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Legal News
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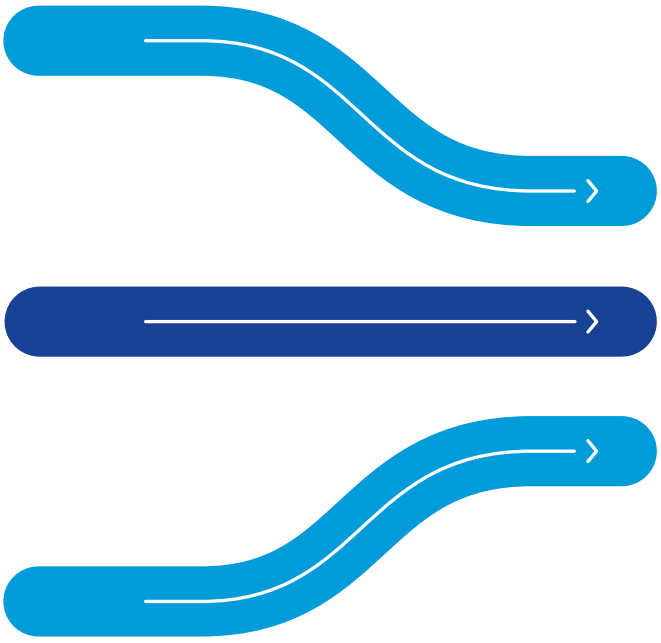
Central- and Eastern Europe



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German Federal Labour Court ruling will make it more difficult for nursing staff from Poland and other CEE countries to work in Germany

German minimum wage mandatory for Eastern European care workers in Germany

Care workers for elderly people in Germany are often recruited from Central European countries, including Poland. These workers are often employed only part-time, but in practice they work longer: they are often on duty 24 hours a day.

In a landmark judgment of 26.06.2021. (No. 5 AZR 505/20), the German Federal Labour Court (BAG) held that in such a case remuneration is due for the entire time of work performed, including on-call duty. At the same time, the Court pointed out that such care workers should be paid the hourly minimum wage in Germany, even if they are formally delegated to work in Germany from another country and employed in accordance with the regulations of that country. In the Court's view, the minimum wage provisions are mandatory provisions within the meaning of Article 9(1) of the EU Rome I Regulation. These take precedence and apply regardless of whether the parties have chosen a foreign law (i.e., made the contract subject to the law of a country other than Germany).

The judgment is being hailed in Germany as a landmark and has precedent-setting significance: in the future, the remuneration rules for caregivers posted to Germany must change. On the one hand, this means an end to wage dumping for this group of employees, but on the other hand it may significantly reduce the labour market for these persons in Germany, as fewer households will be able to afford to pay the German minimum wage to a care worker and pay for their overtime work.

The judgment, however, applies only to employed persons and does not therefore cover care personnel working in Germany as individual entrepreneurs.

Source: Judgment of the German Federal Labour Court of 24 June 2021, reference no. 5 AZR 505/20

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Landmark decision on minimum wage during postings abroad

At the request of a Hungarian court, the Court of Justice of the European Union interprets the definition of minimum wage.

A Hungarian transport company posted its employees to work in France. The drivers received a fixed daily allowance, which increased proportionally to the duration of the posting. The employer labelled the daily allowance as reimbursement of expenses.

The employees filed a lawsuit against their Hungarian employer, because in their view, their hourly wage did not reach the French minimum hourly wage – thus not fulfilling one of the main requirements of the Posting Directive. In court, the Hungarian employer argued that the daily allowance was part of the drivers' wage, which – calculated that way – reached and even exceeded the French minimum wage.

At the initiative of the Hungarian court, the Court of Justice of the European Union ("CJEU") conducted a preliminary ruling procedure. Firstly, it stated that the Posting Directive applies to drivers working in the road transport sector.

Secondly, the CJEU stated that in the case of an infringement of the posting rules, a lawsuit may be instituted in both the destination member state and the member state in which the employer has its registered seat.

