

Webcast series 'State of Tax'

The Posted Workers Directive



Presentation by Iris Tuinstra, Dennis Jolly & Fenna Vankan
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Webinar

Introduction

- Webinar works best via Google Chrome
- The button '**[Ask a question]**' allows you to ask a live question via chat
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Agenda

1. Welcome
2. Background on the Posted Workers Directive
3. The Enforcement Directive & the notification obligation
4. Revision of the Posted Workers Directive
5. Key takeaways
6. Closing



Here with you today



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Impact of the EU PWED



Who? Employee



What? Activities



Where? Service provider / Recipient



When? Timely notifications



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Background

What is the Posted Workers Directive?

What is purpose of the Posted Workers Directive?

What is the impact of the Posted Workers Directive on employers and employees?

1980

Rome Convention came into force

1999

Posted Workers Directive implemented in the Netherlands (Wet arbeidsvoorwaarden grensoverschrijdende arbeid)

2014

Enforcement Directive into force in the EU (Directive 2014/67/EC)

2016

Enforcement Directive implemented in the Netherlands (Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie)

March 2020

Go-live notification obligation

1996

Posted Workers Directive into force within the EU (Directive 96/71/EC)

2008

Rome I Regulation replaces the Rome Convention

2018

EU agreement on revision Posted Workers Directive (Directive 2018/957)

July 2020

Revision of the Posted Workers Directive

Regulatory framework

Posted Workers Directive 1996

1. Directive on the rights of posted workers in the EU
2. Minimum hard core employment terms and conditions
3. Aiming for equal pay for equal work and to mitigate unfair competition

Enforcement Directive 2014

1. Directive with guidelines on how to enforce the PWD
2. Clarify the responsibilities of member states
3. Clarify the definition of posted worker
4. Local implementation of this directive differs per country



Regulation vs Directive



Regulation

- immediately and enforceable by law
- applicable in all Member States



Directive

- sets out certain objectives or a policy
- required implementation in national legislation



Impact of the EU PWED

Posting employees within the EU requires **action even before commencement of the work** performed by the employee.

The developments in the PWD will add an **extra dimension** to the framework of compliance actions resulting for cross border employees.



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What is a Posted Worker

Type of activities

Generally speaking the PWD applies to three types of mobility from one to another EU Member State

Service delivery (‘contracting’)

Group of employees sent from 1 member state to another to deliver services under the direction and supervision of their formal (foreign) employer

Example: installing a plant in the Netherlands

Intra-group transfer

An individual assists a group company in another member state:
Posted intra-group employees

Example: assigning an employee from a Belgian entity to a Dutch entity within the same group of companies

Posting by an employment agency

Posting agency workers to perform duties under the direction and supervision of the hiring company

What is a Posted Worker - Dutch definition

Posted employee

- Employer needs to be located in an EU/EEA member state or Switzerland
- Employee needs to work temporary in the Netherlands

