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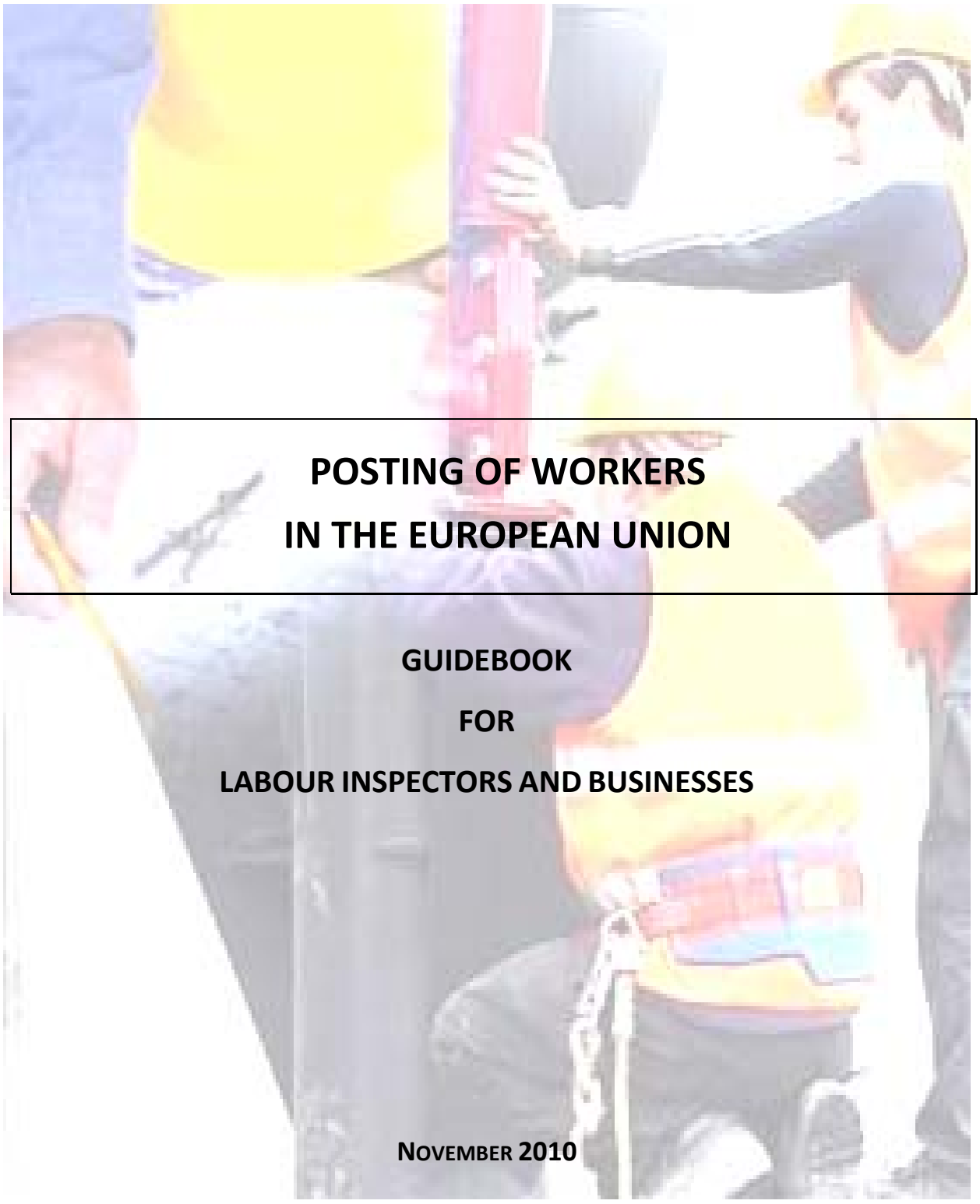

POSTING OF WORKERS IN THE EUROPEAN UNION

GUIDEBOOK FOR LABOUR INSPECTORS AND BUSINESSES

NOVEMBER 2010

ISTITUTO GUGLIELMO TAGLIACARNE
per la promozione della cultura economica

Ministero del Lavoro e delle Politiche Sociali

Inspectia Muncii

POSTING OF WORKERS
IN THE EUROPEAN UNION

GUIDEBOOK

FOR

LABOUR INSPECTORS AND BUSINESSES

NOVEMBER 2010

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The EMPOWER project was implemented by a working group consisting of:
- ISTITUTO GUGLIELMO TAGLIACARNE (lead organisation);
- MINISTRY OF LABOUR AND SOCIAL POLICY - General Directorate for the Labour Market and General Directorate for Inspection Activities (partner);
- ROMANIAN LABOUR INSPECTION (partner).

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FOREWORD

The fundamental principles on which Community law is based (the free movement of goods and services and freedom of establishment of companies) sometimes conflict with national regulations that have been established to protect workers' rights, where the protection of the worker is likely to be overshadowed by the creation of a single European market.

On the other hand, the fear of the phenomena, which are more or less severe, of social *dumping* and unequal treatment in relation to workers' contractual terms (including after the entry into the European market of countries with low *standards* of social protection) takes on an inevitable importance in view of the EU's commitment to ensuring that the integration of the internal market and the removal of barriers to free competition do not result in the loss of workers' subjective rights.

From this perspective, therefore, Directive 96/71/EC on the posting of the workers in the context of the cross-border provision of services, is the expression of a new awareness within the community, based on the premise that social progress in the European Union also involves the protection of workers' individual and collective contractual conditions.

The purpose of Directive 96/71/EC is to accomplish the arduous task of reconciling the goals of economic development, based on the freedom of movement as set out in article 49 of the EC Treaty, which requires that workers be protected; the aspirations of economic agents in the European market to freely carry out their activities within a common area, must be balanced against the need to prevent the occurrence of situations of unequal treatment of

workers, both in terms of wages, and in terms of applicable regulations, in relation to the same services provided in the same workplace.

The solution adopted by the Community legislator (the result of a compromise between the position taken by the Court of Justice, in favour of an integral application of the rules of the host country and that taken by the European Commission, in favour of applying a predefined set of rules in the place in which the services are performed) recognizes the rights of posted workers in the framework of a cross-border provision of services, to afford the same protection that the State in which the service is performed guarantees for resident workers, in relation to certain areas that are listed in an exhaustive manner.

While the Community legislator has addressed and, at least in part, resolved the issue of *social dumping*, it did not take any steps to harmonise the various regulations protecting workers contained in the various national laws.

Directive 96/71/EC did however establish an important principle (article 4) which requires cooperation between the authorities of the Member States who are responsible for monitoring the terms and conditions of employment to prevent manifest abuses in the use of the legal instrument of posting.

In this perspective of cooperation between public government agencies, an initiative has been launched in the form of the ***EMPOWER*** *project - Exchange of* ***E****xperiences and i****M****plementation of actions for* ***PO****sted* ***W****ork****ER****s"*, which was awarded to the Istituto Guglielmo Tagliacarne, involving the participation of Ministry of Labour and Social Policy and the Labour Inspectorate of Romania.

This project has initiated a series of awareness-raising and information

activities to consolidate knowledge about and the application of Directive 96/71/EC, in relation to posted workers in Italy and Romania, in order to point out problematic issues that inspection staff encounter when applying the Community regulations and to provide shared tools in a cooperative environment.

The results of the EMPOWER project include the preparation of this Guidebook, which has been designed for use by labour inspectors who are required to address issues relating to the position of a worker who has been posted to Italy from a country that belongs to the European Union, and a valuable opportunity for employers who want to find out about the law on posting.

This Guidebook is divided into two sections:

- Section 1: the regulations on posting in Italy in view of the transposition of Directive 96/71/EC;
- Section 2: a brief overview of the main aspects of the laws governing the posting of workers in Romania.

SECTION 1

REGULATIONS GOVERNING THE POSTING IN ITALY IN THE LIGHT OF THE TRANSPOSED DIRECTIVE 96/71/EC

1. INTRA-COMMUNITY POSTING – CRITERIA THAT MAY BE USED TO DETERMINE ITS LEGITIMATE USE

The definition of the institution of cross-border posting is contained in European directive 96/71/EC and in the Italian regulations that transpose the directive, namely Legislative Decree 72/2000.

The provisions referred to identify various hypothesis of temporary mobility with respect to workers to whom the regulations on intra-Community posting apply (article 1, paragraph 1, Legislative Decree 72/2000):

- from a company in a different Member State to a subsidiary located in Italy;
- from a company in a different Member State to an Italian company belonging to the same group of companies;
- under a commercial contract (contract of work, services, transportation and so on), entered into with a principal with a registered office or operating in Italy.

A common feature of these cases, which cannot be considered a domestic posting under article 30 of Legislative Decree 276/2003, is the **existence of an organic link between the posted worker and the home organisation, which continues to exercise its management authority,** without outlining in detail the work to be carried out and the relevant procedures for performing it.

The labour to be performed must be of a temporary nature, and must be carried out **in the interest and on behalf of the home organisation**, which must still comply with standard employer's obligations, namely **responsibility in relation to hiring, managing the relationship, associated requirements in**

relation to payment of wages and making social security contributions, as well as disciplinary authority and in relation to dismissal.

While the employer in the sending State maintains its obligations in relation to the payment of wages, they are subject to any agreement between it and the undertaking in the State of employment in relation to actual payment procedures concerning the posted workers (cf. Administrative Commission Decision A2 issued 2009).

