

Subsidiary Legislation made under s. 86.

Employment Act (Rights of Detached Workers) Regulations 2016

LN.2016/137

Commencement **23.6.2016**

Amending enactments	Relevant current provisions	Commencement date
LN. 2016/163 2020/174	<i>Notice of Corrigenda</i> r. 7(1)(b)-(c), (g)-(i), (1A), (4)	30.7.2020

Transposing:

Directive 2014/67/EU

Directive (EU) 2018/957

1932-16

Employment

2016/137

**Employment Act (Rights of Detached Workers)
Regulations 2016**

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In exercise of the powers conferred upon him by section 86 of the Employment Act as read with section 23(g)(i) of the Interpretation and General Clauses Act, and all other enabling powers, and for the purposes of transposing into the law of Gibraltar Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 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'), the Minister has made the following Regulations—

PART 1

General

Title.

1. These Regulations may be cited as the Employment Act (Rights of Detached Workers) Regulations 2016.

Commencement.

2. These Regulations come into operation on the day of publication.

Scope.

- 3.(1) These Regulations are without prejudice to any enactment falling within the scope of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

(2) Nothing in these Regulations will affect in any way the exercise of fundamental rights as recognised in Gibraltar and at European Union level, including the right or freedom to strike or to take other action covered by specific industrial relations systems in Gibraltar nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action.

Interpretation.

4. In these Regulations—

“detached worker” means a person who—

- (a) is in employment in Gibraltar and is required by his employer, during the course of his employment, to perform work of a temporary nature in a Member State, and he is not resident in that State; or
- (b) is in employment in a Member State and is required by his employer, during the course of his employment, to perform work of a temporary nature in Gibraltar, and he is not resident in Gibraltar.

“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, as the same may be amended from time to time;

“Directive 2014/67/EU” means Council Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 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’), as the same may be amended from time to time;

“IMI” means the electronic tool provided by the European Commission to facilitate administrative cooperation between the liaison office, the competent authorities and the European Commission.

Competent authority and liaison office.

5.(1) For the purposes of these Regulations—

- (a) the Director of Employment is designated as the competent authority; and
- (b) the Director of Employment is designated as the liaison office.

(2) The competent authority and the liaison office may discharge their duties under these Regulations through—

- (a) inspectors appointed under section 16 of the Employment Act and the powers and duties set out under section 16 of that Act may be exercised for the purposes of these Regulations; and
- (b) such other human resources as may be made available to them.

(3) The competent authority and the liaison office must work together to ensure that the rights of detached workers are protected and that the work that is carried out in Gibraltar is

genuine in so far as it meets the criteria set out in regulation 15A of the Employment Regulations, 1994.

(4) Subject to subregulation (5), the liaison office is the contact point for any detached workers or employers of detached workers who have queries concerning the rights and obligations relating to detached workers.

(5) Upon receipt of a query, the liaison office must liaise with the competent authority to provide a response.

Inspections.

6.(1) Notwithstanding any powers, rights or duties under any enactment, the competent authority must ensure that effective and adequate inspections are undertaken in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC, taking into account the relevant provisions of these Regulations and Directive 2014/67/EU.

(2) Notwithstanding the possibility of conducting random checks, inspections must be based primarily on a risk assessment by the competent authority.

(3) The risk assessment referred to in subregulation (2) may identify the sectors of activity in which the employment of detached workers for the provision of services is concentrated.

(4) When making such a risk assessment, the carrying out of large infrastructural projects, the existence of long chains of subcontractors, geographic proximity, the special problems and needs of specific sectors, the past record of infringement, as well as the vulnerability of certain groups of workers may in particular be taken into account.

(5) The competent authority must ensure that inspections and controls of compliance under this regulation are neither discriminatory nor disproportionate, whilst taking into account the relevant provisions of this regulation.

PART 2**General information and data protection****Access to information on terms and conditions of employment.**

7.(1) The competent authority must provide the information on the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC which are to be applied and complied with by service providers, including–

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual leave;
- (c) remuneration, including overtime rates (this does not apply to supplementary occupational retirement pension schemes);
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and
- (g) equality of treatment between men and women and other provisions on non-discrimination,
- (h) the condition of workers' accommodation where provided by the employer to workers away from their regular place of work;
- (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

(1A) Paragraph (i) of subsection (1) shall only apply to travel, board and lodging expenditure incurred by detached workers where they are required to travel to and from their regular place of work, or where they are temporarily sent by their employer from that regular place of work to another place of work.