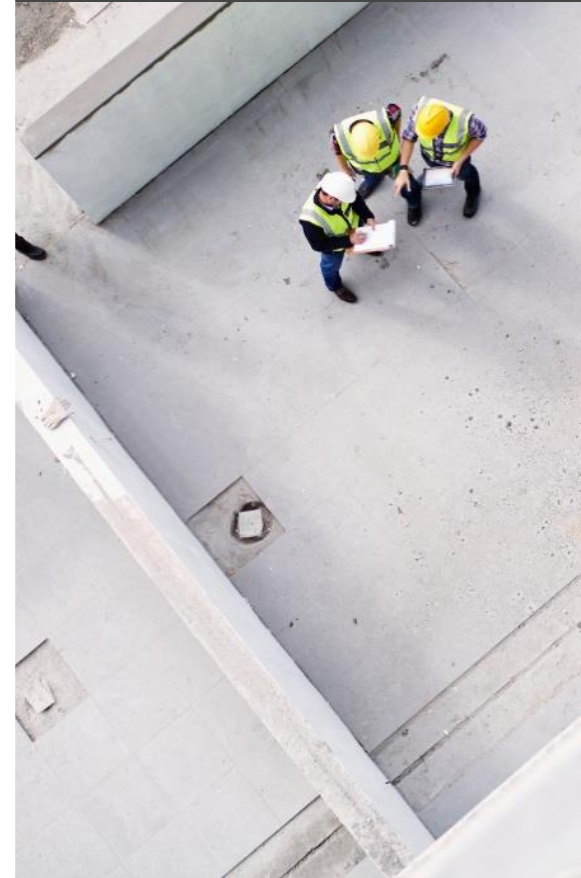
Exemptions*

- **Business trips**
13 out of 52 weeks maximum
- **Assembly, installation and repairs**
Thresholds differs per activity
- **Artists, sports, researchers**
- **International transport**
Most types of transport through NL

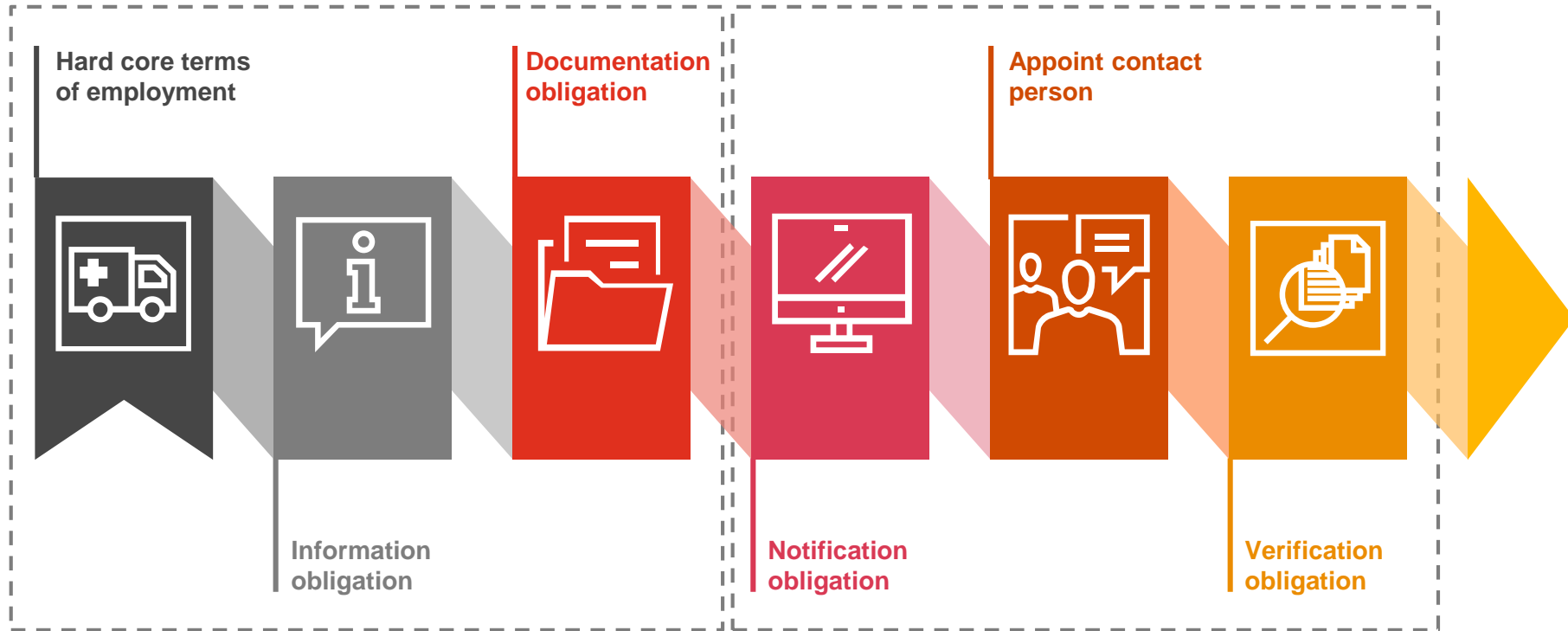
* Non exhaustive

✓ Self-employed individual

In the Netherlands, scope is extended to self-employed individuals in 'high-risk' branches (f.e. construction, agriculture, care, meat industry, etc.)



