

2016 No. 539

TERMS AND CONDITIONS OF EMPLOYMENT

**The Posted Workers (Enforcement of Employment Rights)
Regulations 2016**

<i>Made</i>	- - - -	<i>25th April 2016</i>
<i>Laid before Parliament</i>		<i>27th April 2016</i>
<i>Coming into force</i>	- -	<i>18th June 2016</i>

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The Secretary of State is a Minister designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to employment rights and duties and services in the internal market.

The Secretary of State and the Lord Chancellor, acting jointly, in exercise of the powers conferred by section 18(8) and (9) of the Employment Tribunals Act 1996^(c) and section 2(2) of the European Communities Act 1972, make the following Regulations.

PART 1

General

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Posted Workers (Enforcement of Employment Rights) Regulations 2016 and come into force on 18th June 2016.

(2) These Regulations extend to England, Wales and Scotland.

Interpretation

2. In these Regulations—

“Directive 96/71/EC” means Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services^(d);

“Directive 2014/67/EU” means Council Directive 2014/67/EU of the European Parliament and the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’)^(e).

Review

3.—(1) The Secretary of State must from time to time—

- (a) carry out a review of these Regulations,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) In carrying out the review the Secretary of State must, so far as is reasonable, have regard to what is done in other Member States to implement Directive 2014/67/EU.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory system established by those Regulations,
- (b) assess the extent to which those objectives are achieved, and

(a) Article 2 of, and the Schedule to, the European Communities (Designation) Order 2000 (S.I. 2000/738); article 2 of the European Communities (Designation) Order 2009 (S.I. 2009/221).

(b) 1972 c.68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1) and the European Union (Amendment) Act 2008 (c.7), section 3(3).

(c) 1996 c.17; by virtue of section 1 of the Employment Rights (Dispute Resolution) Act 1998 (c.8) industrial tribunals were renamed employment tribunals and references to “industrial tribunal” or “industrial tribunals” in any enactment were substituted with “employment tribunal” and “employment tribunals”. Section 18(8) was amended by the Tribunals, Courts and Enforcement Act 2007 (c.15), Schedule 8, paragraphs 35 and 38, and the Enterprise and Regulatory Reform Act 2013 (c.24), section 9; section 18(9) was inserted by the Enterprise and Regulatory Reform Act 2013, section 9.

(d) OJ No L 18, 21.1.1997, p. 1.

(e) OJ No L 159, 28.05.2014, p. 11.

- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.
- (4) The first report under this regulation must be published before the end of the period of five years beginning with the day on which these Regulations come into force.
- (5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.

PART 2

Posted Workers in the Construction Sector

Scope of application of this Part

4.—(1) This regulation and regulations 5 to 9 apply to a posted worker in the construction sector who—

- (a) is working or has worked in Great Britain; and
- (b) is working or has worked for the employer to perform services that relate to the employer's contractual obligations to the contractor.

(2) For the purposes of this regulation and regulations 5 to 9—

“contractor” means a person with whom the employer has contracted to provide services;

“employer” means a service provider established in a Member State which posts or hires out workers in accordance with paragraph 3 of Article 1 of Directive 96/71/EC;

“posted worker in the construction sector” means a worker who—

- (a) normally works in a Member State other than the United Kingdom but, for a limited period, carries out work on behalf of the employer in Great Britain; and
- (b) undertakes building work relating to the construction, repair, upkeep, alteration or demolition of buildings including any of the following—
 - (i) excavation;
 - (ii) earthmoving;
 - (iii) actual building work;
 - (iv) assembly and dismantling of prefabricated elements;
 - (v) fitting out or installations;
 - (vi) alterations;
 - (vii) renovation;
 - (viii) repairs;
 - (ix) dismantling;
 - (x) demolition;
 - (xi) maintenance;
 - (xii) upkeep, painting and cleaning work; and
 - (xiii) improvements.

Right not to suffer unauthorised deductions

5.—(1) This regulation applies if a posted worker in the construction sector is remunerated by the employer for any pay reference period commencing on or after the date these Regulations come into force at a rate that is less than the national minimum wage.

