

The Enforcement Directive

What is this directive about and what actions do you need to take? Is there a risk of penalties?

A pillar of the Treaty of Rome, which led to the establishment of the EU in March 1957, is the freedom of movement of workers. This treaty was followed, on December 16, 1996, by the Directive concerning the posting of workers (96/71/EG). Its purpose was to mitigate some of the undesired effects of international assignments. Being a Directive, its rules had to be embedded in local legislation. The Netherlands did this by means of the Terms of Employment (Cross-Border Work) Act (Wet Arbeidsvoorwaarden Grensoverschrijdende Arbeid; "WAGA"). WAGA contained a limited number of mandatory employment conditions that employers had to observe in respect of assignees temporarily working in the Netherlands. Examples are holiday and leave entitlements and the rules on a safe work environment. Initially WAGA was only compulsory for the construction industry but was extended to other compulsory collective labor agreements as of December 1, 2005.

Despite these developments, it was felt that the above Directive did not adequately curb the undesired effects of international assignments. For that reason the Enforcement Directive (2014/67) and the changes to Regulation 1024/2012 (Internal Market Information System; "IMI") were introduced on May 15, 2014. The Directive's rules were transposed in the Posted Workers in the European Union (Working Conditions) Act (Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie; "WAGWEU"). WAGWEU replaced WAGA as of June 18, 2016. IMI took effect on January 18, 2016.

WAGWEU aims to ensure that assignments really are temporary, that there is no fake self-employment and that the sending company has substance. To enable employers to comply with WAGWEU, there will be one central website (in English and Dutch) showing all the relevant information / conditions which companies have to comply with. The sending company should provide this information. An EU-wide system (IMI) has been put into place for the purposes of the international exchange of information

and the provision of mutual assistance between the various EU authorities (in the Netherlands: the Social Affairs and Employment Inspectorate; Inspectie SWV) when enforcing compliance and imposing cross-border penalties.

WAGWEU obliges the sending company to file the following information:

- The sending company's identity
- The receiving company and the assignee's identity
- The receiving company's contact person (see below)
- The identity of the person responsible for paying the assignee's salary
- The nature and duration of the stay and the type of work involved
- The address of the assignee's place of work
- The assignee's social security position.

The digital reporting system for submitting the above information is not yet in place in the Netherlands. The filing obligation has therefore been suspended until such time that it is in place (January 1, 2019). The receiving company should verify whether the sending company has complied with its reporting obligation. To this end, the sending company should provide the receiving company with a copy of its registration. If the sending company has not met or has not fully met its obligations, the receiving company should report this to the authorities before the assignee starts to work.

WAGWEU also obliges the sending company to make certain information available at the assignee's actual place of work, e.g. a copy of the employment contract, a payslip. Existing legislation already stipulates that certain documents should be kept on file by the employer; WAGWEU augments this by requiring the abovementioned documents to be kept at the assignee's place of work.

WAGWEU also requires the sending company to appoint a central contact person in the Netherlands for the sending and receipt of information.

Penalties may be imposed on the receiving and/or the sending company, depending on the offense and could amount to EUR 12,000; they could be even higher if a breach is recurring.

WAGWEU does not apply to merchant sailors, who are covered by the Maritime Labor Convention 2006. Other transportation sectors (e.g. road transport) also fall under WAGWEU, but the cross-border work performed by their employees does not necessarily always involve an assignment situation. Potential WAGWEU implications for this transportation sector should therefore be considered on a case-by case basis.

WAGWEU may have comparable implications for self-employed individuals. However, this is not discussed any further here.

Please note that WAGWEU does not contain rules on, for example, whether the minimum wage, maximum working hours and non-discrimination applies to assignees temporarily working in the Netherlands. It was felt that such rules were unnecessary since the extension of these rules to assignees was already provided for in domestic legislation on the minimum wage, equal treatment and temporary workers, for example. Their inclusion in domestic legislation was based on / followed from the Convention on the Law applicable to Contractual Obligations, effective as of April 1, 1991 and the subsequent Regulation 593/2008 ("Rome I") effective July 25, 2008, which replaced the aforementioned Convention. Rome I should also be used to determine the employment legislation applying in cross-border employment situations for contracts concluded after December 17, 2009.

How can Meijburg & Co help you?

We can assist in a number of ways: first of all, our immigration practice can ensure that the registration which may already be required under immigration law (the Foreign Nationals (Employment) Act; Wet Arbeid Vreemdelingen) corresponds with that required by WAGWEU (this avoids having to register twice). Secondly, we can provide more detailed information on the precise requirements that have to be complied with. Finally, KPMG, as a global service provider, is looking into setting up a "one-stop shop" registration system from which the local KPMG offices in each country can draw the relevant information for that country's registration from its WAGWEU equivalent. This will enable employers to easily outsource this task to KPMG.

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MB170824