(2) The information referred to in subregulation (1) is to be made generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means, in formats and in accordance with web accessibility standards that ensure access to persons with disabilities and to ensure that the liaison offices or other competent national bodies referred to in Article 4 of Directive 96/71/EC are in a position to carry out their tasks effectively.

(3) In addition to the matters set out in this regulation, the competent authority must—

- (a) indicate clearly, in a detailed and user-friendly manner and in an accessible format on a single official website and by other suitable means, which terms and

conditions of employment and/or which parts of Gibraltar law are to be applied to detached workers posted in Gibraltar;

- (b) take the necessary measures to make generally available on the single official website and by other suitable means information on which collective agreements are applicable and to whom they are applicable, and which terms and conditions of employment are to be applied by service providers from other Member States in accordance with Directive 96/71/EC, including where possible, links to existing websites and other contact points, in particular the relevant social partners;
- (c) where the competent authority considers appropriate, make the information available to workers and service providers free of charge in English and in the most relevant languages taking into account demands in its labour market, and that information must be made available if possible in summarised leaflet form indicating the main labour conditions applicable, including the description of the procedures to lodge complaints and upon requests in formats accessible to persons with disabilities; further detailed information on the labour and social conditions applicable to detached workers, including occupational health and safety, must be made easily available and free of charge;
- (d) improve the accessibility and clarity of the relevant information, in particular that provided on a single official website, as referred to in paragraph (a);
- (e) indicate a contact person at the liaison office in charge of dealing with requests for information;
- (f) keep the information provided for in the country fiches up to date.

(4) Where the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC are laid down in collective agreements in accordance with Article 3(1), (1a) and (8) of that Directive, the competent authority must ensure that those terms and conditions are made available in an accessible and transparent way to service providers from Member States and to detached workers, and must seek the involvement of the social partners in that respect, the relevant information should, in particular, cover the different minimum rates of pay and their constituent elements, the method used to calculate the remuneration due and, where relevant, the qualifying criteria for classification in the different wage categories.

(5) The competent authority must indicate the bodies and authorities to which detached workers and undertakings can turn for general information on the law and practice applicable to them concerning their rights and obligations within Gibraltar.

General requests for information.

8.(1) The competent authority must work in close cooperation and provide mutual assistance to their equivalent number in Member States, without undue delay in order to facilitate the implementation, application and enforcement in practice of these Regulations, Directive 2014/67/EU and Directive 96/71/EC.

(2) The cooperation referred to in subregulation (1) must in particular consist in replying to reasoned requests for information from competent authorities and in carrying out checks, inspections and investigations with respect to the situations of posting referred to in Article 1(3) of Directive 96/71/EC, including the investigation of any non-compliance or abuse of applicable rules on the posting of detached workers.

(3) Requests for information include information with respect to a possible recovery of an administrative penalty, fine or both, or the notification of a decision imposing such a penalty, fine or both as referred to in Chapter VI of Directive 2014/67/EU.

(4) In the event of difficulty in meeting a request for information or in carrying out checks, inspections or investigations, the competent authority must without delay inform the requesting Member State with a view to finding a solution, and in the event of any persisting problems in the exchange of information or a permanent refusal to supply information, the competent authority must notify the European Commission, where relevant by means of IMI.

(5) Where the competent authority receives a request from another competent authority or from the European Commission, it must supply the information requested in accordance with the following time limits-

- (a) in urgent cases requiring the consultation of registers, for the purpose of checking an establishment in Gibraltar, as soon as possible and up to a maximum of 2 working days from the receipt of the request, subject to the reason for the urgency being clearly indicated in the request and the inclusion in the request of some details to substantiate that urgency;
- (b) in all other requests for information, up to a maximum of 25 working days from the receipt of the request, unless a shorter time limit is mutually agreed.

(6) Where a Gibraltar register is listed in the IMI and that register may be consulted by the competent authority, it may also, subject to any conditions imposed on the Gibraltar competent authority, be consulted by the equivalent competent authorities of Member States, for the purposes of implementing Directive 2014/67/EU and Directive 96/71/EC.