(2) The contractor is to be treated for the purpose of these Regulations as having made an unauthorised deduction of the relevant sum from the worker's wages.

(3) In this regulation and in regulation 6 the “relevant sum” means the proportion of the amount due to the worker as additional remuneration in respect of the pay reference period, calculated in accordance with section 17 of the National Minimum Wage Act 1998 (a) (non-compliance: worker entitled to additional remuneration), which is the same as the proportion of the pay reference period during which the worker carried out work relating to the employer’s obligations to the contractor.

(4) In this regulation—

“national minimum wage” has the same meaning as in the National Minimum Wage Act 1998;

“pay reference period” has the meaning given by regulation 6 of the National Minimum Wage Regulations 2015(b).

Complaints to employment tribunals

6.—(1) A posted worker in the construction sector may present a complaint against a contractor to an employment tribunal that the contractor is to be treated as having made an unauthorised deduction of the relevant sum from the worker’s wages by virtue of regulation 5(2).

(2) Paragraph (1) does not apply to a posted worker in the construction sector who has—

- (a) presented a claim against the employer under section 23(1)(a) of the Employment Rights Act 1996(c) (deductions from worker’s wages in contravention of section 13 of that Act) to an employment tribunal in respect of the sum due; or
- (b) commenced other civil proceedings against the employer for the recovery, on a claim in contract, of the sum due.

(3) In any complaint brought under paragraph (1), it is a defence for the contractor to show that it exercised all due diligence to ensure that the worker’s employer would remunerate the worker in respect of the relevant sum due to the worker.

(4) Subject to paragraph (6) and regulation 7 (extension of time limit to facilitate conciliation), an employment tribunal must not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning with the date of payment of the relevant wages from which the deduction was made.

(5) Where a complaint is brought under this regulation in respect of a series of deductions, the reference in paragraph (4) to the deduction is to the last deduction in the series.

(6) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this regulation to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(7) An employment tribunal is not (despite paragraphs (5) and (6)) to consider so much of a complaint brought under this regulation as relates to a deduction where the date of payment of the relevant sum from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(8) A posted worker in the construction sector who presents a complaint under this regulation is prohibited from—

- (a) presenting a complaint against the employer under section 23(1)(a) of the Employment Rights Act 1996 (deductions from worker’s wages in contravention of section 13 of that Act) to an employment tribunal in respect of the sum due; or
- (b) commencing other civil proceedings against the employer for the recovery, on a claim in contract, of the sum due,

unless the tribunal dismisses the complaint under this regulation in accordance with paragraph (3).

(a) 1998 c.39; section 17 was amended by section 8 of the Employment Act 2008 (c.24).

(b) S.I. 2015/621.

(c) 1996 c.18.

Extension of time limits to facilitate conciliation before institution of proceedings

7.—(1) In this regulation—

- (a) Day A is the day on which the posted worker in the construction sector complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996^(a) (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
- (b) Day B is the day on which that worker receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(2) In working out when the time limit set by regulation 6(4) expires, the period beginning with the day after Day A and ending with Day B is not to be counted.

(3) If the time limit set by regulation 6(4) would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(4) The power conferred on the employment tribunal by regulation 6(6) to extend the time limit set by paragraph (4) of that regulation is exercisable in relation to that time limit as extended by this regulation.

Determination of complaints

8.—(1) Where a tribunal finds a complaint under regulation 6 well-founded, it must make a declaration to that effect and must order the contractor to pay to the worker the relevant sum treated as deducted by the contractor from the worker's wages.

(2) Where a tribunal makes a declaration under paragraph (1), it may order the contractor to pay to the worker (in addition to any amount ordered to be paid under that paragraph) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by the worker which is attributable to the matter complained of.

(3) Where, in the case of a complaint made under regulation 6, a tribunal finds that, although neither of the conditions set out in section 13(1)(a) and (b) of the Employment Rights Act 1996 was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction must for the purposes of paragraph (1) be treated as reduced by the amount with respect to which that condition was satisfied.