With respect to the above, it should be noted that the Administrative Commission, a Community body which is tasked with indicating interpretative guidelines and methods to be applied to the regulations in question, it had identified earlier in Decision No. 181/2000 and, more recently, in Decision A2 issued 2009, **concerning the interpretation of article 12 of Regulation (EC) No. 883/2004**, **two typical cases of intra-Community posting**, establishing criteria that should be adopted to identify and combat the phenomenon of *"fictitious companies"*, and possible instances of abuse of the workers concerned (cf. on this point INPS Message No. 16085 of 14 July 2008, and INPS Memorandum No. 83 of 1 July 2010).

1. The first case involves the *"**posting of regular staff**"*, that is, when the worker sent by the home organisation habitually works in the Originating country as an employee of the latter, prior to the posting.

   In this case, as indicated by the Commission, the distinctive features of a regular posting are the continuing employment relationship in relation to the home organisation and the fact that the posted employee continues to perform his or her duties on its behalf.

When Italian companies use workers at their premises from undertakings in another Member State and these workers perform work that is not for and under the direction of the home organisation, but rather for the undertaking in the Country in which they are employed, this does not constitute a case of intra-Community posting but *"mere provision of labour"*.

2. The second case relates to a situation in which the worker is recruited by an undertaking operating in one Member State, ***"with a view to being immediately posted"***, on behalf of the said undertaking, in the territory of another Member State, provided that:
   a. prior to the recruitment that occurs on the same date as the posting, the worker has been registered for at least one month with the insurance scheme of the Member State of origin;
   b. there is an **organic link** between the said **undertaking and the worker** for the entire term of the posting;
   c. as a rule, the aforementioned **undertaking carries out its activities in the territory of the first Member State, i.e. this is not a case of a *"dummy corporation"***.

Furthermore, paragraph 2 of article 14 of implementing regulation No. 987/2009 defines an employer as ("*an entity* ") that "***ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question.***. *The criteria that are applied must be adapted to the specific features of each employer and to the actual nature of activities that are carried out*".

The existence or otherwise of substantial activities in the State of origin may be verified by monitoring a series of objective factors. The nature of the activities carried out should still always be taken into account.

In this respect, with reference to the activities carried out in each specific case, it may be useful to refer to:

- the place where the undertaking has its registered office or administration;
- the number of administrative staff working respectively in the Member State in which it is established and in the other Member State,
- the place where posted workers are recruited;
- the place where the majority of contracts with clients are entered into;
- the law applicable to contracts entered into by the home organisation with its clients and with its workers;
- the nationality of the contract principals;
- the turnover achieved by the home organisation in the sending Member State and in the employment State during an sufficiently representative period.

This is not an exhaustive list, they are merely aspects that must be part of a comprehensive assessment, including as part of an inspection in order to verify the authenticity of the intra-Community posting.

In terms of domestic law, it should be noted that the aspects that must be included in the case of an intra-Community posting, set out in article 1 of Directive 96/71/EC, refer to various contractual hypotheses governed by our regulation. The regulatory definition of intra-Community posting can in fact

include the features referred to in to the Directive, namely situations involving contracts of work or services (article 1655 of the Civil Code et seq.; article 29 of Legislative Decree 276/2003), subcontracting (article 1559 Civil Code et seq.), transportation contracts (article 1678 Civil Code et seq.), posting (article 30 Legislative Decree 276/2003) and other types of *"business"* contracts relating to the exchange of services between businesses established in different Community countries that involve the temporary use of staff of the home organisation in the Country in which the services are performed. In this respect, therefore, there should be no confusion between intra-Community posting pursuant to Directive 96/71/CE and the institution of the internal right to posting pursuant to article 30 of Legislative Decree 276/2003.

2. SITUATIONS EXCLUDED FROM THE SCOPE OF APPLICATION OF REGULATIONS GOVERNING THE POSTING

In Decisions 162/1996 and 181/2000, and in Decision A2 of 2009, the Administrative Commission identified the following **situations in which the regulations on posting do not apply**:

1. the undertaking to which the worker has been posted makes him available to another undertaking in the Member State in which it is situated;
2. the worker posted to a Member State is made available to an undertaking situated in another Member State;
3. the worker is recruited in a Member State in order to be sent by an undertaking situated in a second Member State to an undertaking in a third Member State;
4. the worker is recruited in one Member State by an undertaking located in a second Member State to work in the first Member State;
5. the worker is sent to replace a worker who has reached the end of his posting (cf. INPS Memorandum No. 83/2010).

In these cases the exclusion of the applicability of the provisions on posting arises from the complexity of relationships that exist in the above cases, which not only do not involve guarantees on the existence of an **organic link** between the worker and the sending company, but runs counter to the goal of avoiding administrative complications and gaps in workers' insurance coverage, which is the very purpose of provisions on the posting.

3. EQUAL TREATMENT BETWEEN COMMUNITY WORKERS AND ITALIAN WORKERS

In order to guarantee standards of protection that are *"equal or similar"* throughout Italy, article 3, paragraph 1, of Legislative Decree 72/2000 states that with respect to workers that are *"sent"* to our Country by an undertaking located in a different Member State, during the term of the posting, **"*the same terms and conditions of employment" shall apply that* are provided for by legislative, regulatory or administrative provisions, and the National Collective Labour Agreements, in relation to Italian workers that perform similar employment tasks**.

It is therefore necessary to read this regulatory provision, and in particular the expression "*same terms and conditions of employment*", jointly with article 3 of Directive 96/71/EC, concerning the *"hard core"* of protection to be afforded posted workers provided for by the law of the place of execution of the employment tasks (the *lex loci laboris* principle).

Specifically, **if the employment tasks are performed in Italy, during the term of the posting, Italian regulations (sources of law and collective labour agreements) governing the following matters shall apply:**

a) **maximum work periods and minimum rest periods;**
b) **minimum paid annual holidays;**
c) **minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;**
d) **conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;**

e) hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

f) equality of treatment between men and women and other provisions on non-discrimination.

The cited provision must be interpreted and applied in the light of what has been determined by Directive 96/71/EC and settled case law of the Court of Justice of the European Communities.

Consequently, with respect to the matters listed in article 3, para. 1, letters *a*) – *g*), cited above, undertakings that use cross-border postings are required to comply with minimum working conditions laid down by legal, regulatory and administrative provisions and collective agreements that are most representative of the State in which the work is carried out.

Pursuant to article 3, para. 10, of the cited Directive, the regulations of the State in which the work is carried out which establish "*terms and conditions of employment*" including with respect to matters other than those listed above, "*in the case of public policy provisions*".

With respect to cross-border postings, public policy accordingly acts as a further extension of the application of regulations in force in the State in which the posting occurs.

a) maximum work periods and minimum rest periods

Community companies that post workers in Italy are subject to the central provisions and system of penalties provided for by Legislative Decree 66/2003 concerning working hours.

Any administrative penalties for violations that are actually identified and challenged, are imposed on the offender by the Ministry of Labour's inspection staff. If a natural person who has been identified as an offender resides in a Member State other than Italy, it should be recalled that pursuant to article 14 of Law No. 689/1981, there is a time limit of 360 days from the conclusion of the inspection to serve the decision.

The offender may also be subject to the binding requirement pursuant to article 15 of Legislative Decree 124/2004, if it has been established that criminal offences have been committed in relation to the violation of night work provisions.

b) minimum length of paid annual holidays

Community companies that post workers to Italy are subject to the provisions and system of penalties provided for by Legislative Decree 66/2003 (cf. point a).

c) Minimum rates of pay, including overtime rates (this point does not apply to supplementary occupational retirement pension schemes).

The concept of minimum rates of pay

Article 3 of Directive 96/71/EC provides that the concept of minimum rates of pay *"is defined by the national law and/or practice of the Member State to whose territory the worker is posted"*.

In this respect it should be recalled that, while no legal minimum rate of pay has been established in Italy, a minimum rate has been established in collective labour agreements negotiated in the various fields of production by trade union organizations that are comparatively the most representative at the national level, pursuant to the principle of proportionality of remuneration laid

down in article 36 of the Italian Constitution.

The **minimum wage accordingly appears to include so-called seniority increases**, in cases that are evidently provided for under collective bargaining (see for example National Collective Bargaining Agreements in relation to chemical, textile, services and metalworking sectors; also Constitutional Court 23 June 1988, No. 697).

It has also been held that the concept of remuneration must include all emoluments received in the reference period that are associated with the employment relationship, **inclusive of any contributions (from social security and welfare agencies) and withholding tax (IRPEF - personal income tax).**

It should also be noted that, pursuant to art 3.7 of the cited Directive, ***"Allowances specific to the posting shall be considered to be part of the minimum wage,*** *unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging".*

This provision must be understood as meaning that *"posting indemnities"* are legitimate components of compensation, and that such items, independently of the their amount, must be calculated in order to determine the salary of posted workers, and for the purpose of making a comparison with minimum amounts required under applicable collective agreements in Italy.

With particular reference to the **construction sector**, the minimum rates of pay established by the provincial collective agreement would apply to workers involved in intra-Community postings, since, although they would be counted as part of second-level collective bargaining, they are generally subject to these

provisions within the reference territory. Employment compensation must also take into account what is guaranteed by the *"Special Construction Workers' Funds"*. In this regard we refer the reader to the clarification contained in the response to request No. 24 of 3 September 2007.

Equal treatment with regard to salary

The terms of comparison must relate to the **total wages received by posted workers**, without making a comparison concerning a single compensation component, which in any event is impossible, given the different regulatory regimes applicable in the various European countries. In practical terms, it is worth repeating that the comparison must be made on the basis of the minimum wage set out in the salary scales of collective bargaining agreements, which should be considered as gross earnings.

Notice of audit

In order to protect wages claimed by workers involved in intra-Community postings, inspection staff may issue an audit notice, pursuant to article 12 of Legislative Decree 124/2004.