Obligation as part of the Dutch EU PWED



Documentation management



Documents need to be available **at the work location** during the activities:

- Employment agreement
- Payslips
- Documents containing the number of hours worked
- Documents showing social security contribution payment
- Identity employer, recipient party, employee and party responsible for payment of salary
- Proof of salary payment

Documents need to be readily available and kept for 5 years after end of posting

Language: Dutch / English / German / French



Notification requirement



<https://meldloket.postedworkers.nl/>

Foreign employer needs to register **prior to the start of the activities** in online portal details on the posting:

- a. His identity
- b. The identity of the recipient company
- c. Identity of the posted employee
- d. Liaison person
- e. Person/party who is responsible for payment of salary
- f. Nature and duration of activities
- g. Location where activities will be performed
- h. Where social security contributions are paid

Notification requirement - annual notification



An exception applies to small cross-border employers. They are able to notify their activities in the Netherlands for a 12 month period.

Criteria:

1. Employer does not employ more than 9 employees
2. Is located within a 100 km radius from the Dutch border
3. Is registered in the chamber of commerce locally
4. Performed at least 3 activities in the Netherlands in the preceding calendar year
5. Is not performing activities in the construction industry or employment agency services

Notification requirement - exchange of information



Information is shared with several authorities!

- Tax authorities
- Social security authorities
- Inspection of living environment and transport
- Immigration authorities

Exemptions on the notification requirement

Alignment with immigration 'incidental work'

Examples:

- Attending academic conferences (max 5 days per month)
- Business meetings
- Guest lecturers, researchers

Transport sector

- Exemption in relation to activities performed in certain subsectors of the transport sector

Verification requirement



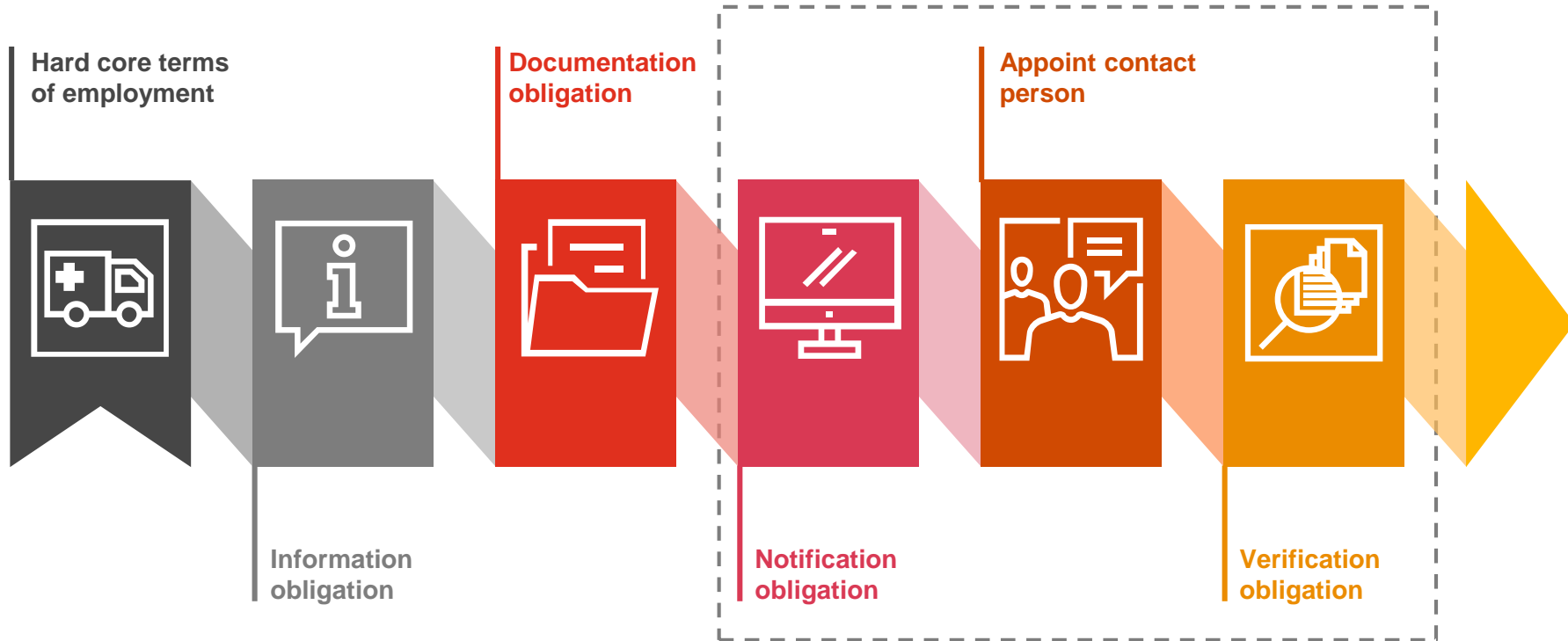
The recipient party has the **obligation to verify** the notification within 5 workdays after start of the activities in the Netherlands, or to notify that the notification has not been completed or incorrect.