(7) Any information received by the competent authority from bodies referred to in point (a) of Article 2 of Directive 2014/67/EU must be used only in respect of the matter for which it was requested.

(8) The competent authority must bear the costs of complying with a request for information.

(9) The receipt of a request for information does not preclude the competent authority from taking measures to investigate and prevent alleged breaches of Directive 96/71/EC or Directive 2014/67/EU.

Administrative cooperation.

9.(1) In accordance with the principles established in Articles 4 and 5 of Directive 96/71/EC, during the period of posting of a detached worker to Gibraltar, the inspection of terms and conditions of employment to be complied with according to Directive 96/71/EC is the responsibility of the competent authority in cooperation, where necessary, with the competent authority of the Member State of establishment.

(2) Where the service provider is established in Gibraltar, the competent authority must continue to monitor, control and take the necessary supervisory or enforcement measures with respect to detached workers posted to a Member State.

(3) The competent authority, where the service provider is established in Gibraltar, must provide assistance to the competent authority in the Member State to which the posting takes place, to ensure compliance with the conditions applicable under Directive 96/71/EC and Directive 2014/67/EU.

(4) Where the competent authority becomes aware that there are facts that indicate possible irregularities, it must communicate them to the competent authority in the Member State without undue delay.

(5) Where information is requested from the competent authority by the competent authority of the host Member State, in respect of each instance where services are provided or each service provider, to provide information as to the legality of the service provider's establishment, the service provider's good conduct, and the absence of any infringement of the applicable rules, the competent authority must provide this information in accordance with regulation 8.

(6) Nothing in this regulation must require the competent authority, where the service provider is established in Gibraltar to carry out factual checks and controls in the territory of the host Member State in which the service is provided.

Administrative requirements and control measures.

10.(1) In exercising any powers under these Regulations the competent authority may only impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in Directive 2014/67/EC and Directive 96/71/EC, provided that these are justified and proportionate in accordance with European Union law.

(2) The measures that may be imposed pursuant to subregulation (1) and set out in Article 9(1) of Directive 2014/67/EU are reproduced in Schedule 1.

(3) Notwithstanding subregulation (1) the competent authority may impose other administrative requirements and control measures, in the event that situations or new developments arise from which it appears that existing administrative requirements and control measures are not sufficient or efficient to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and Directive 2014/67/EU, provided that these are justified and proportionate.

(4) The competent authority must ensure that the procedures and formalities relating to the posting of detached workers pursuant to this regulation can be completed in a user-friendly way by undertakings, at a distance and by electronic means as far as possible.

(5) Where measures under this regulation have been applied or implemented, the competent authority must ensure that the European Commission and service providers are informed.

(6) Nothing in this regulation must affect other obligations deriving from European Union legislation, including those deriving from Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, including those under Gibraltar law regarding the protection or employment of workers provided that the latter are equally applicable to undertakings established in the Member State concerned and that they are justified and proportionate.

Data protection.

11.(1) Subject to subregulation (2), nothing in these Regulations must permit the processing of the personal data of a detached worker in contravention of the provisions of the Data Protection Act 2004.

(2) Where the personal data of a detached worker is transmitted or received pursuant to these Regulations, Directive 2014/67/EU or any other applicable European Union measure, the

person transmitting, or as the case may be, receiving that data is responsible for observance of all applicable laws, and in particular must not transmit it other than in pursuance of an obligation to do so.

PART 3

Detached workers in the construction sector

Detached workers in the construction sector.

12.(1) This Part applies to a person (P) who is—

- (a) a detached worker; and
- (b) is employed to undertake any of the activities set out in Schedule 2.

(2) In this Part—

- (a) P's direct employer is referred to as "E"; and
- (b) where P undertakes work in respect of which E is a subcontractor, the person with whom E has a contract is referred to as "C";
- (c) a reference to the "minimum wage" means a reference to the minimum wage that a person is entitled to receive, under any enactment, relating to work in that sector.

Duty to investigate a complaint.

13. On receipt of a complaint that E has paid P wages that are less than the minimum wage the competent authority must investigate the matter.

Liability to administrative penalty.

14.(1) Subject to subregulation (2) if, after investigating the complaint, the competent authority establishes that P has been paid less than the minimum wage it must issue C, E, or both with an administrative penalty.

