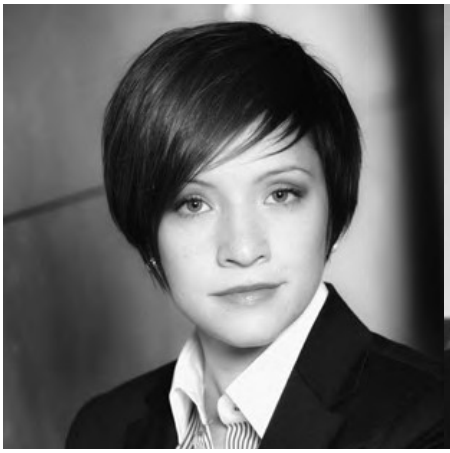
Foreign minimum wage for a Polish employee

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With the growing popularity of assignment of Polish employees to work in other EU countries and hiring of employees to work in those countries by Polish employers, such employers more and more often face the problem of applying foreign regulations on minimum wages.

Many doubts and many regulations

The institution of assignment of employees has not been adequately addressed in Polish law. Moreover, it most often implies the need to apply another country's regulations. Consequently, its use generates numerous doubts. A fundamental question is which country's law should be applied. The answer should be sought in the regulations set forth in the following European acts:

- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (known as "Rome I")
- 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 (the Posted Workers Directive)
- Directive 2014/67/EU of the European Parliament and of the Council on the enforcement of Directive 96/71/EC (the Enforcement Directive)
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as the "Recast Brussels Regulation").

Frequent or long-term assignments and protective regulations

Generally, employer and employee may choose the law governing the employment relationship between them. But under Art. 8(1) of Rome I, such a choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have been applicable if no choice of law had been made. This refers to the protective regulations of the country in which or from which the employee habitually carries out his work in performance of the contract (which is not deemed to change because he is temporarily employed in another country). If the applicable law cannot be determined under that test, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. Nonetheless, if it appears from the circumstances as a whole that the contract is more closely connected with another country, the law of that other country shall apply.

The scope of provisions affording protection to employees is not identical to the concept of mandatory regulations for purposes of Directive 96/71/EC (which include regulations on minimum rates of pay). It is broader, and covers all regulations that seek to protect the rights of the employee as against the employer and are mandatory in the national legal system (under Polish law, for example, most of the provisions of the Labour Code are of this nature—derogations from them are permitted only to the advantage of the employee).

In practice, this means that if an employee is hired by an employer with its registered office in Poland and his employment contract indicates another EU member state as the place of work (or, even without such indication, the employee habitually carries out work in the territory of another EU member state, e.g. in connection with frequent assignments), then Art. 8(1) of Rome I provides grounds for applying foreign protective regulations to the employee, including minimum wage regulations—regardless of whether or not the contract provides for application of Polish law. Consequently, such an employee may claim payment from his employer for time worked in another EU member state in accordance with the minimum rates of pay in force in that country, if the employee was paid less. Such a claim may be pursued before a Polish court or a foreign court, including in the country where the employee habitually carries out work or most recently habitually carried out work.

Brief and incidental assignments and mandatory regulations

But what about the case where an employee hired by an employer with its registered office in Poland does not "habitually" carry out work in another EU member state, but carries out work most often in Poland or another state, and his stays in the foreign country are brief and incidental?

In that situation, provisions of Polish law will undoubtedly apply to the employee, even if the parties did not select Polish law in the employment contract. Then Art. 8 of Rome I will not provide grounds for applying foreign protective regulations, including minimum wage regulations, to the conditions of his employment.

However, Art. 9 of Rome I provides for further modification of the rules governing the law applicable to an employment relationship. Under that article, overriding mandatory provisions are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the regulation. Therefore, if the state of facts exists for which the law of the given country requires application of its regulations as overriding mandatory provisions, those regulations must be applied.

According to the preamble to Rome I (point 34), overriding mandatory provisions include regulations of the country to which a worker is posted in accordance with Directive 96/71/EC. Under that directive, the laws of the member states were harmonised by ascrib-

ing the character of mandatory rules of law to provisions of labour law concerning terms and conditions of employment which are listed in Art. 3(1) of the directive (including among other things regulations governing minimum rates of pay) in the case of workers posted to member states within the meaning of the directive. Consequently, mandatory rules of law (also including foreign minimum wage regulations, if adopted) apply to employees posted to other EU member states within the meaning of Directive 96/71/EC.

Therefore, the understanding of "posting" under directives 96/71/EC and 2014/67/EU is vital. Under those directives, it will basically include the following situations:

- A worker is posted to the territory of another member state under a contract concluded between the domestic employer and the party for whom the services are intended operating in the other member state.
- A worker is posted to the territory of another member state to an establishment or undertaking within the group.
- A worker is hired out to another member state by a temporary employment undertaking or placement agency (but this situation is not of practical relevance within the scope of this article).

Based on these regulations, it may be assumed that if the work carried out in another EU member state by a worker hired by an employer with its registered office in Poland consists only of travelling through the other member state, without performing any activities there for a service recipient or at a group establishment or undertaking, that work is not a "posting" for purposes of directives 96/71/EC and 2014/67/EU. Consequently, because it is not a posting, the mandatory rules of law in force in the country where the work is performed will not apply to that work. Such an employee therefore may not claim payment from his employer for working time in the other member state in the amount of the minimum wage there if the employee was paid less. Nor will there be grounds for the employee to pursue such a claim before a foreign court, because the grounds for exercise of jurisdiction by the foreign court will not arise.

The situation is different for an employee hired by an employer with its registered office in Poland carrying out work in the territory of another EU member state at an establishment or undertaking within the group, or under a contract between the employer and a service recipient in the other member state—even if these activities are brief and incidental. Directives 96/71/EC and 2014/67/EU generally regard as "posting" any carrying out of work in the territory of another member state if it falls within any of the three categories listed above, regardless of the length of the posting. Therefore, in situations where such work is performed in another EU member state, there will be grounds for applying foreign mandatory rules of law, governing among other things minimum rates of pay.

Such an employee can pursue a claim (primarily before the Polish court) against his employer for payment for time worked in the other country at the minimum rates of pay provided for in that country's mandatory rules of law, if the employee was paid less. Then, under Art. 9(3) of Rome I, the Polish court may (but does not have to) give effect to the foreign minimum wage regulations as overriding mandatory provisions, taking into consideration the nature and purpose of the provisions and the consequences of their application or non-application. This is because under that paragraph, the court may give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, the court must have regard to their nature and purpose and to the consequences of their application or non-application.

The employee can seek such payment before a foreign court, but only if there are grounds for finding that the employee habitually carries out work or most recently habitually carried out work in that country. If the foreign court has jurisdiction, it will then be required to apply its minimum wage regulations.

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