Changes to legislation: *The Posted Workers (Enforcement of Employment Rights) Regulations 2016 is up to date with all changes known to be in force on or before 27 May 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

STATUTORY INSTRUMENTS

2016 No. 539

TERMS AND CONDITIONS OF EMPLOYMENT

The Posted Workers (Enforcement of Employment Rights) Regulations 2016

Made - - - -	*25th April 2016*
Laid before Parliament	*27th April 2016*
Coming into force - -	*18th June 2016*

The Secretary of State is a Minister designated [F1] for the purposes of section 2(2) of the European Communities Act 1972 [F2] in relation to employment rights and duties and services in the internal market.

The Secretary of State and the Lord Chancellor, acting jointly, in exercise of the powers conferred by section 18(8) and (9) of the Employment Tribunals Act 1996 [F3] and section 2(2) of the European Communities Act 1972, make the following Regulations.

F1 Article 2 of, and the Schedule to, the European Communities (Designation) Order 2000 (S.I. 2000/738); article 2 of the European Communities (Designation) Order 2009 (S.I. 2009/221).

F2 1972 c.68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), **section 27(1)** and the European Union (Amendment) Act 2008 (c.7), **section 3(3)**.

F3 1996 c.17; by virtue of section 1 of the Employment Rights (Dispute Resolution) Act 1998 (c.8) industrial tribunals were renamed employment tribunals and references to "industrial tribunal" or "industrial tribunals" in any enactment were substituted with "employment tribunal" and "employment tribunals". Section 18(8) was amended by the Tribunals, Courts and Enforcement Act 2007 (c.15), **Schedule 8**, paragraphs 35 and 38, and the Enterprise and Regulatory Reform Act 2013 (c.24), **section 9**; section 18(9) was inserted by the Enterprise and Regulatory Reform Act 2013, section 9.

PART 1

General

Citation, commencement and extent

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

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

Interpretation

2. In these Regulations—

"Directive 96/71/EC" means Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [F4];

"Directive 2014/67/EU" means Council Directive 2014/67/EU of the European Parliament and the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [F5].

F4 OJ No L 18, 21.1.1997, p. 1.
F5 OJ No L 159, 28.05.2014, p. 11.

Review

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

(a) carry out a review of these Regulations,

(b) set out the conclusions of the review in a report, and

(c) publish the report.

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

(3) The report must in particular—

(a) set out the objectives intended to be achieved by the regulatory system established by those Regulations,

(b) assess the extent to which those objectives are achieved, and

(c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this regulation must be published before the end of the period of five years beginning with the day on which these Regulations come into force.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.

PART 2

Posted Workers in the Construction Sector

Scope of application of this Part

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

(a) is working or has worked in Great Britain; and

(b) is working or has worked for the employer to perform services that relate to the employer's contractual obligations to the contractor.

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

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

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

"posted worker in the construction sector" means a worker who—

(a) normally works in a Member State other than the United Kingdom but, for a limited period, carries out work on behalf of the employer in Great Britain; and

(b) undertakes building work relating to the construction, repair, upkeep, alteration or demolition of buildings including any of the following—

(i) excavation;

(ii) earthmoving;

(iii) actual building work;

(iv) assembly and dismantling of prefabricated elements;

(v) fitting out or installations;

(vi) alterations;

(vii) renovation;

(viii) repairs;

(ix) dismantling;

(x) demolition;

(xi) maintenance;

(xii) upkeep, painting and cleaning work; and

(xiii) improvements.

Right not to suffer unauthorised deductions

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

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

(3) In this regulation and in regulation 6 the "relevant sum" means the proportion of the amount due to the worker as additional remuneration in respect of the pay reference period, calculated in accordance with section 17 of the National Minimum Wage Act 1998 [F6] (non-compliance: worker entitled to additional remuneration), which is the same as the proportion of the pay reference period during which the worker carried out work relating to the employer's obligations to the contractor.

(4) In this regulation—

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

"pay reference period" has the meaning given by regulation 6 of the National Minimum Wage Regulations 2015 [F7].

F6 1998 c.39; section 17 was amended by section 8 of the Employment Act 2008 (c.24).
F7 S.I. 2015/621.

Complaints to employment tribunals

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

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

(a) presented a claim against the employer under section 23(1)(a) of the Employment Rights Act 1996 [F8] (deductions from worker's wages in contravention of section 13 of that Act) to an employment tribunal in respect of the sum due; or

(b) commenced other civil proceedings against the employer for the recovery, on a claim in contract, of the sum due.

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

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

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

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

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

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

(a) presenting a complaint against the employer under section 23(1)(a) of the Employment Rights Act 1996 (deductions from worker's wages in contravention of section 13 of that Act) to an employment tribunal in respect of the sum due; or

(b) commencing other civil proceedings against the employer for the recovery, on a claim in contract, of the sum due,

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

F8 1996 c.18.

Extension of time limits to facilitate conciliation before institution of proceedings

7.—(1) In this regulation—

(a) Day A is the day on which the posted worker in the construction sector complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 [F9] (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which that worker receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

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

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

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

F9 Section 18A was inserted by the Enterprise and Regulatory Reform Act, section 7(1).

Determination of complaints

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

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

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

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

Restrictions on contracting out

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

(a) to exclude or limit the operation of any provision of these Regulations, or

(b) to preclude a person from bringing proceedings under these Regulations before an employment tribunal.

(2) Paragraph (1) does not apply to—

(a) any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C of the Employment Tribunals Act 1996 [F10] (conciliation); or

(b) any agreement to refrain from instituting or continuing proceedings if the conditions regulating settlement agreements under these Regulations are satisfied in relation to the agreement.

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