The audit notice measure, which relates to a difference in wages noted during an inspection, is served upon the employer (the Community home organisation).

Furthermore, if the intra-Community posting has come about by means of a tendering process, the audit notice may be served upon the principal in Italy, in its capacity as joint obligor (cf. response to Request No. 33 issued 12 October 2010).

It should be noted that this theory holds for circumstances in which the

audit notice constitutes protection that is merely instrumental, provided for under regulations that protect receivables that the statute intends to protect, namely the worker's employment wages, which are subject to joint liability between the principal and the contractor, pursuant to the combined provisions of article 29 of Legislative Decree 276/2003 and article 3, paragraph 3, Legislative Decree 72/2000.

This operational solution fulfils a dual purpose: on the one hand, it enables the company established in Italy to have full knowledge from the outset of the process in which it is involved since it has joint liability, and on the other hand, informs the workers involved of the joint obligation, providing an additional safeguard of audited wage claims.

Joint liability pursuant to article 29 of Legislative Decree 276/2003: a guarantee of the claims of employees recruited by the contractor

In order to protect staff that are recruited under a contract of works or services, article 29, paragraph 2, of Legislative Decree 276/2003, provides for joint liability between principal, contractor and subcontractor, within a time limit of two years of termination of the contract, to pay workers the employment wages and social security contributions that are owing.

Since this statutory provision provides for joint liability in relation to any employer that contracts works or services within Italy, it may be considered to be applicable, with respect to the specific topic of inspection activities, including in situations of contracts in which workers that have been *"sent"* to our Country by a company located in a different Member State, which should be read in the light of the general principle of joint liability pursuant to article 29 of Legislative Decree 276/2003, with reference to the performance of inspection activities,

including the special regime provided for by article 3, paragraph 3 of Legislative Decree 72/2000.

d) Conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings.

(cf. the "Cross-border labour subcontracting" section)**.**

e) Health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people.

Community companies that post workers in Italy are subject to the central provisions and system of penalties referred to in Legislative Decree 81/2008 (Consolidation Act on Safety).

In particular, since the binding requirement system provides an incentive with regard to the direct application of the penalty during judicial proceedings, it must also be adopted with regard to businesses that are based in other Member States, by reason of the principle of non-discrimination of Community companies in relation to those that are headquartered in Italy.

f) Equality of treatment between men and women and other provisions on non-discrimination

Italian law applies with respect to the prohibition on discrimination, including with respect to gender (Equal opportunity code - Legislative Decree 198/2006 as amended) .

4. CROSS-BORDER LABOUR SUBCONTRACTING (PROVISION OF SERVICES)

Article 4 of Legislative Decree 72/2000 governs cases of cross-border labour subcontracting, that is **the opportunity for businesses that supply temporary workers that are based in one Member State of the European Union to post workers with businesses that require workers with headquarters or production units in Italy.**

With reference to the features of the **authorisation scheme**, it should be recalled that paragraph 3 of the cited provision requires that a certification of equivalence be issued by the Minister of Labour within a thirty day period of the request of the company in question to operate in our Country pursuant to an administrative ruling of another Member State. This certification had the same effect as the authorisation issued to businesses operating in Italy, for the purposes of creating a registration on the register of supplier companies.

This paragraph was abrogated by Legislative Decree 276/2003, as amended by Legislative Decree 251/2004 in order to implement the community principle of the free movement of services.

The result is that **currently businesses that supply temporary labour (*correction*: subcontracting agencies) based in a Member State other than Italy do not require authorization pursuant to article 4 of Legislative Decree 276/2003 to operate legitimately in our Country, if they can demonstrate that they "*are operating pursuant to an equivalent administrative provision*" in comparison to the provision under Italian law, issued by the relevant authorities of the originating State** (cf. Memorandum of the Ministry of Labour No. 7 of 22 February 2005).

In this regard, we would refer to the requirements contained in article 5, paragraph 2 of Legislative Decree 276/2003, with respect to the financial situation of the agencies that intend to operate in the labour market. In particular, it is expected, in the first two years of operations, that the agency will pay a security deposit and subsequently provide a bank guarantee, in order to establish concrete and effective protection of the worker in the event of a failure by the subcontracting agencies to provide contributions or salary. In this specific case, article 5, paragraph 2, letter c) exempts companies from providing these guarantees if they have met *"similar obligations"* in relation to legislation in another European Union Member State.

With respect to compensation to which temporary workers are entitled, article 4 of Legislative Decree 72/2000 provides **that agencies with registered offices in other Member States must comply with the regulations laid down for Italian agencies, currently set out in articles 20 – 28 of Legislative Decree 276/2003** (the reference to Law No. 196/1997 is to be understood as a material reference to the regulations contained in Legislative Decree 276/2003).

We would therefore note that cases involving labour subcontracted by Community agencies are subject to article 23, paragraph 1 of Legislative Decree 276/2003, which provides the right of temporary employees to *"**financial and regulatory payment that on the whole is not less than** that of employees performing equal work to the user"*, and the joint liability of the latter to provide employment compensation and make social security contributions (article 23, commas 1 and 3 of Legislative Decree 276/2003).

An **audit notice** for employment compensation claims is also relevant, in accordance with the procedures referred to above, since the joint liability of the user undertaking in these circumstances are generally subject to these

requirements, as a necessary implementing provision, pursuant to article 23, paragraph 3 of Legislative Decree 276/2003.

5. SOCIAL SECURITY SYSTEM

With reference to the different aspect of the social security regime, we would reiterate that workers that are posted by Community companies are subject to the *"personality"* principle, as opposed to the *"territoriality"* principle that is in force in relation to terms and conditions of employment.

Community undertakings that are involved in posting in Italy maintain the contributions (in terms of social security and welfare) that apply in their Country of origin, using Form A1 (under E 101) issued by the relevant Institute.

For intra-Community posting, therefore, in order to determine the taxable social security base, companies must refer to the contribution regime in effect in the legislation of the Country of origin of the worker, rather than the Italian regime. A similar situation applies to the insurance system for accidents and occupational diseases, which is governed by the law of the Country of origin.

6. NEW PROCEDURE IN RELATION TO EXEMPTION FROM CONTRIBUTIONS FOR POSTED WORKERS IN MEMBER STATES OF THE EU

On 1 May 2010 the new provisions entered into force in relation to legislation applicable to workers moving within the European Union, contained in Part II of Regulation (EC) No. 883/2004 (articles 11 to 16) and in Part II of Implementing Regulation No. 987/2009 (articles 14 to 21).

The new provisions (article 12) extended the maximum term for posting from twelve to twenty-four months.

Consequently, Form E 101 will be replaced by Form A1, which may have a term of twenty-four months, while Form E 102 will be abolished.

If the expected term of the posting is twenty-four months, but must be extended to respond to special requirements, a request may be made for application of article 16 of Regulation (EC) 883/2004, whose content is similar to that of article 17 of Regulation (CE) 1408/1971. In this regard nothing has changed in relation to the governing body, which is still the Regional Directorate of the INPS, based on the territorial structure identified on the basis of the Member State to which the worker is sent.

For greater clarity we describe below examples of situations that may occur on the entry into force of Regulation 883/2004 (1 May 2010):

a) posting form E 101 issued for the period 1.5.2009 to 30.4.2010 → posting extension available until 30.4.2011, in accordance with article 12 of Regulation (EC) No. 883/2004; form A1 will be issued.

b) posting form E 101 issued for the period 1.3.2010 to 28.2.2011 → posting

extension available until 28.2.2012, in accordance with article 12 of Regulation (EC) No. 883/2004; form A1 will be issued.

c) posting form E 101 issued for the period 1.5.2008 until 30.4.2009 + form E 102, issued for the period 1.5.2009 until 30.4.2010, → no posting extension available in accordance with article 12 of Regulation (EC) No. 883/2004 (maximum posting term of twenty-four months has been reached);

d) posting form E 101 issued for the period 1.3.2009 to 28.2.2010 + form E 102, issued for the period 1.3.2010 to 28.2.2011 → no posting extension available in accordance with article 12 of Regulation (EC) No. 883/2004 (maximum posting term of twenty-four months has been reached).

For the cases listed above, an uninterrupted extension of the posting period beyond twenty-four months requires that the authorities enter into an agreement pursuant to article 16 of Regulation (EC) No. 883/2004.

Finally, we would note that the new regulations do not apply:

- **to three Countries that are parties to the European Economic Area (EEA Agreement): Iceland, Liechtenstein, Norway;**
- **to Switzerland, to which Community social security legislation has been extended with effect from 1 June 2002, pursuant to the agreement between Switzerland and the States of the European Union.**

With respect to relations between these States, therefore, the provisions contained in Regulations (EC) Nos. 1408/71 and 574/72 continue to apply and forms E 101 and E 102 are still used.

Regulations (EC) Nos. 1408/71 and 574/72 also continue to apply to

citizens of the third-party States under the terms provided for by Regulation (EC) No. 859 issued 14 May 2003.

With reference to the new procedure in relation to the exemption from making contributions and the general provisions of the Community system for the coordination of social security systems referred to in Regulation (EC) No. 883/2004, reference is made once again to the guidelines and details contained in INPS Memoranda Nos. 82, 83 and 84 issued 1 July 2010, as well as in the Practical Guide to postings in the European Union (cf. INPS Memorandum No. 124/2010).

