



The duties of Italian companies on the posting of workers abroad

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Main issues:

- 1.) Legal aspects;**
- 2.) Social Security aspects;**
- 3.) Tax aspects.**

...a brief introduction:

	Assignment	Relocation	Posting
Definition:	Temporary change of the place of performance of the job. National Collective Employment Contract and Italian laws are maintained .	Definitive change of the place of job performance.	The employer, in order to satisfy its interests , temporarily makes an employee available to a third party. Temporarity is considered as non-definitiveness, regardless the duration of the posting itself.

The relevant Italian Legislation

The relevant Italian legislation is in art. 30 of **Legislative Decree n. 276/2003** and in art. 2 of **Legislative Decree n. 72/2000** implementing the **Directive 96/71/EC** and in **Decree 10 September 2003, n. 276** with which introduced the discipline of labor administration.

The elements that characterize the **posting** and making it legitimate for the **Italian legal system** are:

- a) The **interest of the employer that shall be specific, relevant, concrete** and lasting throughout the whole posting period;
- b) The existence and the maintenance of a **relevant connection between the employer and the employee**, which means that the original **employer shall remain responsible for the economic and legal treatment of the employee** during the whole posting period;
- c) The **temporary nature** of the posting, which shall be considered as **non-definitive**. The requirement of temporariness **is submitted to the existence of the interest of the original employer**, as that is the first requirement to justify the posting. Temporariness has to be considered as **non-definitiveness** and not as short period of time.

The posting company continues to be responsible for the majority of the obligations towards the employee, as follows:

Posting Undertaking Company	The Host Company (the User Undertaking)	Posted Worker
Keeps the title of the employment relationship, wage, contribution and social charges obligations .	Has no title upon the employment relationship. Does not have wage and contribution obligations.	Refers to the Posting company for the obligations relating to the employment relationship.
Keeps disciplinary power .	Holds Executive power of the employment relationship.	Submits to disciplinary power of the posting employer and respects executive directives of the receiving employer.
Manages regular trade union rights, vacation days and, where necessary, terminates the contract.	Can express needs about vacation periods, can suggest disciplinary measures to the posting employer.	Refers to the Posting employer concerning other rights connected with the labour relationship.

...The posting company continues to be responsible for the majority of the obligations:

It is also always the posting undertaking to have to **disburse the wages** (as well as social insurance contributions and expenses) to the employee, while it will be up to the company abroad, the reimbursement related to these labor costs. The cost of labor, if:

- it **doesn't provide for any additional increase**;
- if there is a **valid and effective working relationship** between the posted worker and the posting undertaking:

...is considered for VAT purposes "**outside the scope of VAT** (Art. 8 paragraph 35 **Italian Law 67/1988**) "

The invoice will report the following wording: «*Operation non VAT taxable according to the art. 8, s. 35 of law n. 67 of March 11, 1988*».

1. Legal aspects

The **posting agreement**, stipulated between the posting undertaking and the party abroad (benefiting from the working activity rendered), should specifically state:

- .The **reasons** of the posting;
- .The **interests** about the posting;

Staff Secondment Agreement:

The signature of the posting agreement, so called «**Staff Secondment Agreement**», becomes relevant also in relation for the scope of **deducibility of the personell costs**.

The following details that have to be included in the agreement:

- **Working terms and conditions** of the posted employers;
- Specific description of the **competences of the posted worker**, required by the receiving undertaking to satisfy its operational and/or organizational needs;
- Description of the **effective composition of the reinvoiced costs** (wage, social security contributions, possible additional wages and so);
- Description of the **manner through which determine the costs invoiced** (method of cost allocation method, frequency of the re-invoicing, etc.);
- Possible cost-sharing agreement.

The Letter of Understanding

It is delivered to the posted worker by the posting employer (in addition to the employment agreement), which normally indicates:

- **Place** and **duration** of the posting;
- Possible **extension** of the posting;
- Withdrawal or **early revocation** of the posting;
- Economic treatment;
- The expenses, room and board, fringe benefits and other additional remuneration;
- The applicable **social security provisions**.

2. Social Security Aspects

The **social security system** which is applicable to the posted worker is the one of the country of the posting company (INPS in the case of Italian undertaking).

Since 2010 a new EU provision has also introduced the so-called «**A1 form**», form through which, with a duration of 24 months, the posted worker may be protected from the point of view of social security to all European countries and in those under special conventions.

3. Tax aspects

Provided the general principle that people generally have to pay tax on income in the place where that income has been originated, **Art. 2** (par. 2) of the **Italian Income Tax Code (TUIR)** states that «**are to be considered residents the individuals who:**

a) for **most of the tax period** (*i.e for at least 183 days- 184 for years bisestyles*) are **recorded at registers of the residing population** ;

AND

a) and who **in the territory of the State have the domicile or residence** in accordance with the Italian Civil Code.»

The first requirement is objective and is that related to the the cancellation from the **Registry of the Municipality of residence in Italy** and registration of the person at the **Register of Italian Reswidents abroad (AIRE)**. Such registration is in itself considered by the Italian jurisprudence as not decisive itself to exclude the domicile or residence in the Italian State.

The qualitative requirement

...the second requirement, qualitative, concerns the concepts of domicile and residence (established by the Italian Civil Code).

Domicile (ex art. 43, sub.1, C.C.)	Residence (ex art. 43, sub.2, C.C.)
Domicile corresponds to the main seat of the business and interests (family or affective too) of the person.	Residence corresponds not only to the habitual home and demonstrates his intention live permanently (compared to the style of the person's life and the structure of its social relations).

For the existence of the requirement of habitualness, **is not necessary the continuity and finality**. It is enough for the individual who stays outside of the Italian state, to keep in the Italian territory his house, **to return there whenever he can**, and to **show the intention to keep there the center of his family and social relationships**. These requirements are alternative and not concurrent: it is therefore sufficient only one of them to prove residence in Italy.

The qualitative requirement

The objective requirement is easy to be demonstrated, **qualitative ones are more complex to prove** since they depend on subjective situations.

The Italian tax authorities carries an investigation activity aimed at finding the **evidence of actual place of residence of the Italians living abroad**, concerning:

- a) **family and affective ties and attachment to Italy;**
- b) **economic interests in Italy ;**
- c) **intention to live in Italy, also in the future**, as can be deduced from the facts and conclusive acts or by public statements;
- d) **the long stay in Italian locations** (shown by the return from trips abroad);
- e) **participation in social and sporting events in Italy** (fashion shows, concerts, sport games etc.).


The double taxation

In relation to the double taxation, **art. 15, par.1** of the **double taxation convention between Italy and Slovakia**, sets out the principle that **taxation should take place in the country of production of income.**

The principle is **derogated under art. 15 § 2**, which provides for the **exclusive taxation in the country of residence of the employee**, upon the occurrence of the following concurrent conditions:

- **the recipient is present** in the other State for a period or periods **not exceeding 183 days in a 12 month period that begins and ends in the fiscal year** concerned;
- **the remuneration is paid by or on behalf of, an employer who is not resident** in the other State;
- the **burden of remuneration is not borne by a P.E.** (permanent establishment) or by a fixed base which the employer has in the other state.

Finally, it should be remembered that **only in the event that the posted worker holds this tax residence in Italy**, the **posting undertaking must operate deductions at source relating to IRPEF.**



Thank you
for the attention!

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