Contact person



A liaison person needs to be available in the Netherlands to be able to answer questions concerning the posting or to deliver documents etc. to the authorities upon request.

Obligation as part of the Dutch EU PWED



Online notification portal



Critical aspects:

- Reporter
- Sending entity
- Receiving entity
- Contact Person
- Project
- Employee(s)

The image displays a composite of web portal screenshots. A large magnifying glass is positioned over the 'Company information' section of a form. The background shows overlapping sections of the portal, including 'Employee details' and 'Project' sections.

Employee details

First name * DJ

Project

Employer > Service recipient > Project > Employees > Summary

Project

Sector * [dropdown]

Company information

Company name * [input]

Country of residence * [dropdown]

At which chamber of commerce has it been registered? Dutch Chamber of Commerce Chamber of Commerce in another country

VAT identification number * [input]

Address service recipient

Provide manually Yes No

Postal code in the Netherlands * [input]

House number * [input]

House number addition [input]

City [input]

Country of residence [input]

Previous Next

Sanctions and fines

Sanctions and fines:

Penalty in case of non-compliance

- Not providing information / documents upon request - EUR 6,000
- Not complying with notification requirement:
 - 0-10 posted employees: EUR 1,500
 - 10-19 posted employees: EUR 3,000
 - >20 posted employees: EUR 4,500
- Not complying with verification requirement - EUR 1,500
- Not complying with documentation requirement - EUR 8,000
- In case of deliberate evasion of rules: increase of 50%
- In case of recidive offence: increase of 100% or 200%
- Depending on the nature and seriousness of the breach: reduction of 25%, 50% or 75%

Key take aways

- Notification and verification obligation - service provider and service recipient need to work together
- The notification obligation is part of a wider scope of requirements
- Ensure you have insight in where your employees perform activities and which 3rd party employees perform activities at your premises

Now is the time to re-confirm that all appropriate processes and procedures are in place!

Questions & Answers



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Recap - Background

What is the Posted Workers Directive?

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What is the impact of the Posted Workers Directive on employers and employees?



Status implementation of revised PWD

Where do we currently stand?

What is the aim of the legislative proposal?

14 May 2020

Legislative proposal adopted by Dutch House of Representatives

11 December 2019

Legislative proposal submitted to Dutch Parliament

30 July 2020 (expected)

Implementation of the revised Posted Workers Directive in the Netherlands

What is a Posted Worker - Dutch definition

Type of activities

Generally speaking the PWD applies to three types of mobility from one to another EU Member State

Service delivery ('contracting')

Group of employees sent from 1 member state to another to deliver services under the direction and supervision of their formal (foreign) employer

Example: installing a plant in the Netherlands

Intra-group transfer

An individual assists a group company in another member state:
Posted intra-group employees

Example: assigning an employee from a Belgian entity to a Dutch entity within the same group of companies

