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Employment Law and Cross-Border Assignment of Drivers

Since the transport sector is very international, transport companies often assign their employees abroad. This can easily lead to a situation where the employment law provisions of several different countries have to be observed at the same time.

by
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1. Legal framework for cross-border assignments

If the employment contract does not contain any explicit stipulations, the applicable law is determined by the place where the employee normally works, even where the employment involves temporary stays in other countries. If it cannot be determined where the work is normally conducted, the location of the employer's branch at which the driver is employed is decisive, unless the employment relationship as a whole has closer ties to another country.

As a result, the employment contracts of drivers who are employed by a Finnish company and who regularly carry out transport assignments to and from Finland are usually governed by Finnish law. The fact that the employees carry out cross-border transportation and traverse different countries does not in itself mean that the employment law of these countries must also be observed.

However, transport companies also often assign their drivers on a temporary basis to carry out transportation to and from bases

in other countries. When posting workers to another EU country, certain minimum conditions of the relevant national employment law – such as rules on working time, minimum wages and occupational security – have to be observed in addition to the generally applicable rules.

Drivers are considered posted if they are temporarily assigned to carry out CEMT transports; i.e. transports regularly conducted to and from an establishment in another country where the driver usually also lives for the duration of the assignment.

But even if the employer company does not have a fixed establishment but engages in *cabotage* transportation in the other country, the drivers conducting such transportation may be regarded as posted workers, with the result that certain provisions of that country's employment law have to be observed.

There are significant variations from country to country as to the situations in which a driver engaged in cabotage transportation will be regarded as a posted worker. In some countries, a driv-

er is deemed to be posted only after a certain number of days. However, the relevant periods are usually considerably shorter than the legal limitation periods for cabotage transportation existing in some countries. Regardless of the employment law otherwise applicable, the national provisions on driving hours and rest times always have to be observed when engaging in cabotage transportation. (For further details on this subject, please refer to our article "*Road Cabotage in the Freight Transport Market: Opportunities and Obligations*")

There are also variations between different countries in relation to the length of posting period that needs to elapse before the national provisions on minimum wages and annual holiday become applicable. According to the relevant provisions of EU law, Member States may introduce waiting periods of up to one month, which has been done in several countries.

As these considerations show, establishing the applicable employment law provisions in different international transport situations

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can be a complex matter. Any given employment relationship may be governed by the laws of several countries at different times, and even at the same time. Naturally, this can cause considerable practical difficulties. Several regulations applicable throughout the European Union – for example, those relating to driving hours and rest periods – have facilitated cross-border carriage to a certain extent. However, complete harmonisation of employment law provisions has not yet been achieved by any stretch of the imagination.

Therefore, particularly with regard to regular or longer assignments of drivers abroad, it is advisable to make clear contractual arrangements which take the relevant mandatory provisions into consideration while at the same time minimising the parallel applicability of employment law provisions from several countries.

2. Driving times, breaks and rest periods

The observation of mandatory maximum driving hours and minimum rest periods is a very important issue when giving assignments to drivers, since these rules have considerable impact on planning the transport route.

With regard to transports within the European Union, the EEA, or Switzerland, the relevant provisions can be found in Regulation 561/2006, which entered into force in April 2007 and replaced the earlier provisions. As a result of the new Regulation, the maximum driving hours have been further reduced. At the same time,

the obligations to create and maintain records of driving and rest times have been tightened.

2.1. Maximum driving times

According to the Regulation, after a driving period of four and a half hours the driver has to take a break of at least 45 minutes. This break may be replaced by a maximum of two shorter breaks, whereas the first break has to last at least 15 minutes and the second break at least 30 minutes.

The daily maximum driving time is nine hours and may be extended to up to ten hours twice per week. The daily maximum may be exceeded only in exceptional cases if this is necessary in order to reach to a stopping place that is safe for the driver, the vehicle and the goods and if the extended driving time was not foreseeable when planning the route. In such case, the driver has to indicate the reasons for the longer driving time on the record sheet or print-out of the recording device.

For the first time, the new Regulation stipulates a weekly maximum driving time of 56 hours. Aggregate driving time may not exceed 90 hours in any period of two consecutive weeks.

2.2. Rest periods

Within each period of 24 hours the driver must take a continuous rest period of at least eleven hours, which may be reduced to nine hours three times per week. The rest period may also be divided into two parts, the first one lasting at least three and the second one at least nine hours.

Even if two or more drivers take alternating driving shifts within each period of 30 hours, a rest period of at least nine hours must be observed, during which the vehicle is not being driven.

In addition to the daily rest period, a weekly rest period of 45 hours must be granted. The weekly rest period may be reduced to 24 hours, although this may not occur in two consecutive weeks. The reduced weekly rest period must be compensated for by an equivalent additional rest period, to be granted before the end of the third week following the reduction. The weekly rest period must commence at the latest six days after the end of the previous weekly rest period.

During the daily and weekly rest periods, the drivers also may not perform any other work, such as loading and unloading, cleaning, paperwork etc.

2.3. Tighter regulations in collective agreements

The EU Regulation lays down minimum conditions. The employer and employee organisations are free to agree on more favourable terms for the employees concerned in collective agreements, and this has occurred in many cases.

