postcare 2.0

Informing the Care Services Workers on Posting Rules

POSTCARE 2.0

Marek Benio – Transcript of 8 videoblogs

CLIP 1 (0:59)

When you want to deliver a service across borders on the internal market of the European Union, it's easier than you think. You just have to send your workers to another Member State to temporarily carry out their work there until the service is done. But in order to do this. You need to determine which labour law is applicable to their employment conditions. You have to also determine where will they pay Social Security contributions. And last but not least, you have to determine which law is applicable when it comes to taxes to avoid double taxation. Let me explain in detail the differences in these three legal areas.

Clip 2 (2:04)

When it comes to labour law, the parties are free to choose the legal order, which will be applicable to their contract. They may even choose that part of the contract would be subject to 1 legislation and another part of the contract to another legislation. But the free choice is not completely free. It is limited by the protection. Of workers, right? So such a choice may not limit the protection or deprive the worker the protection that is guaranteed to him by the norms which they cannot derogate by the way of contract. Which are regulated in the legislation, which would have been applicable had they not chosen. The legal the legal system. Usually it would be the legislation of habitual place of work. The second. Restriction is that there are self imposing norms from the receding Member States, which are aimed at the protection of the workers of that Member State against any workers who would be employed. On the basis of less favourable. Working conditions in the basic labour law areas such as remuneration, working time, the time of rest and the right to paid annual leave, but also health and safety, but also. Equal treatment non discrimination rules. Employment of minors. And also. The protection of. Women who gave birth to a child.

Clip 3 (2:19)

When they ask me what is most important in the Posting of Workers Directive, what do we have to pay attention to? I usually say that. This is the principle of favourability. It's Article 3, Section 7. Which forces the employer to constant comparison. Of which provisions from which legal system of labour law are more favourable for the work, because it says that the application of the self imposing norms of the receiving Member State may not be. Or may not be in contradiction with application of more favourable provisions from the sending Member State. Well, in order to understand it, it's very easy to explain it on the basis of remuneration. When a person from low wage country is posted to high wage country to perform work, he or she must receive at least the remuneration which is guaranteed in the receiving Member States in the collective labour agreements, or at least a

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minimum remuneration. This remuneration may must also consist of all obligatory elements according to the law of the receiving Member State. But when a person is posted from a high wage country to a low wage country, the principle of favourability. Says that he may not receive less than he would have received back home for doing the same work. This way this provision levels up the remuneration, so it's a mechanism of convergence.

Clip 4 (2:05)

As you can see, in case of labour law, we have the mechanism of harmonisation of legislations, so the starting point is this, the Member States are free to determine to architect there labour legislation. They may have labour codes, they may have collective agreements. They may have other tools like jurisprudence in order to determine the basic working conditions and the employees rights. But when it comes to harmonisation, each of this system must comply with minimum standards and the minimum standards are usually determined by the way of directives on the European level. In case of posted workers, however, there is no directive determining minimum standards. For all posted workers in the European Union? Oh no! It's much smarter than this. Imagine that the posting of Workers Directive. Compels the receiving Member States to impose their standards on the workers who are temporarily posted to their territory. But they have to be executed from the employers who as service providers from another country, have no establishment in the receiving Member State. The problem of execution of these minimum standards which are higher standards of the receiving Member States is very complex.

Clip 5 (3:45)

In case of Social Security, we have to determine the applicable legislation. Because in Social Security in the European law, there is no harmonisation, there are no minimum standards required by the European law. Of course, there are minimum standards required by international law: International Labour Organisation is the forum where international treaties are determining the minimum standards of working conditions, but when it comes to the European Union, we have the mechanism of coordinating very different. Social Security systems. The starting point is exactly the same as in the case of labour law. The Member States have full autonomy. In determining in structuring their Social Security systems, so as a Member State, you are free to have low contributions or high contributions, low benefits or high benefits. You can restrict access to benefits you can give away benefits as you please. When a worker crosses border, it is very important. That he or she does not lose social security protection just by crossing internal border. What would be of free movement of people, free movement of persons or free movement of workers if by crossing a border you would jeopardise your own social security protection. In case of the European law, we have the golden rule. Only one legislation is applicable, but it is applicable in its entirety. So unlike in the case of labour law, you may not construct a patchwork. In the field of Social Security, you apply one legislation only. Now the big question is which legislation is it? Is it descending Member State legislation or the receding Member State legislation? And as a principal, you should pay Social Security contributions wherever you work. And this is known as Lex Loci laboris principle. In cases where you know that after performing a job,

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you're guaranteed to return to your previous social security system, it makes no sense to shred the history of social security contributions between two systems, or even more systems. Therefore, in such situations of temporary posting. We need to step aside or step away from the principle of lex loci laboris. Lex loci laboris becomes an exception in such situations. Whereas the rule should be that you continue to be subject of the same social security system even when you cross borders.