Posting by an employment agency

Posting agency workers to perform duties under the direction and supervision of the hiring company

Definition 'posted workers': posted intra-group employees (second column) and posted agency workers (third column)

Dutch hard core terms of employment as currently applicable



The 'hard core' employment terms and conditions consist of:

- Minimum rates of pay (e.g. minimum wage of EUR 1,680 gross (as per 1 July 2020), 8% holiday allowance)
- Maximum work hours (12 hours per shift and 60 hours per week) and minimum rest hours
- Minimum of 20 paid vacation days per calendar year (based on full-time employment)
- Health, safety and hygiene at work
- Equal treatment regulations

The same hard core employment terms and conditions apply insofar these are included in a **collective labour agreement** that is **a)** declared generally binding ('AVV CLA'), and **b)** applies to the activities in the Netherlands

Example



Foreign employer

Hard core employment terms:

- Minimum wage of EUR 1,680 gross per month (as per 1 July 2020)
- Minimum of 20 paid vacation days per calendar year
- Holiday allowance of 8% of the gross annual salary
- Max. 12 hours work per shift
- Max. 60 hours work per week
- In case of posting by an employment agency: Hirer's reward ('principle of equal pay')



Hiring company

Two points of attention

- 1) Chain liability for Dutch hiring company
- 2) Registration obligation for (foreign) temporary employment agencies and companies

Four most important changes

- 1) Rights of posted agency workers are **equalized** with rights of Dutch agency workers
- 2) **Employment agencies remain responsible** for employment terms, even if posted agency worker is sent to another company
- 3) The new 'hard core' terms of employment include **allowances related to the posting**
- 4) After 12 (or 18) months, the '**extended hard core**' terms of employment must be applied

Hard core terms of employment

Hard core employment terms (until 12 months)

Hard core terms of employment applicable to *posted workers*: i) in legislation, and ii) in a collective labour agreement that is declared generally binding ('AVV CLA') that applies to the activities in the Netherlands

Hirer's reward ('principle of equal pay') applicable to *posted agency workers*

Extended hard core employment terms (after 12 (or 18) months)

Application of almost all mandatory Dutch labour law for *posted workers*, e.g. payment during illness and all benefits as included in AVV CLA

Excluded: Procedures, formalities and conditions for concluding and terminating employment contracts and supplementary pension arrangements

Working habitually or long-term in the Netherlands (Rome I)