(2) An administrative penalty must not be issued to C where C proves to the satisfaction of the competent authority that C had exercised due diligence in its affairs with E and that taking into account all the circumstances of the case it would not be reasonable to hold C liable.

Issue of administrative penalty.

15.(1) An administrative penalty must be issued by the competent authority in writing and be served on C or E or both, as the case may be, either in person or, in the case of a corporate body, on an officer of that body or by sending it by registered mail to the registered office or its principal place of business.

(2) An administrative penalty must state the sum that is due to be paid, the time by which it must be paid and details as to how payment may be effected.

(3) The amount to be included in the administrative penalty must comprise of the amount by which the wages were underpaid, plus an additional amount of at least the equivalent of level 3 on the standard scale but not exceeding level 4 on the standard scale.

Payment in full.

16. The competent authority must not accept part payment of any sum due under an administrative penalty.

Distribution of penalty.

17. Where the competent authority recovers any sums on the payment of an administrative penalty, or pursuant to regulation 18, it must pay P the amount by which P was underpaid and any balance remaining after such distribution must be paid into the Consolidated Fund.

Recovery as civil debt.

18. Where an administrative penalty is not paid within the time stated in the penalty notice, the competent authority may recover the amount as though it were a civil debt owed to the Government.

Appeal.

19.(1) A person to whom an administrative penalty has been issued may appeal against the imposition of that penalty to the Magistrates' Court within 14 days of the date upon which the administrative penalty was issued.

(2) The Magistrates' Court may, upon hearing an appeal under this regulation, confirm, quash or vary any administrative penalty.

PART 4

Cross-border enforcement of financial administrative penalties

Interpretation of Part.

20. In this Part–

“competent authority” means a competent authority designated by a Member State for the purposes of Directive 2014/67/EU;

“EU penalty”, means, a financial administrative penalty or fine including fees and surcharges relating to non-compliance with Directive 96/71/EC or Directive 2014/67/EU–

- (a) imposed on a service provider established in Gibraltar by a competent authority in a Member State; or
- (b) confirmed by an administrative or judicial body in a Member State as payable by a service provider established in Gibraltar.

Designation under Article 14.

21. The person designated under regulation 5(1)(a) is designated for the purposes of Article 14 of Directive 2014/67/EU, and in this Part is referred to as the “Gibraltar competent authority”.

Request for recovery of EU penalty.

22.(1) An amount payable in pursuance of an EU penalty is recoverable in Gibraltar as if the sum were payable under an order of the Supreme Court.

(2) Where a competent authority in a Member State requests that an EU penalty which is not subject to further appeal be recovered, the Gibraltar competent authority is entitled to recover the amount of any sum owing as part of that EU penalty, and any monies recovered must be paid into the Consolidated Fund.

(3) Where a competent authority in a Member State requests that a decision imposing an EU penalty be notified, the Gibraltar competent authority must undertake that notification.

(4) Where an EU penalty is recovered, the requesting competent authority must be notified of any other relevant document related to the recovery of the EU penalty, including the judgment or final decision, which may be in the form of a certified copy, which constitutes the legal basis and title for the execution of the request for recovery.

(5) The competent authority must, subject to regulation 23, recognise without any further formality a request that is received in accordance with this Part.

(6) The provisions of subregulations (1), (2) and (3) are subject to the provisions in regulations 23 and 24.

EU penalties: information to be supplied.

23.(1) A request for the recovery of an EU penalty and a request for the notification of a decision concerning an EU penalty must at least indicate-

- (a) the name and known address of the addressee, and any other relevant data or information for the identification of the addressee;
- (b) a summary of the facts and circumstances of the infringement, the nature of the offence and the relevant applicable rules;
- (c) the instrument permitting enforcement in the requesting country and all other relevant information or documents, including those of a judicial nature, concerning the underlying claim or EU penalty; and
- (d) the name, address and other contact details regarding the competent authority responsible for the assessment of the EU penalty, and, if different, the competent body where further information can be obtained concerning the EU penalty or the possibilities for contesting the payment obligation or decision imposing it.