Based on the lump sum and the progressive nature of the daily allowance – even if it was labelled as "reimbursement" – the CJEU concluded that it was in fact not a reimbursement. Rather, its purpose was to compensate the drivers for being away from home and for other disadvantages entailed by their posting. Consequently, the CJEU decided that such a daily allowance is an "allowance specific to the posting" which is part of the minimum wage. Although not mentioned in the decision, it must be noted that in this case the costs of the posting must – of course – be borne separately by the employer.

According to the CJEU, the daily allowance would not be part of the minimum wage if paid to reimburse the posting expenses actually incurred (e.g., costs of

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travel, accommodation and food) or if it qualified as a wage supplement (e.g., overtime bonus) under the national law of the destination country.

To sum up, it can be concluded that the daily allowance (if it really is reimbursement) is not part of the wage during posting, which therefore in itself must reach the minimum wage in the destination country.

The Hungarian lawsuit is still in progress, so no final decision has yet been made. However, it is already clear that in the case of posting employees abroad, the employer must pay particular attention to appropriate design of the wage structure.

Source: Judgment of the Court of Justice of the European Union in Case C-428/19

Lithuania introduces mandatory “construction worker ID code”

Effective 1 January 2022 all workers on construction sites across Lithuania will need to have a unique “construction worker ID code”.

The Lithuanian parliament has amended the Construction Law as follows: effective 1 January 2022 every construction worker in Lithuania will have to be assigned a unique “construction worker ID code”. The new requirement will apply to employees of construction firms as well as self-employed persons.

The stated purposes of the new requirement are:

- combating illegal work and exploitation of workers;
- combating failure to report construction works;
- combating failure to account for income and other forms of tax evasion.

Until the end of 2021 the Ministry of Social Security and Labour will adopt a special-purpose database to record ID codes of construction workers and related information. The burden of providing the data to the system will fall on a construction worker’s employer, who will also have to ensure that it can provide documents in case a construction site is inspected by state authorities.

Once the requirement is in force and the database is operational, the state authorities plan to run checks on actual construction sites and compare workers’ documents against the data in the database.

In case of discrepancy or complete absence of data, penalties will apply, ranging from EUR 500 to EUR 7 000.

Source: Law amending the title of the fourth section of the Construction Law of the Republic of Lithuania No I-1240 and adding Article 221 to the Law

https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/d6bccdc0db0111eb866fe2e083228059?jfwid=-1cefbqu4zm

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Amendments regarding posting of workers to Romania

Amendments to the Methodological rules on the posting of workers within transnational services provision in Romania

Under amendments to the Methodological rules on the posting of workers (the Rules), the provisions on administrative cooperation, assessment of risks arising from non-compliance with the provisions on the posting of workers have been supplemented, the notice period has been amended, and the procedure for extending the period of posting and the situation where the posted worker is working in another Member State have been regulated.

As regards administrative cooperation, in order to obtain and forward documents on the activity of workers to the requesting authority, the Labour Inspection will request territorial labour inspectorates to carry out inspections and controls in order to identify any non-compliance or abuses concerning transnational posting, including cases of undeclared work and false self-employment.

The notice period for transnational posting has been amended. Notice must be sent to the territorial labour inspectorate no later than before the start of the posting and any change occurring during the posting must be notified no later than the day the change occurs.

With the introduction of Article 71, the procedure for extending the period of posting has been regulated and a notification template has been introduced in Annex 2 to the Rules.

An additional criterion has been introduced for assessing the risks caused by non-compliance with the provisions on the posting of workers. For the purposes of risk assessment, the Labour Inspection or the territorial labour inspectorate will also consider other sources of media information it comes into contact with or becomes aware of.

Furthermore, the situation where the posted worker is carrying out their activity in another Member State has been regulated. In this case the worker

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is considered to be posted by the temporary employment agency that provided the worker and the user undertaking is obliged to inform the temporary employment agency at least 30 days before the worker starts working in another Member State and to notify the territorial labour inspectorate no later than the day before the worker is posted.

