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Top 10 Issues to Consider When Posting Workers in France

BY NICOLAS CHAVRIER AND LÉONIE CHABAUD

“Posting of workers,” a common practice within the European Union, refers to the assignment of an employee to work in another EU Member State (the “host country”) on a temporary basis.¹ Under this arrangement, also known as a secondment, the posted employee works in the host country but does not become fully integrated into the host country’s labor market. Rather, the employer posts the employee to the host country for a short-term assignment (e.g., the assignment cannot exceed five years if the transfer is between France and the United States), during which time the employee retains the employment relationship with the sending employer. During the posting period, the posted employee continues service for and works at the direction of the sending employer, despite working in the host country.

The following Top Ten list seeks to highlight the employment issues companies should take into account prior to posting workers, particularly to France.

1. Specific rules often govern the posting of workers.

The formalities for posting of workers have evolved a great deal over the past few years in the European Union in general, and in France in particular. In France, posting is governed by articles L. 1261-1 to L. 1263-7 and articles R. 1261-1 to R. 1264-3 of the French Labor Code (“Code du travail”). These rules apply to employers based outside of France whose workers perform work in France in the following situations:

- In the supply of services: activities of a commercial, agricultural, or artisanal nature, provided pursuant to a contract with a service provider.

¹ “Posting of workers” is the generic term used within the European Union. This practice is known as “secondment” in the United States and other geographical regions.

- To support intra-group mobility: the provision of staff, on a non-profit-making basis, between undertakings within the same group.
- For the provision of interim staff: a temporary work agency may second an employee to a user company in France.
- To work on their own behalf: a company may post employees for its own purposes, such as attending a work seminar, traveling to France for a business trip, participating in a filming project, etc.

Employers considering sending workers to France for such purposes must be cognizant of the particular rules applicable to the arrangement, some of which are addressed herein.

2. Employers complete a declaration of posting in advance of the work commencing.

Employers based outside of France intending to post workers to provide services in France are required to file a declaration of posting. This declaration must be submitted to the local branch of the Labor Inspectorate where the services will be provided, prior to the start of workers' secondment in France.

The declaration must be completed online via the [SIPSI website](#). The declaration must be submitted before the assignment begins, but it is strongly advised, where possible, to submit the declaration at least four days prior to the posting.

Employers must disclose in the declaration the name and address of the company, its main primary business activity, its director, the service provided, the government entity collecting social security contributions, the list of workers who will be posted, the working hours and resting time of the workers, and the duration of the assignment. In short, the employer must submit any relevant information regarding the employment relationship and the provision of services while in France.

Failure to comply with this legal requirement is punishable by a fine of 2,000 euros (€) per worker (up to a maximum of 500,000 €).

3. The Company must appoint a representative.

In addition to the declaration of posting, French law requires foreign employers to appoint a representative in France to act as a "liaison representative" in the event of an inspection. In this role, the company representative must provide any documents or information requested by an inspector.

Failure to appoint a company representative is punishable by a fine of 2,000 € per worker (up to a maximum of 500,000 €).

4. Specific requirements apply to construction workers.

Special rules apply to companies that post construction workers for projects in France. First, to prevent unqualified workers and fraud, French law generally requires all construction workers to have a compulsory professional card, which costs 10.80€ (an administrative fee) and must be paid by the employer. This requirement also applies to construction workers of foreign employers, and failure to obtain the card is punishable by a fine of 2,000 € per worker (up to a maximum of 500,000 €).

Second, construction companies that post workers to France should register with the local branch of the *Caisse Congés Intempéries BTP* (the agency that administers paid leave benefits) where the service will be provided. Construction employers must declare their workers and provide the French benefits, unless the employer can show that its employees receive "essentially similar protection" of paid leave as that granted to employees in France—which is almost never the case.

5. Work visas are mandatory for many employers.

Employers based outside the European Union, such as in the United States, are required to apply for a work visa for each employee who will be posted, and the work visa must be for the duration of the assignment in France and be obtained prior to the start of the secondment.² The work visa application must be submitted at the local “*unité territoriale*” where the worker will be posted.

In cases of intra-group mobility (*i.e.*, when a worker is seconded to an affiliated company), a simplified work visa application process applies as the posted worker is considered an “employee on assignment.”³ Employers can follow the simplified procedure if the employee:

- has worked with the company for at least three months, and the company can establish a valid and substantial business outside of France;
- is assigned to work in France for at least three months;
- receives a gross compensation equal to at least 1.5 times the French minimum wage (*i.e.*, SMIC); and
- provides special expertise to the French-based company or is completing training to implement a project abroad.

Employers can take advantage of the simplified procedure only if all four of these requirements are met.

The French website “[Pour la promotion de l’immigration professionnelle](#)” provides a number of useful additional details about the visa requirements and labor immigration.

6. E.U. employers must coordinate social security coverage for European employees.

Employers based in the European Union seeking to post workers in another Member State must determine which social security system applies. The social security benefits of posted workers are regulated through Regulation 883/2004 and the implementation Regulation 987/2009, which provide the framework for coordination of social security systems amongst the Member States and to which all Member States are subject.⁴

Under the regulations, social security contributions for posted workers must be paid in the State where the employer is established and carries out a substantial part of the company’s business activities (“the posting State”). Posted workers can claim social security benefits (such as those related to unemployment, pension, work accidents, etc.) in the posting State where they are insured, as long as a direct relationship between the posted worker and the sending company continues to exist.