Therefore, if a collective agreement is applicable to the employment relationship, its provisions on driving times and rest periods must also be observed. In Finland, for example, there is a generally binding collective agreement in place for the lorry sector, which is tighter than the EU Regulation in some respects.



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For example, the agreement provides that the weekly rest period may only be reduced to 36 hours. A reduction to 24 hours is only admissible when the driver is not at the place of the employers' operational centre.

3. Overall working time

Usually, the driver's tasks are not limited to driving but also include loading and unloading the vehicle, maintenance and paperwork. Therefore, the provisions on overall working time have to be taken into consideration in addition to those on driving times and rest periods when planning the route for a certain transport.

Within the European Union, the legal framework for the road transport sector in this respect is laid down under the Working Time Directive (15/2001). The Directive stipulates that the weekly maximum working time is 48 hours. It may temporarily be extended to up to 60 hours if, over a period of four months, the averaged weekly working time does not exceed 48 hours. In addition, after a working time of six hours, the driver has to take a break of at least 30 minutes (or 45 minutes where daily working time exceeds nine hours).

The Directive only provides for minimum standards, and the relevant national provisions or collective agreements are often more stringent. In addition, the Directive provides for the possibility for employee and employer organisations to derogate from the provisions on maximum weekly working time. Such derogation is included, for example, in the Finnish collective agreement for

the lorry sector, which provides for a regular working time of 80 hours per two weeks.

4. Route planning and obligations to keep records

Transport businesses have to organise their employee's work in such a way that the statutory provisions on driving times, rest periods, and overall working time are observed. The observance of these provisions must be checked on a regular basis. It should be noted that the employer will be held liable for violations committed by employees, even where these occur abroad.

The legal provisions have to be taken into consideration when concluding the contract in relation to the transportation assignment in question. The transport company has to make sure that the contractually agreed schedule enables the drivers to observe the provisions on driving times and rest periods.

In view of possible roadside checks, the drivers have to carry with them the driving records for the previous *15 days* at any time. This applies equally to any manual records as well as to analogue tachograph cards. If the vehicle is equipped with a digital tachograph, as has been mandatory for all new vehicles since May 2006, the driver's card must also be presented. From January 2008 on, drivers will have to carry with them the records of the current day and the previous *28 days*.

5. Wages

5.1. Minimum wages

Many countries have minimum wage provisions, either in statutory law or in collective agreements. In Finland for example, such provisions are contained in the collective agreement for the lorry sector, which is generally binding and therefore applicable to all employees in that sector.

Provisions on minimum wages in collective agreements must be taken into consideration even if the parties are not bound by the agreement in question and the provisions in it are therefore not directly applicable. Indeed, if the actual wages are considerably lower than the minimum wages of an existing collective agreement, this will often be considered as wage dumping, as a result of which, instead of the agreed wages, the employer has to pay the wages *common* in the sector, which may be more than the minimum wages in the collective agreement.

Transport businesses which employ drivers at an establishment abroad or post workers to work there should therefore always check for possible provisions on minimum wages.

5.2. Compensation for overtime, night and weekend work

In the transport sector, overtime, night and weekend work is very common. In Finland, the provisions on compensation for such work can be found in the generally binding agreement for the lorry sector.



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The Finnish Labour Court has (for example, in judgment TT:2005-124) decided that the parties may agree that additional compensation for evening and night work shall be covered by the employee's regular salary under the employment contract, provided that the total salary paid is not lower than it should be according to the provisions of the collective agreement.

Overtime and weekend work, however, must always be specifically compensated by way of increased salary. Thus, compensation by means of a higher daily allowance or other payments which do not constitute salary and on which no social contributions are paid is not permitted.

In view of the fact that employees in the transport sector often work irregular hours, it is especially important to keep accurate records of the working hours performed by employees and the compensation paid for overtime, weekend work etc. Omissions in this context can become expensive for the employer. Where checks are carried out by the relevant authorities, the employer may be ordered to pay extensive supplementary compensation if documentary evidence of past working hours and compensation paid cannot be supplied. In addition, the authority may impose heavy penalties.

5.3. Kilometre incentives in general prohibited

The Finnish collective agreement for the lorry sector provides for the general possibility to pay wages by reference to the quantity of work carried out, as far as

the nature of the work permits this and it is technically possible. However, payment of wages by reference to kilometres driven is, at least in the area of long-distance transport, not usually permitted.

This prohibition is drawn from the relevant provisions of EU law, which stipulate that transport businesses may not make payments to their drivers on the basis of distance travelled if such payments may endanger traffic safety or encourage infringements of the regulations on driving times and rest periods.

This is usually interpreted as a general prohibition on relating payments to kilometres driven in long distance transportation, since drivers would otherwise be encouraged to drive faster and work longer hours than is permitted. The situation is different, for example, with regard to refuse collection or street cleaning where the distance completed directly reflects the work performance and there is no danger of infringing speed limits.

According to a ruling of the European Court of Justice in 2006, kilometre wages may be acceptable in some cases if the risks typically involved with such wages are excluded by other means. This may be achieved by means of explicit contractual limitations on the daily and weekly distances driven, by the observation of working time, by taking rest periods into account in the payment system, or by effective control of the speed limits and maximum driving hours.