The bnt team in Romania is at your disposal for further information, assistance in implementing the new legal provisions, as well as in drafting necessary documents.

Source: Government Decision no. 654/2021 amending and supplementing the methodological rules on the posting of workers within transnational service provision in the territory of Romania, approved by Government Decision no. 337/2017.

New law on short-time work in Slovakia to start in 2022

After confusing support projects, order is being brought to employment law by a brand new law on short-time work.

From 2022, Slovak employment law will finally have clear and understandable rules for state support during the period when employers cannot provide their employees with work or can provide less work.

The new Act on Short-Time Work is seen as a novel instrument for granting state aid, which clearly serves the purpose of compensating for an employee's wage during a period when the employer cannot assign employees to work to the extent originally agreed and short-time work therefore occurs. Although the Slovak Ministry of Labour and Social Affairs has proposed including self-employed persons in this scheme, the law ultimately applies only to employees and employers — but not to employers and employees in public administration.

State financial support for employers consists of a contribution to the partial reimbursement of wage costs per employee for each hour of work lost by the employer during short-time work, amounting to 60% of the employee's average wage. This support is intended to help employers and workers in times of crisis, similar to the first aid project that has supported them to date. State assistance during short-time work is activated when the employer is not able to assign work to at least one-third of employees in the amount of at least 10 % of the fixed weekly working time, due to a labour obstacle on the employer's side.

A prerequisite for the grant of state aid is the existence of a temporary external factor beyond the employer's control. This is in particular an exceptional situation, a state of emergency or exception, an extraordinary circumstance or a case of force majeure. But also, for example, an unexpected reduction in subcontracting by the employer's contractors.

The state provides support during short-time work for a maximum of 6 months in a period of 24 consecutive months.

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The conditions for receiving support include maintaining the job for which the state has provided support for at least two months after the support has ended and a separate written agreement with the trade union or with the employee on the application of this procedure.

Source: Act No 215/2021 Coll. on short-time work

Court decision protects phone data from police access

The state may not use telecoms data to the same extent as before to solve crimes

Estonia's Supreme Court has found that the rules currently in force in Estonia on storage and use of telephone data by telecommunications companies violate EU law. To store data permanently is unlawful as it violates the fundamental right to respect for private life. This means that, in future, neither the public prosecutor nor the courts can obtain users' call and location data from telecommunications companies for the purpose of investigating criminal offences. The use of such data is to be excluded as long as Estonian law on storage and use of data does not comply with EU law.

According to Uno Lõhmus, a former judge at the European Court of Justice, EU directives and EU jurisdiction do not completely exclude collection, storage and availability of traffic and location data. However, it is illegal to store and share the entire data of all users of communications.

Individuals can always demand information about themselves from a communications company and make it available to the judicial authorities if necessary.

The judgment concerns data generated by a communication device, e.g. a telephone, which makes it possible to determine when and for how long a connection took place and where the parties involved were located. This enables conclusions to be drawn about many personal aspects of telephone users. This type of tracking is considered simple, cheap and efficient.

According to the state prosecutor, the judgment will have the greatest impact on proceedings in which communication data is decisive evidence – as is often the case nowadays, because phones are ubiquitous. In certain cases, gathering evidence can become impossible. The use of such data has often been crucial for investigators and in many cases has made it possible to uncover serious crimes and save lives. In any case, detection of crimes is now becoming more complex, time-consuming and therefore more expensive.

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Current practice goes back to a European Union directive of 2006. The impetus came from the terrorist attacks in London in 2004 and 2005 and pressure from law enforcement agencies in several countries.

Source:

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2. https://www.riigikohus.ee/et/uudiste-arhiiv/riigikohus-riik-ei-saa-sidefirmade-kogutud-andmeid-kuritegude-uurimiseks-valja-nouda

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4. https://www.err.ee/1608129820/uno-lohmus-kaua-tuleb-oodata-oiguse-kooskolla-viimist-pohioiguste-nouetega 04.03.2021

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