(2) In addition to the information in subregulation (1), the request must indicate-

- (a) in the case of notification of a decision, the purpose of the notification and the period within which it must be effected;
- (b) in the case of a request for recovery of an EU penalty-
 - (i) the date when the judgement or decision has become enforceable or final;
 - (ii) a description of the nature and amount of the EU penalty;
 - (iii) any dates relevant to the enforcement process, including whether, and if so how, the judgement or decision has been served on the defendant or given in default of appearance;

- (iv) a confirmation from the requesting competent authority that the EU penalty is not subject to any further challenge or appeal; and
- (v) the underlying claim in respect of which the request is made and its different components.

(3) The Gibraltar competent authority must take all the necessary steps to notify the service provider of the request for recovery or of the decision imposing an EU penalty and of the relevant documents, as soon as possible, and no later than 1 month of receipt of the request.

(4) The Gibraltar competent authority must, as soon as possible, inform the requesting competent authority of–

- (a) the action taken on the request for recovery and notification and, more specifically, of the date on which the addressee was notified;
- (b) the grounds for refusal, in the event that the Gibraltar competent authority refuses to execute a request for recovery or to notify a decision imposing an EU penalty in accordance with regulation 24.

Grounds for refusal.

24. The a request for recovery of an EU penalty may be refused if–

- (a) the request does not contain the information referred to in regulations 23(1) and 23(2);
- (b) the request is incomplete;
- (c) the request manifestly does not correspond to the underlying decision;
- (d) following inquiries by the competent authority it is obvious that the envisaged costs or resources required to recover the EU penalty are disproportionate in relation to the amount to be recovered or would give rise to significant difficulties;
- (e) the overall EU penalty is below 350 Euros or the equivalent sum in pounds Sterling;
- (f) fundamental rights and freedoms of defendants and legal principles that apply to them as laid down in the Gibraltar Constitution are not respected; or

- (g) where the conditions of Article 15(2) of Directive 2014/67/EU have not been satisfied;
- (h) the request is not made via the IMI.

Outgoing requests for assistance.

25.(1) Where the Gibraltar competent authority requests the assistance of a competent authority it must make such a request via the IMI.

(2) A request must include those matters set out in regulation 23 but no such request must be made where any penalty, underlying claim or judgement or order is being contested or challenged.

(3) If after a request has been made, there is a challenge or an appeal the competent authority to whom the request was made must be notified without undue delay.

Suspension.

26(1). Any enforcement procedures undertaken by the Gibraltar competent authority must be suspended, where it has received notice pursuant to Article 18 of Directive 2014/67/EU, pending the decision of the appropriate competent body or authority in the requesting Member State in the matter, and any challenge or appeal must be made to the appropriate competent body or authority in the requesting Member State.

(2) The Gibraltar competent authority must without delay notify the competent authority to whom it requested assistance under this Part where the EU penalty or underlying claim is challenged or appealed by the service provider concerned or by an interested party.

SCHEDULE 1**Control measures.**

For these purposes Member States may in particular impose the following measures—

- (a) an obligation for a service provider established in a Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State, containing the relevant information necessary in order to allow factual controls at the workplace, including—
 - (i) the identity of the service provider;
 - (ii) the anticipated number of clearly identifiable posted workers;
 - (iii) the persons referred to under points (e) and (f);
 - (iv) the anticipated duration, envisaged beginning and end date of the posting;
 - (v) the address(es) of the workplace; and
 - (vi) the nature of the services justifying the posting;
- (b) an obligation to keep or make available and/or retain copies, in paper or electronic form, of the employment contract or an equivalent document within the meaning of Council Directive 91/533/EEC, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive, payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided;
- (c) an obligation to deliver the documents referred to under point (b), after the period of posting, at the request of the authorities of the host Member State, within a reasonable period of time;
- (d) an obligation to provide a translation of the documents referred to under point (b) into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the host Member State;

- (e) an obligation to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices, if need be;
- (f) an obligation to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State, in accordance with national law and/or practice, during the period in which the services are provided. That person may be different from the person referred to under point (e) and does not have to be present in the host Member State, but has to be available on a reasonable and justified request.

SCHEDULE 2**Activities in the construction sector.**

All building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work—

- (a) excavation;
- (b) earthmoving;
- (c) actual building work;
- (d) assembly and dismantling of prefabricated elements;
- (e) fitting out or installation;
- (f) alterations;
- (g) renovations;
- (h) repairs;
- (i) dismantling;
- (j) demolition;
- (k) maintenance;
- (l) upkeep, painting and cleaning work; and
- (m) improvements.