(4) A tribunal may not order a contractor to pay or to repay to the worker any amount in respect of a deduction, or in respect of any combination of deductions, in so far as it appears to the tribunal that the contractor or the worker's employer has already paid or repaid any such amount to the worker.

Restrictions on contracting out

9.—(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

- (a) to exclude or limit the operation of any provision of these Regulations, or
- (b) to preclude a person from bringing proceedings under these Regulations before an employment tribunal.

(2) Paragraph (1) does not apply to—

^(a) Section 18A was inserted by the Enterprise and Regulatory Reform Act, section 7(1).

- (a) any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C of the Employment Tribunals Act 1996^(a) (conciliation); or
- (b) any agreement to refrain from instituting or continuing proceedings if the conditions regulating settlement agreements under these Regulations are satisfied in relation to the agreement.

(3) For the purposes of paragraph (2)(b) the conditions regulating settlement agreements under these Regulations are that—

- (a) the agreement must be in writing;
- (b) the agreement must relate to the particular complaint;
- (c) the worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on the ability of the worker to pursue the worker's rights before an employment tribunal;
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the worker in respect of loss arising in consequence of the advice;
- (e) the agreement must identify the adviser; and
- (f) the agreement must state that the conditions regulating settlement agreements under these Regulations are satisfied.

(4) For the purposes of paragraph (3)(c) a “relevant independent adviser” is a person who is any of the following—

- (a) a qualified lawyer;
- (b) an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union;
- (c) an advice centre worker (including a volunteer) who has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre,

but this is subject to paragraph (5).

(5) A person is not a relevant independent adviser for the purposes of paragraph (3)(c) in relation to the worker in any of the following cases—

- (a) if the person is, is employed by, or is acting in the matter for, the employer or an associated employer;
- (b) in the case of a person within paragraph (4)(b) or (c), if the trade union or advice centre is the employer or an associated employer;
- (c) in the case of a person within paragraph (4)(c), if the worker makes a payment for the advice received.

(6) In paragraph (4)(a) “qualified lawyer” means any of the following—

- (a) as respects England and Wales a person who, for the purposes of the Legal Services Act 2007^(b), is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act), and
- (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.

(7) In paragraph (4)(b) “independent trade union” means a trade union (within the meaning given by section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992^(c)) which—

(a) Sections 18A and 18B were inserted by the Enterprise and Regulatory Reform Act, section 7(1). Section 18C was inserted by the Enterprise and Regulatory Reform Act, section 7(2), Schedule 1, paragraphs 2 and 6.
 (b) 2007 c.29.
 (c) 1992 c.52.

- (a) is not under the domination or control of an employer or a group of employers or of one or more employers' associations, and
 - (b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatever) tending towards such control.
- (8) For the purposes of paragraph (5) any two employers are “associated” if—
- (a) one is a company of which the other (directly or indirectly) has control; or
 - (b) both are companies of which a third person (directly or indirectly) has control.

Amendment to the Employment Tribunals Act 1996

- 10.**—(1) The Employment Tribunals Act 1996 is amended in accordance with paragraph (2).
- (2) In section 18 (conciliation: relevant proceedings etc), in subsection (1)—
- (a) omit the word “or” at the end of paragraph (z2);
 - (b) at the end of paragraph (z3) insert—
 - “, or
 - (z4) under regulation 6 of the Posted Workers (Enforcement of Employment Rights) Regulations 2016.”.