Memorandum No. 82 issued 1 July 2010. *Regulation (EC) No. 883 of 29 April 2004, published in the Official Gazette of the European Union L 200 of 7 June 2004, as amended by Regulation (EC) No. 988 of 16 September 2009, and implementing regulation (EC) No. 987 of 16 September 2009, published in the Official Gazette of the European Union L 284 of 30 October 2009, relating to the coordination of national social security systems - provisions of a general nature.*

Memorandum no. 83 issued 1 July 2010. *Regulation (EC) No. 883 of 29 April 2004, published in the Official Gazette of the European Union L 200 of 7 June 2004, as amended by Regulation (EC) No. 988 of 16 September 2009, and implementing regulation (EC) No. 987 of 16 September 2009, published in the Official Gazette of the European Union L 284 of 30 October 2009, relating to the coordination of national social security systems - provisions relating to legislation applicable to postings.*

Memorandum no. 84 issued 1 July 2010. *Regulation (EC) No. 883 of 29 April 2004, published in the Official Gazette of the European Union L 200 of 7 June 2004, as amended by regulation (EC) No. 988 of 16 September 2009, and implementing*

regulation (EC) No. 987 of 16 September 2009, published in the Official Gazette of the European Union L 284 of 30 October 2009, relating to the coordination of national social security systems - provisions in relating to the recovery of benefits provided but not due and contributions and relation to rights of institutions responsible for benefits against liable third parties.

Practical Guide to postings in the European Union (Annex to INPS Memorandum No. 124/2010) *"EU Provisions on social security - Rights for people moving within the European Union".*

Employment entitlements	Undertaking established in Italy with workers habitually employed and resident in a member country	Undertaking established in Italy with workers involved in postings	Undertaking not established in Italy with workers involved in intra-Community postings	Source
Contracts govern by the Civil Code	Legislation chosen by the parties or in the absence of a choice, lex loci laboris	Legislation chosen by the parties or in the absence of a choice, the country in which the work is habitually performed	Legislation chosen by the parties, or in the absence of a choice, the country in which the work is habitually performed	Regulation 593/2008
Regular and overtime pay	Italy	Italy	Italy	Article 57, Law 218/94
Special Construction Workers' Fund	Italy	Italy	Italy	Article 3, Leg. Decree 72/2000
Contribution	Italy	Member country	Member country	Article 12, Reg. 883/2004
Statutory accounts	YES	YES	NO (possible provision)	
Wage packets	YES	NO (possible provision)	NO (possible provision)	
Hiring notification	YES	NO	NO	
Hiring letter	YES	NO	NO	
Working and rest hours	Italy	Italy	Italy	Article 3, para. 1, Dir. 96/71 and art. 9, Reg. 593/2008
Minimum holiday length	Italy	Italy	Italy	Article 3, para. 1, Dir. 96/71 and art. 9, Reg. 593/2008
Temporary labour			Italy	Article 4, Leg. Decree 72/2000
Safety, health and hygiene	Italy	Italy	Italy	Article 3, para. 1, Dir. 96/71 and art. 9, Reg. 593/2008
Measures to protect mothers and combat child labour	Italy	Italy	Italy	Article 3, para. 1, Dir. 96/71 and art. 9, Reg. 593/2008

Employment entitlements	Undertaking established in Italy with workers habitually employed and resident in a member country	Undertaking established in Italy with workers involved in postings	Undertaking not established in Italy with workers involved in intra-Community postings	Source
Equal opportunities for both genders	Italy	Italy	Italy	Article 3, para. 1, Dir. 96/71 and art. 9, Reg. 593/2008
Unlawful contracts, art. 18, Leg. Decree 276/03	YES	YES	YES	Art. 9, Reg. 593/2008
Fraudulent subcontracting, art. 28, Leg. Decree 276/03	YES	YES	YES	Art. 9, Reg. 593/2008
Non-compliant subcontracting and contracts, art. 27, Leg. Decree 276/03	YES	YES	YES	Art. 9, Reg. 593/2008
Joint liability for compensation in internal contracts, art. 29 Leg. Decree 276/2003	YES	YES	YES	Art. 3, Leg. Decree 72/2000, Art. 9, Reg. 593/2008
Joint liability for compensation in external contracts, art. 29, Leg. Decree 276/2003	YES	YES	YES	Art. 9, Reg. 593/2008
Joint liability for contributions in internal contracts, art. 29, Leg. Decree 276/2003	YES	NO	NO	Art. 9, Reg. 593/2008
Joint liability for contributions in external contracts, art. 29, Leg. Decree 276/2003	YES	NO	NO	Art. 9, Reg. 593/2008

CHECK LIST FOR THE INSPECTION PERSONNEL AT THE TIME OF INITIAL ACCESS AND RELATIVE REPORT CONTAINING THE REQUEST TO SUBMIT DOCUMENTS FOR BUSINESSES OPERATING UNDER THE EU SECONDMENT CONDITIONS

1. E101-102 Forms and/or A1 Forms;
2. List of posted workers: it is felt that a provision pursuant to art. 14 of Legislative Decree no. 124/204 may be applied to the EC employer, which requires a "list of posted workers" to be presented, with an indication of the presumable secondment period;
3. Preventive communications of secondment abroad, if obligatory in the country of origin (as in the case of Romania);
4. ID document for the workers (to be requested at the time of initial access);
5. Individual employment contract for seconded workers and possible letter of employment, as this is a European regulation;
6. Communication of employment - public registration - or equivalent documentation (in accordance with the regulations of the country in which the employer is established);
7. Company details as provided by the Chamber of Commerce (in accordance with the regulations of the country in which established), in order to verify the company's technical/professional suitability;
8. Commercial contract between the seconding business and the hosting business: tender, carriage, secondment, provision of labour (temporary work), etc.;

9. In relation to workplace safety and hygiene, the regulations on health monitoring and worker information/training are considered to be applicable. With regard to the former, it is felt that we can (must) request the medical certificate certifying suitability for the tasks and duties (where required by the TUSIC - Unified Work Safety Legal Text). A certificate drawn up by the competent doctor in the country where established is also deemed to be legitimate and, therefore, fully acceptable at the time of the inspection. With regard to the obligatory documentation for safety purposes, EU businesses operating in the construction business, if envisaged by the Italian regulations (section IV of the TUSIC), must - we feel - submit the POS (Operating Safety Plan). In addition, in the cases covered by art. 26 of the TUSIC, the (Italian) client must in any case draw up the DUVRI (Sole Document for assessment of interference risks), in accordance with the general regulations. In the case of a tender, the regulation that also renders compulsory the use of ID passes is considered to be applicable;

10. Pay slips (equivalent document in the country of establishment). It is felt that the presentation of pay slips signed by the workers could also be "ordered" (art. 14 of Italian Legislative Decree 124/2004), or that at least they recognise them as having been handed over and reporting their pay details;

11. Presence register (equivalent document in the country of establishment);

12. Any administrative authorisations in the country of establishment (e.g. supply, selection of personnel). It is felt that this type of information is very useful right from the start of the inspection, especially when, apparently, at the time of the initial access (or a report), a scenario of illegitimate

tender is made out pursuant to art. 29 of Legislative Decree 276/2003, or a scenario of illegitimate secondment pursuant to art. 30 of Legislative Decree. 276/2003. The fact that, in certain European countries, the provision of labour is not subject to authorisation conditions by the Public Administration (e.g.: GB, NL, etc.), is seen as presenting a problem. In this case, there would be no equivalent authorisation in the country of establishment, pursuant to art. 4 of Legislative Decree 72/2000;

13. For non-EU workers who work for EU companies using the trans-national secondment regime: residence permit issued by the Authorities in the EU country of establishment, communication to the Territorial Government Office (UTG) - Prefecture pursuant to art. 27 of Legislative Decree 286/98;

14. As Italian law is the applicable law with regard to Minors accessing the workplace, the problem of the possibility of checking school records in the country of establishment has been raised,

15. Bills of the EU company to the Italian client company

16. In the case of road haulage: Chrono-tachographs, in order to identify working times and breaks, for possible penalties.

17. Registration in the Sole Labour Register (LUL): hosting/user business.

With reference to the prescriptive and sanctioning regulations of Italian Law referred to in the <u>Check List</u> indicated above, regarding tendering (arts. 29, 18 and 28 of Legislative Decree 276/2003), secondment (arts. 30 and 18 of Legislative Decree 276/2003) and the provision of labour (art. 23, clause 3, of Legislative Decree 276/2003), note that these regulations are to be considered as regulations that must necessarily be applied (art. 9 of EU

Regulation no. 593/2008, the so-called "Rome 1 Regulation") and, therefore, apply regardless of the national law under which the employment contracts are regulated.

In other words, even if the individual employment contract is regulated by the national law of another Member State, the Italian Law regulations that must necessarily be applied apply in any case.

GLOSSARY

CONTRACT (CIVIL AND COMMERCIAL CONCEPT): article 1655 of the Civil Code defines a contract as an agreement by means of which *"a party undertakes , to perform a work or service in return for compensation in money by organising the necessary means and operating at its own risk"*. In relation to organizing the factors of production, entrepreneurs use contracts as an alternative to hiring employees directly, by entrusting the achievement of the desired end result (works or service) to a person who can provide an organization that is appropriate for achieving this goal, and who bears the economic risks. Consequently the person to whom the achievement of the works or the result is entrusted (defined as the *"contractor"*) is usually (although not necessarily), an entrepreneur. The person who entrusts the achievement of the work or service (defined as the "contracting entity" or "principal") may be an entrepreneur or a person that is not an economic agent (including but not limited to a person that entrusts the construction of a building or building renovation to an undertaking).

CONTRACT (LABOUR CONCEPT): article 29 of Legislative Decree 276/2003 includes the concept of a contract, which is fully in step with the civil-commercial concept (v.), highlighting, in relation to employment, the essential requirements of a contract, namely that the contractor must organise the necessary means and assume the risk associated with the project, which distinguish it from staff leasing (v.).

