted workers, in practice, do not stop their labour market search for better opportunities just because they are posted. Rather, our interviews show that they sometimes seek employment at another firm while being posted. For instance, they may seek employment in a different company at the same construction site while being posted - sometimes in a company established in the host country, other times in another posting company.

One example of this is Alexandru, a Romanian posted worker in Denmark. Alexandru was recruited via a phone call by a Polish middle manager in a Polish company working in Denmark. While employed in a Polish company, Alexandru went directly from Romania to Denmark to work. He worked for the company



for a while, but there were problems with the tax authorities and eventually the company closed. However, the Polish middle manager started a Romanian company and hired Alexandru to work for that company in Denmark. Since he was working continuously in Denmark, Alexandru decided to find his own flat and settle down with his wife in Denmark while still working for the Romanian company. This raised problems as the costs were high and the company would not give the same financial support for his flat as they paid for housing of the other workers. Alexandru then found a job in a Danish firm, where the boss' wife was a Romanian (SMUG fieldwork notes).

Alexandru's story is interesting, because it illustrates the complexity of the practices of posting. He is formally employed in and posted by a Polish firm despite never working for that company in Poland, then being recruited to another posted position in the host country, and finally shifting to a host country firm despite formally never entering the host country labour market. Another biographical interview highlighted how posting becomes a more or less permanent way of working:

A Polish interviewee, Marek, had difficulties finding a job in Poland and therefore chose to be posted to Germany with a Polish construction company back in 1994. It was the beginning of a working life with many postings in Germany, France, the Netherlands and Denmark. In 2013, he was posted to Denmark by a Polish company. When the project was done in the beginning of 2016, he returned to Poland for a few months, after which he returned to Denmark again later in 2016 to work for another Polish company. In 2019, he obtained a job in the Danish company, where he now works (SMUG fieldwork notes).

Marek's story represents what we would call a 'posting career', in which the worker is posted more or less continuously by the same or different companies. They may return home as part of a system of rotating working weeks, or due to the finishing of a project, but they hardly ever work in the country from which they are posted. This is in line with statistical data based on PD A1 forms, which show that many workers have repeat postings (Wispelaere et al., 2022). It is also consistent with survey data generated among posted Polish workers in the Danish construction sector. The survey data showed that four out of five of these posted workers used the employment conditions of other Polish posted workers in the sector to evaluate their conditions, indicating that posting is a labour market of its own (Arnholtz and Andersen, 2016).

Paradoxically, many workers who have a posting career with multiple postings, are not posted in the legal sense

Yet, despite this being a well-documented part of the posting phenomenon, such posting careers do not conform to the legal definition of posting since these workers do not 'normally work' in the country they are posted from. The situation becomes even more legally questionable when the posted worker is a third country national. A Moldovan interviewee, Dmitry, was recruited by a



Portuguese temporary agency to be posted abroad. The agency secured him a work permit, but he had to pay a fee for that. He has worked on several short-term contracts in several different countries for several different companies, most of which are established in Portugal. He has been back to Portugal to work for short periods of time, but he mainly works abroad (SMUG fieldwork notes).

While another example of a 'posting career', Dmitry's story adds an extra layer of complexity, because he is a third country national with a work permit in Portugal only. As long as they have a valid work permit in one EU Member State, it is legal to post third country nationals to work in other EU Member States. However, if their posting does not conform to the legal definition of posting, posted third country nationals may be in violation of immigration laws and risk criminal prosecution, incarceration and deportation.

Legal uncertainty in practice

These legal uncertainties put workers at risk, and especially so for third country nationals posted within the EU

During the focus group of the SMUG project, participants – consisting of trade union officials, an employers' association officials, and a labour inspectorate representative – raised concerns about the extent to which the three cases described above complied with the legal definition of posting. In the case of Dmitry, one public authority representative said that they would consider it being a circumvention of Danish immigration legislation, because he was hired from a third country for the purpose of posting. If this authority was involved with Dmitry's case, they would therefore report him to the police with the aim of deportation. A discussion ensued during the focus group about how long a TCN should stay in another EU Member State before the posting can be regarded as legal, but no clear answer was found since neither Danish nor EU law is clear on this.

In the case of Marek, the fact that he never worked in the country he was posted from was viewed as an indicator that he was not posted in the meaning of the PWD. However, given that he had worked in so many countries, it was hard to identify which country he normally works in – at least until he was hired by the Danish firm. Finally, regarding Alexandru, the fact that he was living in Denmark and recruited in Denmark (although working for a Romanian firm) also made many participants question the genuine nature of the posting arrangement. In both cases, it would be hard for trade unions and authorities to determine to what extent Danish labour regulation could be applied to these workers, and they would therefore be afforded less protection than workers posted in accordance with the definition of the PWD.



The key question raised by these discussions was which legal status would apply to these workers, if they were not posted workers as defined by the PWD. The workers were still formally employed in a foreign service-providing company, and some of their colleagues may be genuinely posted, so treating them differently might violate principles of non-discrimination. As a trade union representative explained:

We asked that question in a written statement to the Danish Ministry of Employment back in 2008. We have also asked the European Commission about this. We never had a response. It is legally uncertain. What is certain, however, is that some of the companies use this legal uncertainty to pick the regulation they want to follow (SMUG focus group).

As pointed out by other focus group participants, the particular situation in Denmark is such that the regulatory difference between being posted and working for a company established in Denmark is not substantial. This is because most regulation of wages and working conditions occurred through collective agreements. Whether a company is covered by the collective agreement, depend on trade union making successful demand for a collective agreement and not on the company's country of establishment. Therefore, many posting companies decide to establish themselves in Denmark if they wish to operate there long-term (on a similar situation in Norway see Alsos and Ødegård, 2020). However, the fact that neither authorities nor workers themselves can obtain a clear understanding of the workers' legal status and what it implies in terms of employment regulation, tax rules and social security is problematic. For example, the taxation issues mentioned by our interviewee Alexandru may well revolve around the differences between being a posting or an established company, but Alexandru clearly did not understand the problem and simply lost his job when the company closed down.

Conclusion and recommendations

Legislators should clarify the legal status of posted workers not conforming with the PWD definition of posting

With the revision of the PWD, legislators have aimed at counteracting the underpayment of posted workers compared to the workers of the host country. In fact, much effort has been put into improving the regulation of the wages and working conditions of these workers. However, the recruitment and mobility patterns of posted workers sometimes mean that they fall between categories. This again means that they are hardly covered by any of the intended regulation.

European workers are increasingly seeking employment opportunities across national borders, and posted work is one way of seeking these opportunities.

However, their patterns of mobility - observed in this and other research projects (Arnholtz and Andersen, 2016) - does not conform to the definition of a 'posted worker' as normally working in the company's country of establishment. Nor do they conform with the conception that posted workers never enter the labour market of the country they work in.

To increase the protection of these workers, legislators need to clarify the legal status of workers who do not conform to the definition of posted worker in the relevant EU regulation. With the 2018 revision of the PWD, legislators specified that workers posted longer than 12-18 month will be covered by the full labour market regulation of the host country. A similar specification may be needed for posted workers not conforming to the PWD's definition of a posted worker.

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Contact

Berggasse 17
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Tel: +43 / 1 / 319 45 05 - 0
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