PART 3

Cross-border enforcement and disclosure of information

Cross-border enforcement of financial administrative penalties and fines

- 11.**—(1) An amount payable in pursuance of an EU penalty is recoverable—
- (a) in England and Wales, if the county court so orders, under section 85 of the County Courts Act 1984^(a) or otherwise as if the sum were payable under an order of that court;
 - (b) in Scotland, by diligence as if the sum were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.
- (2) Where a competent authority in a Member State other than the United Kingdom requests that the Secretary of State recover an EU penalty, the Secretary of State is entitled to recover the amount of any sum owing as part of that EU penalty.
- (3) For the purposes of this regulation—
- “EU penalty” means a financial administrative penalty or fine including fees and surcharges relating to non-compliance with Directive 96/71/EC or Directive 2014/67/EU—
- (a) imposed on a service provider established in the United Kingdom by a competent authority in a Member State other than the United Kingdom; or
 - (b) confirmed by an administrative or judicial body in a Member State other than the United Kingdom as payable by a service provider established in the United Kingdom;
- “competent authority” means a competent authority designated by a Member State other than the United Kingdom for the purposes of Directive 2014/67/EU.
- (4) Any amount received by the Secretary of State under this Part is to be paid into the Consolidated Fund.

(a) 1984 c.28.

Disclosure of information held by Revenue and Customs

12.—(1) This regulation applies to information which is held by or on behalf of the Revenue and Customs, including information obtained before the coming into force of this regulation.

(2) No obligation of secrecy imposed by statute or otherwise prevents the disclosure, in accordance with this regulation, of information if the disclosure is made for the purposes of replying to reasoned requests for information made by a competent authority of another Member State in accordance with Article 6 of Directive 2014/67/EU.

(3) The information must not be disclosed except by the Revenue and Customs as defined in section 17(3) of the Commissioners for Revenue and Customs Act 2005^(a).

(4) Information obtained by means of a disclosure authorised by paragraph (2) must not be further disclosed except for the purpose mentioned in that paragraph.

(5) Nothing in this regulation authorises the making of any disclosure which is prohibited by any provision of the Data Protection Act 1998^(b).

(6) Nothing in this regulation must be taken to prejudice any power to disclose information which exists apart from this regulation.

25th April 2016

Nick Boles
Minister of State for Skills
Department for Business, Innovation and Skills

25th April 2016

Shailesh Vara
Parliamentary Under Secretary of State for Courts and Legal Aid
Ministry of Justice

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement provisions of Directive 2014/67/EU of the European Parliament and the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (“the Directive”).

Part 1 of the Regulations specifies that the Regulations come into force on 18 June 2016 and extend to England, Wales and Scotland. Regulation 3 introduces a provision which requires the Secretary of State to review the operation and effect of these Regulations and to publish a report within five years and every five years after that. Following a review it will fall to the Secretary of State to consider whether the relevant provisions should remain as they are, or be revoked or be amended. A further instrument would be needed to revoke the relevant provisions or to amend them.

Part 2 of the Regulations relates to posted workers in the construction sector and subcontracting liability. This concerns arrangements where the posted worker’s employer is the direct subcontractor of a contractor. Regulation 5 provides that any sums deducted by the employer from

(a) 2005 c.11.

(b) 1998 c.29.

the worker's wages up to the value of the national minimum wage may be treated as deducted by the contractor for as long as those sums remain unpaid to the worker. Regulation 6 introduces a right for the worker to make a complaint to an employment tribunal against a contractor if the worker's employer has deducted sums from the worker's wages as described in regulation 5. Regulation 8 concerns compensation that the worker might be entitled to.

Section 18(1) of the Employment Tribunals Act 1996 sets out "relevant proceedings" for the purposes of early conciliation and other conciliations services provided by ACAS. Regulation 10 adds proceedings under regulation 6 to the list of relevant proceedings under section 18(1). Regulation 7 makes amendments to the limitation period to take account of early conciliation.

Part 3 of the Regulations implements Chapter 6 of the Directive. Competent authorities in other Member States can request that the United Kingdom authorities enforce financial administrative penalties and fines against service providers established in the United Kingdom. Regulation 11 allows the Secretary of State to enforce those penalties and fines on behalf of the requesting authority. Regulation 12 makes provision for an information gateway to allow Her Majesty's Revenue and Customs to provide information in accordance with the United Kingdom's obligations under the Directive to reply to reasoned requests for information made by a competent authority in a Member State other than the United Kingdom.

A transposition note and an impact assessment of the effect that this instrument will have on the costs to business and the voluntary sector are attached to the Explanatory Memorandum which is available alongside the instrument on www.legislation.gov.uk.

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