UNIVERSALLY APPLICABLE COLLECTIVE AGREEMENTS: article 3, para. 1 of Directive 96/71/EC of the European Parliament and of the Council concerning the posting

of workers in the framework of the provision of services, which aims to guarantee posted workers (*v.*) in the territory of an EU member state, originating from another EU Member State, the same working and employment conditions granted to workers in the place in which the work is performed, provides that in the construction industry (which is specifically listed in an annexe to the Directive) posted workers must benefit from not only the statutory, regulatory and administrative provisions of the State in which the work is performed, but also the provisions contained in collective agreements or arbitration awards that have been declared universally applicable insofar as they concern the matters listed in subparagraphs *a*) to *g*) of article 3, para. 1 of the cited Directive.

Legislative Decree 72/2000, implementing Dir. 96/71/EC, provides that the applicable terms and conditions of employment for workers posted by one Member State other than Italy, to Italy, are those established in addition to statutory, regulatory or administrative provisions, as well as collective agreements that have been concluded by the most representative employers' and labour organizations at national level, concerning similar services provided by workers in the place in which the posted workers perform their activities.

There is no obligation to apply statutory provisions or collective agreements concerning minimum length of holidays and minimum wage (including extra pay for overtime) in the case of skilled or specialized workers, employees of a company that supplies goods in relation to which initial assembly work or initial installation is required, which is essential to bring them into operation, if the posting does not exceed eight days.

However statutory, regulatory and administrative provisions, and those contained in the above-mentioned collective agreements, also apply to postings whose duration is equal to or less than eight days in the construction sector, (in relation to which, under the same terms as those contained in Directive 96/71/CE

cited above - a special list is included in the annexe to the cited Legislative Decree).

As we have seen, the Italian legislator has opted to expand the application of collective agreements to workers involved in an intra-Community posting. In fact, for the purposes of comparison:

b. the Directive provides that with respect to the matters listed in letters *a*) - *g*) of article 3, para. 1, universally applicable collective agreements must apply to the construction sector (not to the exclusion, of course, of other sectors, but nevertheless the Directive imposes an obligation to apply these agreements)

c. in the Legislative Decree implementing the application of collective agreements, which is characterized by the most representative employers' and labour organizations at national level, there are no restrictions to any productive sector, and its non-applicability relates exclusively (similar to the non-applicability of internal statutory, regulatory or administrative provisions) exclusively to paid annual holidays and minimum wages, including higher rates for overtime, in relation, as mentioned above, to types of work listed in article 3, paragraph 2 of the cited Legislative Decree, for a term not exceeding eight days.

As legal writers have pointed out, the application of the aforementioned collective agreements with respect to workers posted to Italy by businesses established abroad must be subject to the same limitations provided for Italian employers, since Article 39 of the Constitution has not been enforced. Consequently, in the event that an employer making a posting and established abroad is not a party to a collective agreement, only the portion of the collective agreement relating to the setting of the minimum wage will apply (i.e. the portion that binds all Italian employers).

POSTING: According to the Italian legal system, a posting is an organizational format used by an employer (defined as the *"home organisation"*) that employs, on a temporary basis, one of its workers at another employer's premises (defined as the *"host organisation"*) in order to satisfy its own interests (article 30 of Legislative Decree 276/2003). The interest of the home organisation may not merely be the provision of its own labour force to another employer, as this would constitute staff leasing (*v.*), which under the Italian legal system is permitted only if it is operated by an employment agency that is registered in the appropriate public register (articles 4 and 5, Legislative Decree 276/2003).
Special regulations permit the posting of workers in the event that an undertaking is experiencing an emergency and complies with specific procedures that involve the trade unions (article 8, Law No. 236/1993).

INTRA-GROUP POSTING: In accordance with the Italian legal system, sending a worker from one undertaking to another belonging to the same group may constitute a posting, since the various undertakings involved are independent and distinct legal entities. The Italian system does not recognize groups as legal entities (and accordingly sending a worker may not be considered as a mere transfer from one production unit to another, pursuant to article 2103, paragraph 1, last period of the Civil Code). Consequently an *intra*-group posting that fully meets the criteria of a posting *tout court*, must also comply with the requirements of article 30, Legislative Decree 276/2003 (the interest of the home organisation and temporary nature of the posting). However, even though the home organisation cannot automatically be considered to have an interest in the posting merely because it occurs between companies belonging to the same group, the practice of posting within a group of companies corresponding *"to a real business requirement for the purpose of rationalizing forms of development*

in order to achieve a balance for all of the companies in the group" is considered lawful (v. Ministry of Labour and Social Policy, Memorandum No. 28/2005), however this is always subject to the requirement that the posting be temporary. An intra-group posting is one of the cross-border situations that is contemplated (v.), and takes place between businesses established in different Member States and belonging to the same group.

CROSS-BORDER POSTINGS: Cross-border postings involve many organisational formats with respect to labour (cf. relevant measures), performed through contracts (including commercial contracts) among employers. These common feature of these contracts is their temporary nature, involving one or more workers at a business organisation other than the one that employs them. This arrangement cannot constitute an employment relationship. The employment relationship between the posted worker and the home organisation is maintained. Such a posting involves two different states, namely the state in which establishment of the home organisation is located and another different State to which the worker is sent to work on a temporary basis. A posting may also involve a self-employed worker established in a State different from the one in which he is temporarily working in favour of another business organisation. Article 1, para. 3 of Directive 96/71/EC of the European Parliament and the Council, concerning the posting of workers in the framework of the provision of services, takes into consideration the following three transnational measures:

a. posting workers under a services contract concluded between the undertaking making the posting and the employer established in another Member State. The worker works on behalf of and under the direction of the home organisation (that is, the employer established in the sending State). The organisation benefiting from the services does not establish an employment

relationship with the posted worker, who, during the posting period, remains an employee of the employer that sent him. This type of contract is very similar to *a contract of work* (*v.*);

b. posting workers in the context of a commercial relationship between companies established in different Member States and belonging to the same group of companies. During the term of the posting, the worker remains employed by the employer that sent him. This arrangement is the same as the so-called *intra-group posting* (*v.*);

c. posting workers in the context of a commercial relationship between a temporary employment undertaking (or an undertaking that provides temporary transfers of workers) on one hand, and the undertaking that uses the workers on the other, when the home organisation and the one using the workers are established in different Member States. A worker that is transferred from the temporary employment undertaking, for the entire term of the transfer period, remains an employee of the transferring undertaking. This arrangement is the same as staff leasing (v.).

POSTED WORKER (ITALIAN POSTING): the employed worker that is temporarily sent to work for an employer that is distinct from the one with which there is an employment relationship. The employment relationship with the home organisation is maintained during the posting period as well (v.), during which the worker, to satisfy the home organisation's interest, performs his duties within the organisation of the employer that is using his services, or host organisation.

POSTED WORKER (TRANSNATIONAL POSTING): article 2, par 1, Dir. 96/71/EC of European Parliament and of the Council, concerning the posting of workers in the framework of the provision of services, defines a posted worker as for 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.

This relates to the employee of a employer established in a Country that is different from the one in which he is working on a temporary basis.

During the term of the posting, the posted worker remains under the authority of the original employer, providing his labour services in the context of a relationship that is substantially the same as a contract of work, an *intra*-group posting or staff leasing, provided for by the Italian legal system. The organizational measures falling within the Community regulations governing cross-border posting (*v.*) are set out in article 1, para. 3, letters a), b) and c) of Directive 96/71/EC of the European Parliament and the Council concerning the posting of workers in the framework of the provision of services.

FREEDOM TO PROVIDE SERVICES: article 49 of the EC Treaty prohibits restrictions on freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community and provide their services in another State. (*v.*). Any measure restricting the free provision of services following the entry into force of the EC Treaty is prohibited and restrictions existing at that date must be eliminated within the transition period, through the adoption of Council directives, in accordance with a general progressive plan.

FREEDOM OF ESTABLISHMENT: Article 43 of the EC Treaty prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Freedom of establishment includes the right to take up activities as self-employed persons and to set up and manage undertakings.

These entities may establish themselves (by opening agencies, subsidiaries, branches or offices) in a Member State other than that in which they are originally established. Any measure restricting the freedom of establishment, after the entry into force of the EC Treaty is prohibited and restrictions existing at that date must be gradually phased out through the adoption of Council directives, in accordance with a general progressive plan.

REQUIRED STANDARDS OF APPLICATION: according to article 9, para. 1 of Regulation (EC) No. 593/2008 of the European Parliament and the Council, on the law applicable to contractual obligations (Rome I) *"Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*.

The above-mentioned definition originates with the significance attributed in the jurisprudence of the Court of Justice of the European Communities to the concept of public policy (*v.*).

Overriding mandatory provisions, which derogate from the Community's principle of the freedom to provide services (in fact the provider of services is subject to them for the sole reason that it has an establishment in a State other than that of origin), have a logical and legal foundation in the protection of interests associated with the social, economic and political stability of the State in which the services are performed, independently of the legislation applied by the parties.

PUBLIC POLICY: based on article 46, para. 1 of the Treaty establishing the European Community (formerly article 56) public policy operates as a general principle by virtue of which the freedom to provide services may be derogated from a regulatory or administrative source.

Given recital No. 41 of Directive 2006/123/CE on services in the internal market, the concept of public policy covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare.

With specific reference to cross-border posting, public policy operates as a further possible extension of the application of the regulations in force in the State in which the posting takes place, in accordance with the provisions of article 3, para. 10, of Directive 96/71/EC.