Moreover, the social security contributions must be paid to the posting State as long as the duration of the posting does not exceed 24 months. Article 12 of Regulation 883/2004 exempts the posted worker from paying social security contributions in the receiving Member State during a posting period of up to 24 months. However, Article 16 of Regulation 883/2004 allows the competent authorities of two or more Member States to reach agreements providing for exceptions to the rules, for postings of up to five years.

² Employees from countries that are not members of the European Union (commonly referred to as “third countries”) are required to obtain a work visa prior to the start of a secondment. This requirement may vary according to the employee’s country of origin and does not apply to nationals or citizens of the European Union.

³ With the simplified procedure, the employer is not required to demonstrate that it is unable to find qualified individuals from the national territory to perform that particular work.

⁴ In December 2013, the Administrative Commission for the Coordination of Social Security Systems published, on behalf of the European Commission, the “Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland,” a detailed guide explaining the applicable rules for determining which Member State’s legislation should apply in given situations. The guide, which does not reflect the official position of the European Commission, is available here: <http://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>

Finally, in France, posted workers (or persons employed in more than one Member State) must carry “Portable Document A1” (formerly Form E101) at all times to prove that social security contributions are being paid in the posting State.

7. U.S. employers must also coordinate social security coverage for their seconded employees.⁵

France and the United States are parties to the Agreement on Social Security, a bilateral agreement that allows for greater freedom of movement between both countries, as well as providing social security protections for persons who work or have worked in both countries. Under Article 6.1 of this agreement, a person employed in the United States or France who is temporarily transferred to work in the other country for the same employer (or, under certain conditions, a foreign affiliate of the same employer) will continue to be covered by the social security legislation of the country from which the employee has been transferred. This provision thus enables the employer to avoid double contributions. This rule will apply only if the expected duration of the transfer is five years or less. In short, this agreement allows for employers in France and in the United States to temporarily post workers in the other country while maintaining their social security affiliation with the sending State.

To maintain an employee’s affiliation with the sending State and establish an exemption from compulsory coverage and taxes under the French system, an employer must request a certificate of coverage (Form SE 404-02) from the U.S. Social Security Administration (SSA). The certificate of coverage serves as proof of exemption from social security taxes on the same earnings in the other country.

8. Mandatory French labor regulations will apply during the posting, including rules governing minimum wage.

Employers of workers posted in France must comply with various mandatory labor regulations, especially with regard to those under Article L. 1262-4 of the French Labor Code.⁶ For example, seconded employees must receive a particular minimum wage.

In France, all employees, included posted workers, are entitled to the legally guaranteed minimum salary, which currently is set at 9.76 € per hour (*i.e.*, 1,480.27 € monthly). Where a different minimum wage has been collectively bargained, such minimum wage shall apply instead of the one legally mandated.

When the posting exceeds one month, the employees must be paid a monthly salary, and must receive a pay slip (or an equivalent document), translated into French and indicating the following information:

- salary due (including overtime), in euros;
- working hours and periods;
- leave and public holidays;
- conditions of liability based on weather-related risk and paid leave funds (constructions and entertainment sectors); and
- any applicable collective bargaining agreement.

Employers must be careful to comply with these minimum wage and wage payment obligations.

⁵ In cases where the posted workers originate from third countries (non-Member States), employers should verify the criteria, based on the application of a social security agreement between the countries (if one exists). In the absence of a bilateral agreement between the sending State and the host State, there is no guarantee that the worker will not be subject to a double affiliation (*i.e.*, being required to pay social security contributions to both the sending State and the temporary State of employment).

⁶ This provision covers, for example: working hours, rest periods, paid leave, minimum wage, conditions for hiring workers, health and safety regulations, and anti-discrimination measures.

9. Additional regulations will apply to working time, rest periods, and paid leave.

Posted employees are entitled to the protections afforded to all workers under the French Labor Code, with regards to working time, rest periods (per day and per week), and paid leave. Although the standard workweek in France is 35 hours per week, the maximum working time is 10 hours per day and 48 hours per week. All employees must be allowed a minimum rest period of 35 hours per week, which is broken down as a daily rest period of 11 consecutive hours, plus weekly rest period of 24 consecutive hours. Sundays are, in general, considered rest days.

Employees are entitled to a paid annual leave that accrues at a rate of 2.5 working days per month worked. Maternity leave, paternity leave, and other types of family-related leave also apply—even where employees would not enjoy such benefits in their home jurisdictions.

10. Be aware of the tax implications.

Last, but not least, employers must be aware of pertinent tax consequences. Transnational secondments trigger tax implications for employees, which should be considered prior to posting the worker. The United States and France are parties to the U.S.-France Income Tax Treaty, which aims to avoid double taxation as long as a set of criteria enumerated under the treaty are met. The specific requirements are:

- the posted worker must be “present in the other State for a period or periods not exceeding in the aggregate 183 days in any 12-month period commencing or ending in the taxable period concerned;
- the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and
- the remuneration is not borne by a permanent establishment or a fixed base that the employer has in the other State.”⁷

Conclusion

The posting of employees is not only a common arrangement for today’s employers, it is often a necessity to compete globally. Failure to follow the required formalities, however, may expose the company to fines and other legal risks, regardless of the employer’s good faith in establishing the secondment. Accordingly, employers should take steps, as noted above, to plan and prepare for posting employees transnationally, when deciding whether or not to second employees to foreign countries.

⁷ US-France Income Tax Treaty, U.S.-France, art. 15 § 2, Aug. 31, 1994, available at <https://www.irs.gov/pub/irs-trty/france.pdf>. The US-France Income Tax Treaty was amended by the Protocol signed on December 8, 2004 and by the Protocol signed on January 13, 2009.