Clip 6 (3:20)

Some workers are sent by their employer. To perform work in another Member State for a limited period of time. If this period of time does not exceed 24 months and the person is not sent to replace another posted worker, he or she should remain in the social security system of the sending Member State. This way we avoid the very complex situation where you would have to claim social security benefits partially from many systems. But what about persons who are constantly and not temporarily performing their work in many Member States, more than one Member State? Well, in this case it is even more important to keep them in one single system and not to swap systems whenever they cross borders. Imagine the truck drivers who would cross 3 borders a day. They are borders between social security systems. So for highly mobile workers whose job is not temporarily but constantly. To be in various Member States we've invented legal fiction which pins them into one single legislation. So again, the principle of single legislation is very important here. Now, which legislation is this? Usually, is the legislation of the place of residence, but under one condition that a substantial part of the work is carried out in that Member State. By substantial part, we mean more than 25% of the working time. If it is less, this would usually be the Member State were the employer has registered their office - the employers Member State. Unless the work done in the place of residence in the country of place of residence is lower than 5% of working time and brings less than 5% of remuneration. In that case, we call this a marginal work and we disregard the work performed in this Member State when it comes to determining the applicable legislation. So for highly mobile workers, it would be either. The Member State of residence or the Member State of the registered office of their employer.

Clip 7 (3:26)

Can we post third country nationals as part of our team in the framework of provisional services? Well, the short answer is yes, of course. If they are lawfully employed and legally residing in the sending Member States, yes. Their employer has the right to use their staff, their employees, in order to perform work in the framework of service provision. However, apart from labour law, Social Security and tax issues, we have a 4th area which is very sensitive and that area is the right of residence, the right to enter and to stay in a given Member State? Luckily, we have Schengen zone. And the logic of the Schengen zone is that if one Member State has checked from the security point of view, either third country national can enter or not, the other Member States acknowledge this. However, when it comes to perform work, this is not free movement of workers. The third country nationals are not totally free to exercise free movement of workers. Posted workers are not exercising free movement of workers. This means that they are not seeking employment in the receiving Member State. The receiving Member States should not impose any additional barriers on third country nationals. Certainly, they may not demand a separate work permit to carry out the

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work temporarily on their territory, if the third country national has the work permit or is otherwise lawfully employed in the sending Member State. But can they demand a visa for work purposes? Well, the same logic says different. The same logic says: they are not exercising their right to free mobility. No, they are the part of the right of their employer to deliver the service to another Member State. So according to this logic, they will of course have to be allowed to enter and to perform work. On the territory of the receiving Member State. When the work, however, lasts longer than the period of visa free mobility. Then you would have to apply in a simplified procedure. For residency visa. But not a visa with work permit.

Clip 8 (5:05)

In the European Union the problems vary across the Member States. They are not the same all over the place when it comes to posting third country nationals in the live-in care sector provision. From the Polish perspective we've discovered that the biggest problem is the residency issue. The right to enter and to reside in the receiving Member State. This especially is a problem when it comes to Germany, where German authorities require a special national visa from day one when they cross the border. And there have been cases of deportation of lawfully posted caregivers. This is an unresolved problem between third country nationals who are posted to Germany and Germany. Another problem that we've discovered within this project is that the scope of obligations of a caregiver tends to expand with time. So a caregiver is hired as a caregiver. He goes to the household of a care recipient. And then after shorter or longer periods of time, his duties expand to households duties. So he's gardening, he's making small repairs in the house, he's cooking dinner for all the family and not only for the care recipient. This is strange because when it comes to Spain, the problem is quite the opposite. Third country nationals, by and large are employed in the households in private households as housekeeping help. And when they work as housekeepers, when they were cleaning the house they've learned: oh! By the way. There in the corner is a grandma. Please clean her too. And by extension of their housekeeping duties, they become also caregivers. This is completely different approach because in the case of Serbian caregivers or Ukrainian caregivers posted from one of the Member States, Croatia or Slovenia or Poland to Austria or Germany, they are employed as caregivers, so their set of skill is determined a priori by the need of care. Whereas in case of Spain they become caregivers as they work as housekeepers. Completely different problem appeared in the Netherlands. Our Partners report that we have incredible problems with determining the legal status of third country nationals. When you see a worker who is apparently from outside the EU, it is very difficult to determine whether this person is directly employed in the Netherlands by a Dutch company. Is he a hired out worker? And if so, is this person hired out by a temporary work agency from another Member State or maybe by temporary work agency established even outside the European Union? Is this person posted or is this person directly hired in the Netherlands? The problem with establishing their legal status is that the workers themselves don't know who they are, so to speak. Needless to say, such situation makes the control of the working conditions extremely difficult.

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