EQUAL TREATMENT (OR THE PRINCIPLE OF NON-DISCRIMINATION): article 3, paragraph 1 of Legislative Decree 72/2000, implementing Directive 96/71/EC, lays down the general rule that posted workers in a cross-border posting (*v.*), must be subject to *"during the term of the posting, the same terms and conditions of employment that are provided for by legislative, regulatory or administrative provisions, and collective agreements which have been concluded by the most representative employers' and labour organizations at national level, that are applicable to workers providing similar services in the place in which the posted workers perform their activities."*

This provision must be interpreted and applied in light of the what has been established by the cited Directive and settled case law of the Court of Justice of the European Communities. Consequently it should be noted that businesses that

conduct cross-border postings are required to comply, with respect to the matters listed in article 3, para. 1, letters *a*) – *g)*) of Directive96/71/EC, with minimum levels of terms and conditions of employment laid down by legal, regulatory and administrative provisions and collective agreements that are most representative of the State in which the work is carried out. Furthermore, in accordance with article 3, para. 10 of Directive 96/71/EC, the regulations of the State in which the work is performed that establish "*terms and conditions of employment*" also apply with respect to matters other than those listed in paragraph 1 referred to above, "*in the case of public policy provisions*".

The principle of freedom to provide services (*v.*) remains applicable, according to which internal national regulations cannot be applied to companies that provide services under a cross-border posting assignment, if this would give rise to an obstacle to free access to the market of a Member State.

It should therefore be concluded that internal regulations (that is, those of the state in which the work is performed) may not be applied if the home organisation, on the basis of regulations in force under its system (State of establishment) is able to protect the terms and conditions of employment of its posted workers, to the same extent and meeting the same requirements as the regulations in the State in which the posting occurs.

STAFF LEASING (ITALIAN SYSTEM): article 2, paragraph 1, letter *a*) of Legislative Decree 276/2003 defines staff leasing as *"the professional provision of labour, on an open-ended or fixed-term basis"*. For the purpose of the performance of staff leasing activities, article 4 of Legislative Decree 276/2003 provides that agencies with an establishment (*v.*) in Italy must be registered in the appropriate section of the register of employment agencies maintained by the Ministry of Labour. The legal and financial requirements required for registration in that register are

set out in article 5 of the cited decree.

STAFF LEASING (CROSS-BORDER): article 4, paragraph 1 of Legislative Decree 72/2000 implementing Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, provides that staff leasing agencies established in a Member State other than Italy must be subject to the same regulations governing agencies established in Italy. Consequently the provisions contained in articles 20-28 of Legislative Decree 276/2003 apply to them.

With reference to the legal and financial requirements referred to in articles 4 and 5 of Legislative Decree 276/2003, pursuant to the provision in article 4, paragraph 3 of Legislative Decree 72/2000, businesses that provide temporary labour (*correction*: subcontracting agencies) do not require the authorisation referred to in article 4, paragraph 2 of Legislative Decree 276/2003, if "they can show that they are operating pursuant to an equivalent administrative ruling, issued by the competent authority of an EU Member State other than Italy".

ESTABLISHMENT: according to the case law of the Court of Justice of the European Communities (EC), the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period. This requirement may also be fulfilled where a company is constituted for a given period or where it rents the building or installation through which it pursues its activity. It may also be fulfilled where a Member State grants authorisations for a limited duration only in relation to particular services. An establishment may take the form of an agency, subsidiary, branch or representative office, but may also consist of an office managed by a provider's own staff or by a person who is independent but authorised to act on a

permanent basis for the undertaking, as would be the case with a representative office.

This concept of an establishment requires the actual pursuit of an economic activity at the place of establishment of the provider (which is the actual place in which the establishment is located), and accordingly a mere letter box does not constitute *"an establishment"* (v. recital No. 37, Dir. 2006/123/CE of European Parliament and of the Council, on services in the internal market). The concept of an establishment is particularly important for the purposes of identifying the legislation that applies to an undertaking's employees, which as a rule is that of the place of the establishment (for example for an undertaking established in Italy → Italian law applies).

However, it is not necessary to have an establishment; it is sufficient that the work be performed by posted workers in the territory of a Member State (*v.*) in the context of a cross-border posting (*v.*) in order to be able to apply the working and employment conditions in force in the State in which the work is performed, with regard to the matters listed in article 3, para. 1, letters *a*)-*g)*) of Directive 96/71/EC of the European Parliament and the Council, set out by statutory, regulatory or administrative provisions and/or collective agreements or by arbitration awards that have been declared universally applicable. The application of the regulations resulting from collective agreements or arbitration awards is furthermore limited to the activities that relate to the construction sector, listed in the relevant annexe of the cited Directive.

In any event the parties (employer and workers) may agree to apply the regulations of a State other than that of the establishment, however, if such an agreement is reached, it may not derogate from the overriding mandatory provisions (v.) of the State in which the work is performed.

ANNEXE TO SECTION 1: SERVICE ABROAD OF INSPECTION ORDERS

The topic of service abroad relates to the inspection offices of the Ministry of Labour and Social Policy for their necessary procedural involvement in labour inspection activities and enforcement of penalties. The issue of the proper procedures for Service of sanctions (minutes of investigation and dispute, order-injunction, and so on) abroad is worth exploring at some length, which follows, preceded by a brief *excursus* of the relevant regulations.

Service in the event of a residence, address for service or dwelling abroad.

By virtue of the reference contained in article 14, paragraph 3, of Law No. 689 of 24 November 1981, if the addressee of the document does not have a residence, address for service or dwelling in the State, and has not elected address for service or appointed an agent with general authority with the powers provided for under article 77 of the Code of Civil Procedure, the criteria used for serving administrative sanctions are those provided for in article 142 of the Code of Civil Procedure.

Assuming that the foreign address of the addressee is known, this rule is applied in preference to the procedure indicated in international conventions in force and applicable to the specific case, namely by requiring the Consular Authority to act, pursuant to articles 30 and 75 of Presidential Decree No. 200/1967 on consular functions and powers. In accordance with the provisions of paragraph 2 of article 142 of the Code of Civil Procedure, only when it is not possible to effect service in one of the aforementioned ways, the formalities to be followed are those laid down in the first paragraph of that

article.

With regard to the complex issue of service abroad, it must first be divided between service abroad of judicial and extrajudicial documents in civil and commercial matters, service abroad of documents in criminal matters (which are foreign to inspection activities as such), and finally, the type of interest to us, service abroad of administrative documents and measures.

With respect to service abroad of judicial and extrajudicial documents in civil and commercial matters, different sources have developed over the years: the Hague Convention of 15 November 1965, which was implemented in Italy by Law no. 42/1981; for the states of the European Union (except for Denmark) Regulation No. 1348/2000, which replaced the Hague Convention, and subsequently **the new Regulation on intra-Community service** of 13 November 2007 (Regulation No. 1393/2007[1]) concerning service and communication of

[1] In each Country a request to proceed must be submitted to a **Competent Receiving Agency**. At the request of the party serving the notice, the bailiff at the Bailiff's Office, having received the documents to be served, forwards them by post to the designated Competent Agency, together with a form containing the request for service and the main details of the document. The copies of the document to be served need not be translated into the language of the country where the document is served, but this is usually requested by the addressee's country. By contrast, the standard form containing the request for service and main details of the document, which is delivered to the addressee so that he may immediately determine the key points of the document that has been served, must always be drawn up in the language of the relevant State, or in French or English. The Central Authority proceeds with the service in accordance with the methods laid down by the domestic law of the State of destination. The Agency also prepares a certificate (in accordance with the form established by the Convention) indicating that the service has occurred and the methods by which it was performed, the place and date, as well as the identity of the person to whom the document was delivered.

Article 1 of Regulation No. 1393/2007, governing "civil and commercial matters", expressly excludes "*revenue, customs or administrative matters* [and] *liability of the State for actions or omissions in the exercise of state authority (acta iure imperii)*" and reiterates the *"dual channel"* of transmission of documents (direct contact by letters rogatory between designated bodies by Member States and direct service in the third alternative through a consulate, by post or the immediate induction of a bailiff or other officials or persons with the authority to carry out service directly in the receiving State). In particular, we note: the possibility of refusal to accept the document to be served if there has been failure to comply with language requirements, in exceptional circumstances; the more flexible language scheme, which provides that the document should be drawn up in an official language of the place of

documents (OJEC, L 324 of 10 December 2007), which, in article 1, expressly excludes *"revenue, customs or administrative matters [and] liability of the State for actions or omissions in the exercise of state authority (acta iure imperii)"*. As of 13 November 2008 (except for Article 23, applicable as of 13 August 2008), superseded Regulation 1348/2000, which was abrogated in its entirety.

Service of administrative documents on persons living abroad in the event of a known address

I. In terms of provisions that relate more specifically to inspection, with respect to serving **administrative documents** abroad, **the Strasbourg Convention of 24.11.1977 is in force, having been ratified by Italy by Law No. 149 of 21/03/1983**. At present, the other States that are parties to this Convention are: **Austria, Belgium, Estonia, France, Germany, Italy, Luxembourg** and **Spain**.

In the event that it is necessary to serve an administrative document on a person residing abroad, it is therefore necessary to verify first of all whether the country of destination has ratified the convention[2].

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service or in *any language understood by the addressee*; the addressee's right to be informed of his right of refusal, not only by the decentralized authority of the receiving State (in the case of letters rogatory), but also of the diplomatic or consular officers or authority or person tasked with carrying out direct service by post (in the event that direct postal service is used by the sending State).

With respect to consular service, the use of which is recognized as an alternative, article 30 of Presidential decree 200/1967 entrusts to the consular authority the task or directly serving the documents delivered to it, including by post or through local authorities, in accordance with international conventions and the laws of the State of residence, subject to the authority, pursuant to Article 75 of Presidential decree 200/1967, to deliver documents for service to the Consul in whose district the addressee is located. It should however be noted that this instrument is generally used for service upon Italians living abroad.

