

Posted worker pay requirements 1/22/23



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We have written before about changes to labour law affecting tax matters. Tax authorities are now scrutinising compliance with local and international law that provides for giving posted workers employment conditions that are consistent with the host country's national law, including prescribed working hours, rest periods, protection at work and minimum pay. This article explores the rules governing pay and their tax implications.

The legal framework

Section 14(2.5) of the Latvian Employment Act provides that in the case of a worker posting the concept and mandatory elements of pay should be determined according to the law or practice of the country the worker is posted to. A similar procedure applies to workers being posted to work in Latvia: pay is governed by the Employment Act and other Latvian laws relating to pay.

The definition of posting and related requirements have been passed into the Employment Act by transposing Directive 96/71/EC of the European Parliament and of the Council (as amended by Directive 2018/957). The directive aims to create a legal basis for equal treatment of local and posted workers across the EU by prescribing:

- Maximum working hours and minimum rest periods
- Minimum annual paid leave
- Minimum rates of basic pay, overtime pay and other conditions pursuant to section 14(3) of the Employment Act.

The directive is applied in order to provide workers that are posted temporarily to work abroad while keeping their current employment contract, with minimum labour protection levels in the host country. How this framework originated and evolved is partly linked to the fight against cheap labour in member states that pay comparatively higher remuneration levels, and seeks to resolve inequality across the EU.

Accordingly, a posted worker is entitled to at least the minimum wage at the host country's level.

The State Revenue Service's approach

In practice the SRS has started checking how these requirements are met by first assessing whether a worker's business trip qualifies as a posting:

1. An employer posts a worker to another country under the employer's agreement with the person for whom the work will be carried out.
2. An employer posts a worker to a branch or group company in another country.
3. A labour hire firm as employer posts a worker to a host company that is established in another country and will be directing the work to be carried out for its benefit.

If a foreign assignment is to qualify as a posting:

- There must be an employment relationship between the worker and the employer.
- The posting must include an international element (an international posting).
- The worker must be posted to a country where they do not usually work.
- The posting must be for a specified period.

Thus, having identified a worker posting, the SRS will check that the worker was paid the minimum or a higher wage for the relevant period according to the host country's national law.

It's important to note that under the directive, when the remuneration paid to the posted worker is compared with the remuneration due according to the host country's law or practice, we should refer to the gross remuneration and compare total gross amounts, not separate basic elements.

When it comes to charging taxes, the SRS will levy only the additional amount payable to the government. What we see in practice is that in similar cases the SRS will engage the National Labour Office, which is required to ensure not only that taxes are paid on the appropriate remuneration but also that the remuneration is actually paid to the worker.

An extra tax burden in Latvia or abroad?

If the remuneration is found to fall short of the host country's minimum level, the SRS may charge an additional tax on the relevant amount. Information on this minimum level is available to the SRS through the exchange of information with foreign tax authorities.

As regards the country of tax payment, we should assess whether the conditions that allow the person to continue paying personal income tax in their country of tax residence based on exclusions under article 15(2) of double tax treaties are met, or whether income tax is payable in the host country. In the latter case, either the payer of income or the worker may have to register for paying taxes, depending on the host country's national rules.

In the case of a posting, it's worth taking out an A1 certificate, which allows the worker to remain socially insured in their home country (this is issued for a period of two years, with the option of renewal).

A daily allowance as part of pay

This topic may raise some questions. According to the directive's preamble, a daily allowance associated with a business assignment often serves several purposes. To the extent its purpose is to reimburse expenses incurred during the business assignment (e.g. money spent on travel, meals and accommodation), the daily allowance should not be treated as a part of the remuneration. The member states have discretion to lay down rules for reimbursing such expenses according to their own national law or practice. The employer should reimburse such expenses to posted workers according to the national law or practice relating to employment relationships.

The Employment Act provides that a posting is governed by the law that regulates the reimbursement of business trip expenses, meaning a daily allowance must be paid during the posting. However, the rules make the following restrictions:

- The employer is required to pay the worker a daily allowance equal to 30% of the statutory

rate (under the Cabinet of Ministers' Rule No. 969).

- Unless the employment contract or collective agreement provides otherwise, the employer is not liable to pay the worker a daily allowance equal to 30% of the statutory rate if
 - the worker is provided with three meals a day, or
 - the remuneration payable to the worker equals what is paid to a comparable worker in the host country.

So Latvian law prescribes the right to pay a daily allowance of up to 30% in the case of a posting or none at all if conditions are met.

However, our assessment of the Latvian legal framework leads to the conclusion that the daily allowance is not treated as a part of the remuneration, which follows from both the Employment Act's definition and the case law. Thus, given its compensatory nature, the daily allowance should not be added to the remuneration in assessing whether this meets the host country's minimum pay level requirements.