

EXPLANATORY MEMORANDUM TO

THE POSTED WORKERS (ENFORCEMENT OF EMPLOYMENT RIGHTS) REGULATIONS (NORTHERN IRELAND) 2016

2016 No. 242

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for the Economy and is laid before the Northern Ireland Assembly.

2. Purpose of the Statutory Rule

- 2.1 This Statutory Rule 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 Statutory Rule 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 industrial tribunal and may be awarded compensation.
- 2.3 The Statutory Rule 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. Background

What is being done and why

- 3.1 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 issued a Call for Evidence¹ inviting views on the proposals and seeking 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

¹ <https://www.gov.uk/government/consultations/call-for-evidence-eu-proposal-for-a-posting-of-workers-enforcement-directive>

called for assurance that regulatory impacts on business should be proportionate. This feedback was used to inform the UK's negotiating position.

- 3.2 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.
- 3.3 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.
- 3.4 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.

4. Consultation

- 4.1 In 2015 the UK Government consulted on proposals to amend existing legislation so that a posted worker can make a complaint to the employment tribunal (in Great Britain) or industrial tribunal (in Northern Ireland) against a contractor for the non-payment of wages (up to the national minimum wage). This approach was recommended as the most appropriate way of introducing the requirements of Article 12 of Directive 2014/67/EU, aligning with Great Britain and Northern Ireland's existing legislative framework of enforcing individual employment rights.
- 4.2 The consultation ran for 10 weeks and closed on 24 September 2015 and was accompanied by a draft Impact Assessment, inviting comments as well as any further evidence to improve the data available on workers posted to and from the UK.
- 4.3 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>
- 4.4 The Department agreed that the consultation would be circulated to Northern Ireland stakeholders and responses were included in the UK Government's overall response. There were nine written responses to the consultation in total. These covered replies from a range of organisations including business representative bodies, the legal community and trade unions. The responses identified that the business representative bodies largely wanted to see limits placed on posted workers' rights and 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.
- 4.5 As a consequence of the responses to the consultation, the UK Government's approach to implementing Directive 2014/67/EU is 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 or Directive 2014/67/EU. It aims to maintain the rights of workers without imposing substantial regulatory burdens on the

businesses that employ them. The Department was consulted about, and agreed with, this approach.

4.6 Action is being taken in three areas:

- 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.

5. Equality Impact

5.1 The numbers of posted workers being posted into and from the UK have been estimated to be relatively low (43,000 and 30,000 respectively in 2013). Posted workers are not currently required to be registered either before arrival or on entry, nor are they monitored whilst posted. There are no figures available specifically for Northern Ireland. Given the relative size of NI within the UK it is possible to estimate that there were approximately 1075 workers posted into, and 750 posted out of Northern Ireland in 2013. However, given the land border between Northern Ireland and the Republic of Ireland, it is likely that the numbers will be greater around the border areas.

5.1 As part of the Impact Assessment process at both consultation² and final³ stage the Department for Business, Innovation and Skills (BIS) conducted an Equalities Analysis. This analysis considered the proportion of posted workers broken down by protected group compared against the proportion of workers in each protected group in the labour market. Data limitations impact on the ability to examine the majority of the protected groups with the exception of age and gender.

5.2 The analysis indicated that there were three times as many male posted workers to female posted workers. The research also indicates that those aged 25-40 make up a larger proportion of posted workers compared to the distribution for all workers. However, these estimates include all posted workers and not just those in the construction sector. In the absence of Northern Ireland specific information, it could be estimated that the equality impacts will be the same in Northern Ireland, as in the rest of the UK.

6. Regulatory and Financial Impact

6.1 Impact Assessments have been carried out on a UK wide basis by BIS. Using BIS figures the anticipated impact on business, charities or voluntary bodies in Northern Ireland is estimated to be less than £1000 per annum in respect of addressing claims for unpaid wages.

6.2 The estimated net impact on the public sector in Northern Ireland for the administration of the award and recovery of unpaid wages, based on the BIS Impact

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447852/BIS-15-413-IA-implementing-the-posted-workers-enforcement-directive.pdf

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484926/BIS-15-683-posted-workers-impact-assessment.pdf

Assessment, is estimated to be negligible. The BIS Impact Assessment is available on the government's legislation.gov.uk website:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484926/BIS-15-683-posted-workers-impact-assessment.pdf

7. Section 24 of the Northern Ireland Act 1998

- 7.1 The Statutory Rule is deemed compliant with Section 24 of the Northern Ireland Act 1998. The equivalent Statutory Instrument in GB (the Posted Workers (Enforcement of Employment Rights) Regulation 2016) has been deemed compatible with the European Convention on Human Rights.

8. EU IMPLICATIONS

- 8.1 The purpose of the S.R. is to transpose into domestic law Directive 2014/67/EU of the European Parliament and the Council of the European Union. The deadline for transposition is 18 June 2016. Failure to transpose the Directive before the deadline could leave the Department open to infraction proceedings by the European Court.

9. Parity or Replicatory Measure

- 9.1 The UK Government has already laid the Posted Workers (Enforcement of Employment Rights) Regulations 2016 (S.R. 2016 No. 539) and these will come into force on 18 June 2016. The Northern Ireland Statutory rule substantively follows the approach in Great Britain.

10. Additional Information

- 10.1 Not applicable.