In practice, direct service by mail allows Italian bailiffs to send documents by registered mail with return receipt. Naturally this service shortens the time frames involved, but may involve considerable risk that the process does not succeed, since, unlike service by the domestic postal services pursuant to article 8 of Law no. 890/1982, the procedure may not be considered to have been completed if the addressee refuses to accept the envelope or to sign the return receipt and proof of delivery is missing for any reason.

[2] Complete information on this Convention may be found on the Web site at www.conventions.coe.int.

If this is the case, pursuant to this Convention, requests for service of documents must be sent in the manner described below.

A. Directly to the Central Authorities designated by the contracting states.

Article 2 of the Convention states that each Contracting state shall designate a **Competent Receiving Agency** to receive and take action on requests for service of documents relating to administrative matters from other Contracting States.

Pursuant to article 6 of the Convention, the request set out in the relevant form may also relate to a particular method of service requested by the requesting authority, unless such a method is incompatible with the law of the requested State. The requesting authority may request that service be effected within a specific time, and the Competent Receiving Agency shall comply with that request if it is possible to do so within that time limit.

The request and the document must be sent in duplicate in Italian (however, for the purposes of properly effecting service, to prevent the rejection of the document by its addressee on the ground that he does not know the language in which it is drawn up, it is recommended that a translation be provided in the language of the addressee's country or in a known language of communication) accompanied by a facsimile of the form that is attached to the text of the cited Convention and a note, in English or French, duly and completely filled out in one of the same languages.

Under the title *"Council of Europe Treaties"* that appears on the top left of the page, click on the heading *"Full List"* to view a full list of conventions; reference 094 provides a link to the convention in question, namely *"European Convention on the Service abroad of Documents relating to Administrative Matters"*. Click on this reference to access the text of the Convention (in word or html format) as well as a list of the Central Authorities designated by the contracting parties for receipt of notifications and the forms to be used (these are set out at the end of the text of the Agreement in Word format).

At this point the authority of the requested State furnishes a certificate in accordance with the model form appended to the Convention, confirming that the request has been complied with, or if the request has not been complied with, it provides the reason. The certificate is forwarded directly to the requesting authority by the authority that has prepared it.

B. Through its consular officers, or, if circumstances so require, its diplomatic agents

Pursuant to article 10 of the cited Convention, each Contracting State may effect service of documents directly through its consular officers or, where circumstances so demand, by its diplomatic agents, preferably translated into the language of the addressee's country on persons within the territory of other Contracting States. This procedure may be used in relation to nationals of the requesting state and may be prohibited in cases in which at the time of ratification or approval of the Convention, an individual State has opposed such service within its territory in the case of documents to be served upon its nationals or upon nationals of a third State or upon stateless persons; any other Contracting State may claim reciprocity.

C. Direct service by means of registered letter with return receipt

Pursuant to article 11 of the cited Convention, each Contracting state should be free to effect service of documents directly on persons residing in another Member State **by registered letter with acknowledgement of receipt**, translated into the language of addressee's country. Any individual State may object to this type of service within its territory, and the other Contracting States may claim reciprocity. To date, Germany has objected to the type of service available under article 11.

D. Other ways to effect service

Pursuant to article 12 of the Convention, each Contracting state shall be free to use diplomatic or consular channels for the purpose of requesting service of documents, pursuant to articles 30 and 75 of Presidential decree 200/1967 on consular functions and powers (this method will be discussed in more detail below).

II. In the event, however, that **the country is not a signatory of the aforementioned Convention (but is included in the list of countries below**), as indicated by the Ministry of Foreign Affairs, Directorate General for Italians Abroad and Migration Policies, Office IV, it is still possible in relation to international practices to serve **notice by means of an international registered letter**, using the same methods referred to in the previous point, as long as local regulations do not contain obstacles to direct transmission by Italian government offices:

- ALBANIA
- AUSTRALIA
- CANADA
- CHILE
- COLOMBIA
- COSTA RICA
- EL SALVADOR
- PHILIPPINES
- FINLAND
- JORDAN
- GREAT BRITAIN
- IRAQ
- IRELAND
- ISRAEL
- LATVIA
- MOZAMBIQUE
- NEW ZEALAND
- NETHERLANDS
- OMAN
- PARAGUAY
- PERU
- PORTUGAL
- REP. OF KOREA
- SINGAPORE
- SLOVAKIA
- SWEDEN
- UGANDA
- HUNGARY

III. The service of documents on persons resident in the **Republics of former Yugoslavia (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro,**

Serbia and Slovenia) must be effected, as provided for by article 4 of the Convention between Italy and Yugoslavia on legal and administrative assistance signed in Rome on 3.12.1960 (Official Journal No. 237 of 20.09.62). Documents should therefore be sent directly to the aforementioned Ministry, DGGC Uff. II., Via Arenula 70, 00186 ROME

IV. Only in the event that it is impossible to effect service using one of the manners permitted by international conventions, **for all other countries** "***normal diplomatic channels*** " may be used, pursuant to articles 30 and 75 of Presidential Decree No. 200 of 5.1.1967, by sending two copies of the document, with a translation into the language of the addressee's country or in a language of communication (English or French) that is in use, directly to the Italian Diplomatic and consular representative offices abroad, taking care to identify the Consulate with jurisdiction in the territory with respect to the place of service (the consular network may be reviewed on the following web page: http://www.esteri.it/MAE/IT/Ministero/Servizi/Italiani/Rappresentanze/).

The Representative Office is responsible for returning a copy of the document to the requesting office with proof of service. For this purpose, to speed up the process and save money, a request should be made that the proof of service be sent to the **Certified E-mail Address** indicated by the Requesting Authority when making the request for service to be effected.

V. In the event that it is necessary to arrange for service of an administrative document **upon Italian nationals that are resident abroad**, the procedures to be used are as follows:

- **service by international registered letter** (for States that are parties to the Strasbourg Convention, pursuant to article 11 of the said Convention, and for

States that accept this form of service referred to in point II above);

- if an individual State of destination is not among those that accept such a procedure, the procedure provided for in articles 30 and 75 of Presidential Decree 200/1967 (in point IV above).

In cases that are referred to in this point, namely service upon Italian nationals, there is no requirement for a translation of the document or completion of the form; it is sufficient to send a request to the Italian Consulate with jurisdiction in the territory that correctly identifies the particulars of the addressee's residence.

VI. In the event of an **unknown address** it is not possible to effect service of the document abroad. However, in accordance with paragraph 5 of Article 14 of Law 689/1981 "*for residents abroad, if the residence, address for service or dwelling are not known, service is not mandatory…*".

In any event, if the addressee of a document cannot be reached, or the addressee's current residence, address for service or dwelling is not known, if the last residence or address for service is known or foreign place of birth is known, there is the slim possibility of arranging for service pursuant to Article 143 of the Code of Civil Procedure, provided that the State of destination contemplates a similar procedure. If necessary, the place of birth or last residence abroad of the interested party should be indicated, so that the Representative Consulate Office may act, and the Administrative Authority may direct the relevant documentation, for posting on notice boards in municipal offices. If this information is not available, the document is returned without service having been effected.

Service of administrative documents in ROMANIA

In absence of international cooperation agreements in relation to this topic, a request for service of administrative documents in relation to residents in the Republic of Romania is sent directly to the Italian Diplomatic/Consular Representative Office identified below in duplicate, together with a translation thereof preferably into the local language, accompanied by the relevant form. Subsequently the Consular Registry arranges for the return to the requesting office of a copy of the document with proof of service, in accordance with the procedure described in point IV.

Italian Embassy in Bucharest
Str. Henry Coanda 9, Sector 1
010667 - Bucarest
Tel. : 0040213052100 Fax. : 0040213120422
Web site: www.ambbucarest.esteri.it
E-mail: ambasciata.bucarest@esteri.it

It should be pointed out that, in the event of an unknown address, it is not possible to effect service since the information on "*the address for service/residence in Romania of Romanian nationals*", is considered personal information (Romanian Law No. 677/2001), and accordingly cannot be disclosed to the Consular Registry Office. In this regard, the local authorities have identified the National Institute for Population Records, Ministry of the Interior and Administration in Bucharest, as the relevant organisation to be contacted:

Inspectoratul National pentru Evidenta Populatiei din cadrul Ministerului Administratiei si Internelor
Str. Obcina Mare n. 2, Sector 6
Bucuresti (Romania)
Web site: http://www.evidentapersoanelor.ro
E-mail: inep@mira.gov.ro

SECTION 2

BRIEF OVERVIEW OF THE MAIN ASPECTS OF THE LAWS GOVERNING THE POSTING OF WORKERS IN ROMANIA.

1. GENERAL PROVISIONS ON THE ADMINISTRATIVE PROCEEDINGS FOR THE EMPLOYMENT CONTRACTS IN ROMANIA

The formal administrative system governing the labour relations in Romania is based on individual written employment contracts. This universal obligation is established pursuant to legislation on employment relationships, namely Law No. 53/2003 - the *Labour Code*, and must be in place before the worker takes up his / her activities.

The registration and monitoring of employment contracts are conducted through an electronic general register of the employees' work recordings, managed in parallel by employers and the Labour Inspection through its territorial labour inspectorates. Employers record the information pertaining to their employees in the register and send it to the territorial labour inspectorate before hiring takes place; information is also sent when the employment relationship is terminated (Government Decision No. 161/2006).

Employers with completely private share capital are required to include the individual employment contracts in written form, by delivering them to the territorial labour inspectorates (Law No. 130/1999).

The historical practice of registering workers, created in 1976 and based on a workbook, will be phased out in late 2010 and will be completely replaced by the electronic general register of the employees' work recordings and by a system of personal social insurance statements.

SUMMARY TABLE OF OBLIGATIONS IN RELATION TO EMPLOYMENT CONTRACTS TO BE COMPLIED WITH BY EMPLOYERS

No	OBLIGATION (OF THE EMPLOYER)	TIME FRAME	ON WHAT BASIS (DOCUMENT/RECORD)	GOVERNING LAW
1.	Request of a mandatory medical certificate: when employed and then on a regular basis	Prior to the conclusion of the individual employment contract (IEC)	- Verification of skills (a fiche is kept by the head of the workplace) - Medical file of the employee	- Law no 53/2003 – the Labour Code - Government's Decision (GD) no 355/2007
2.	Conclusion of the IEC in a written form	Prior to the beginning of the employment relationship	- IEC template	- Law no 53/2003 – the Labour Code - Order of the Minister of Labour no 64/2003
3.	Recording in the general employee register	Prior to the beginning of the employment relationship	- Software made available by the Labour Inspection, which is held and updated by the employer	- GD no 161/2006
4.	Data regarding the employee that are contained in the general employee register and in the IEC must be submitted to the territorial labour inspectorates (TLIs)	Prior to the beginning of the employment relationship	- Proof that data have been submitted online or on written form at the pay-desks of the TLIs - Database managed by the Labour Inspection	- GD no 161/2006
5.	Appropriate training given to the employees in the field of safety and health at work: - general training; - training at workplace; - regular training.	Prior to the beginning of the employment relationship	- Individual training fiche (is kept by the head of the workplace)	- Law no 319/2006 - GD no 1425/2006
6.	The IECs are registered at the TLIs (only by the employers entirely funded from private capital)	In 20 days from the conclusion of the IEC	- Registration no. and date on the form of the IEC	- Law no 130/1999
7.	Documents concerning the execution, modification, suspension and cessation of the IEC must be submitted to the TLIs (only by the employers entirely funded from private capital), including the documents proving a change of the workplace (delegation – posting abroad) *Provision valid until 31/12/2010*	In 5 days from the conclusion of the IEC	- Registration no. and date on the document submitted and/or registration no. and date on the document proving the submission of all papers	- Law no 130/1999

8.	Recording in the general employee register the cessation of an IEC	At the cessation of the IEC	- Software made available by the Labour Inspection, which is held and updated by the employer	- GD no 161/2006
9.	Data contained in the general employee register, regarding the cessation of the IEC must be submitted to the TLIs	At the cessation of the IEC	- Proof that data have been submitted online or on written form at the pay-desks of the TLIs - Database managed by the Labour Inspection	- GD no 161/2006
10.	Proofs that wage rights have been calculated are submitted to the TLIs (only by the employers entirely funded from private capital) *Provision valid until 31/12/2010*	On a monthly basis, before the 25th of the following month	- Registration no. and date on the document submitted and/or registration no. and date on the document proving the submission of all papers	- Law no 130/1999
11.	Update of the workbook *Provision valid until 31/12/2010*	In 15 days after being employed or after a modification or the cessation of the IEC	- Workbook (is kept by the employer or at the seat of the TLI, for the employers entirely funded from private capital)	- Decree-Law no 92/1976 - Order of the Minister of Labour no 136/1976
12.	Lists with the employees must be submitted to the authorities managing the social securities budgets (such as: pensions, unemployment, accidents at work, occupational diseases, health state)	On a monthly basis, before the 25th of the following month	- Proof that data have been submitted online or the registration no. and date on the submitted document - Database of the authorities managing those budgets	- Law no 19/2000 and Order of the Minister of Labour no 340/2001 - Law no 76/2002 and Order of the Minister of Labour no 405/2004 - Emergency Ordinance no 158/2005 and Order of the Minister of Health no 60/2006

2. NATIONAL COLLECTIVE LABOUR AGREEMENTS IN ROMANIA

The right to collective bargaining and the compulsory nature of collective agreements are guaranteed by the basic law, namely the Constitution of Romania.

The system of the collective labour agreements has a hierarchical structure (national, a division of the national economy, group of undertakings/unit, undertaking/unit) and is based on the principle of the representation by way of contract and universal application (Law no. 130/1996).

The collective labour agreement at national level is applicable to all employers in Romania.

SUMMARY TABLE OF THE MAIN FEATURES OF THE NATIONAL COLLECTIVE LABOUR AGREEMENT

Single collective labour agreement at national level 2007-2010	**Valid from 01.01.2007 to 31.12.2010**
Normal duration of working hours	- 8 hours daily.
Maximum duration of working hours	- 12 hours daily; - 48 hours per week.
Minimum duration of periodic rest	- 12 hours daily; - two days per week, usually Saturday and Sunday.
Minimum paid annual holidays	- 21 business days; - 20 business days in the first year of employment.
Minimum wage	- 600 Lei for unskilled workers; - 720 Lei for skilled workers; - 1,200 Lei for positions for which a secondary school diploma is required.
Compensation or payment for overtime	- compensation with time off within the following 30-day period or payment with a 100% surcharge%

3. NATIONAL COLLECTIVE LABOUR AGREEMENT IN THE CONSTRUCTION SECTOR IN ROMANIA

The collective labour agreement negotiated in the construction sector is applicable to all employers that operate in this field, regardless of whether they have participated in or have been represented during negotiations and signed this agreement.

SUMMARY TABLE OF THE MAIN FEATURES OF THE NATIONAL COLLECTIVE LABOUR AGREEMENT IN THE CONSTRUCTION SECTOR

Collective labour agreement in the construction sector	Valid from 05.12.2007 to 05.12.2010
Normal duration of working hours	- 10 hours daily.
Maximum duration of working hours	- 12 hours daily; - 48 hours per week (as an annual average).
Minimum duration of periodic rest	- 12 hours daily - two days per week, usually Saturday and Sunday.
Minimum paid annual holidays	- 21 business days; - 20 business days in the first year of employment.
Minimum wage	- 650 Lei for unskilled workers; - 780 Lei for skilled workers; - 1,300 Lei for positions for which a secondary school diploma is required.
Compensation or payment for overtime	- compensation with time off within the following 30-day period or payment with a 100% surcharge.

4. ROMANIAN LEGISLATION ON THE POSTING OF WORKERS

Directive 96/71/EC was transposed into Romanian legislation by means of Law no. 344/2006 concerning the posting of workers in the framework of the transnational provision of services, and the Government Decision no. 104/2007 *for the regulation of the specific procedure concerning the posting of workers in the framework of the transnational provision of services in Romania.*

The Labour Inspection is Romania's public authority in relation to the posting of workers in the framework of the transnational provision of services, which:

- functions as a **liaison office**, and exchanges information with the relevant institutions in the Member States of the European Union or the European Economic Community;
- **monitors the enforcement of the rights** of posted workers in Romania in the framework of the provision of transnational services;
- **receives,** through the territorial labour inspectorates, **reports from the undertaking** that provides transnational services in relation to the posting of workers.

An undertaking that posts workers to perform services in Romania must:

- **provide** the territorial labour inspectorate, in writing, in Romanian, before work activities begin, with information on the posted workers (a copy of this report must also be sent to the beneficiary);
- **ensure that the posted workers** benefit from the minimum level of essential

terms and conditions of employment required under Romanian law;

- **safeguard and make available to the labour inspector** during inspections, the contract relating to the provision of services and the documents required to check on the compliance with the working terms and conditions;
- **submit to the Romanian system of penalties** for failure to comply with legal obligations (associated with the posting procedure, or the failure to comply with Romanian regulations concerning the terms and conditions of employment).

SUMMARY TABLE OF THE RIGHTS OF THE ROMANIAN LABOUR INSPECTORS WITH RESPECT TO THE MONITORING THE APPLICATION OF LEGAL PROVISIONS ON THE POSTING OF WORKERS IN THE FRAMEWORK OF THE TRANSNATIONAL PROVISIONS OF SERVICES

Access to the workplace, without notice and without being accompanied by the workplace manager
Documents that the labour inspector will request from the legal representative in Romania of the Community company posting workers for the purpose of providing services: - the deed of incorporation of the Community company, containing identification information about it, its registered office, tax code, and name of legal representative (copies); - a document establishing the capacity of the legal representative in Romania or representative of the Community company, for the person acting as a liaison with the Romanian authorities (a copy of the original, if it relates to the incorporation of the company and the original document, if it relates to a proxy/power of attorney for activities in Romania); - a copy of the agreement concluded with the Romanian beneficiary, on the basis of which the Community company provides services; - a copy of the receipt for transmission of the report of posted workers to the territorial labour inspectorate; - a copy of the recruitment/employment document, or, if there is no obligation to present this document in the Country of establishment, the legal document provided for by the law of the Country of establishment, containing the essential components of the employment contract (valid at the time of the inspection), for each of the posted workers; - the receipt of the legal recruitment/employment in the Country of establishment for foreign workers; - a copy of the document relating to the change in work location from the Country of establishment to Romania (posting) and the documents that determine the extra monetary compensation payable for the posting, for each of the posted workers; - a copy of Form E101/A1 issued by the authorities of the Country of establishment for each posted worker; - a copy of the receipt for the payment of wages and fees associated with the posting, for each of the posted workers; - a document attesting to the hours of work performed by the posted workers (original); - documents attesting the actual performance of on-the-job training and health monitoring for posted workers (original/copy); - any other relevant document required by the labour inspector.
Identification of posted workers by legitimating
Interviews with workers involved in intra-Community postings and request for various identification sheets to be filled out in relation to the terms and conditions of labour from which they benefit
Photographs, audio-video recordings