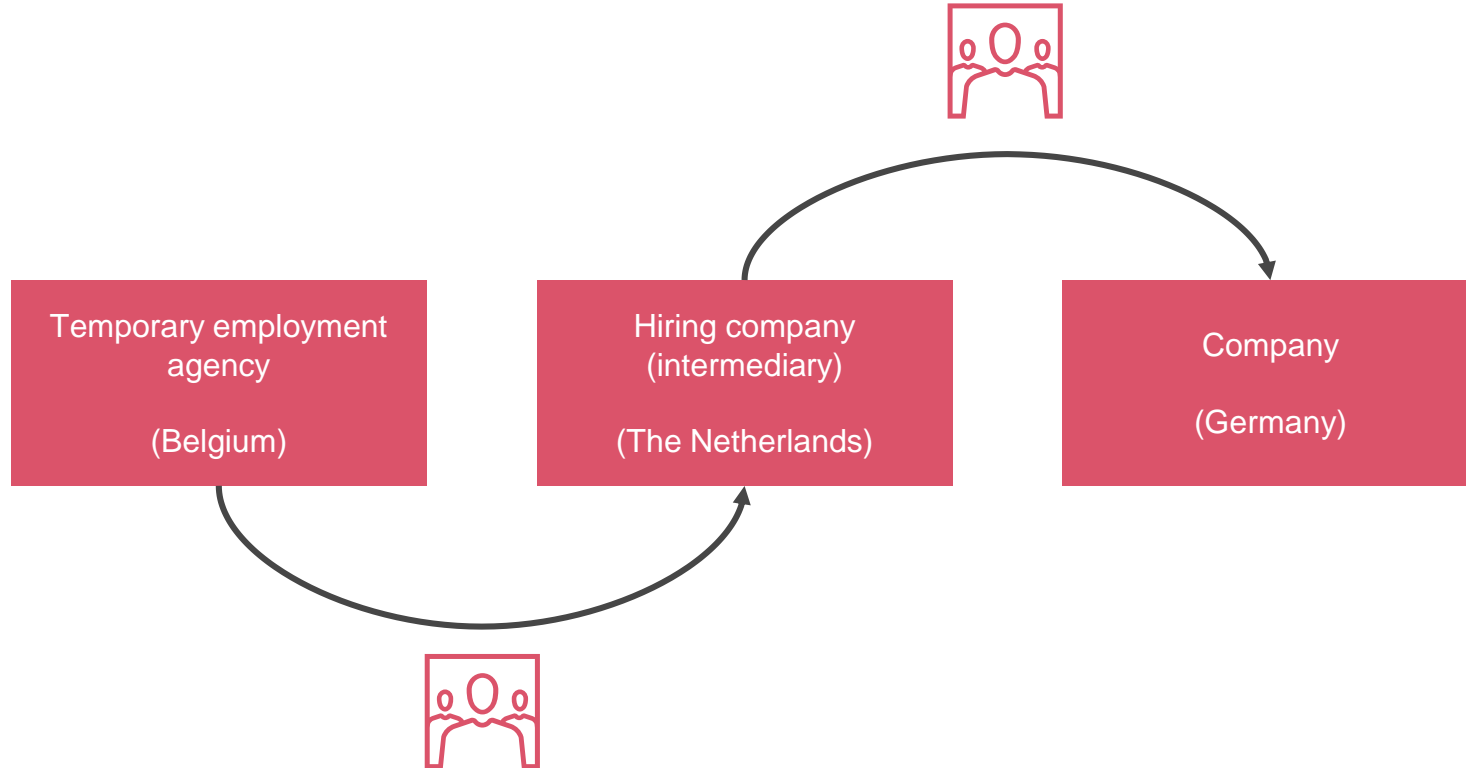
Application of all mandatory Dutch labour law for employees 'habitually' working in the Netherlands, so including Dutch dismissal law ('cherry picking')

No fixed number of years. Unclear after how long Rome I applies. Depending on facts and circumstances

Rights of posted agency workers are equalized with rights of Dutch agency workers

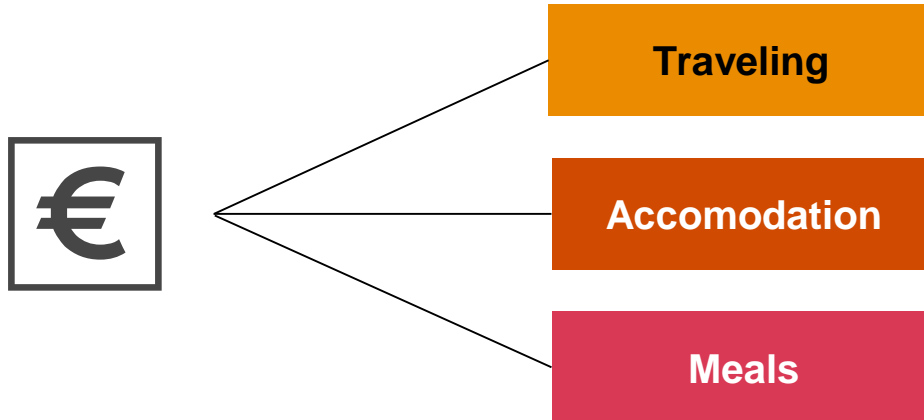
- Posted agency workers are entitled to the same employment benefits as Dutch agency workers in a similar position **as of day 1**
- This includes entitlement to the employment conditions as set out in an applicable **collective labour agreement** that is declared generally binding ('AVV CLA') which apply to Dutch agency workers

Employment agencies remain responsible to apply correct employment terms, even if the hiring company is sending the posted agency worker to another company

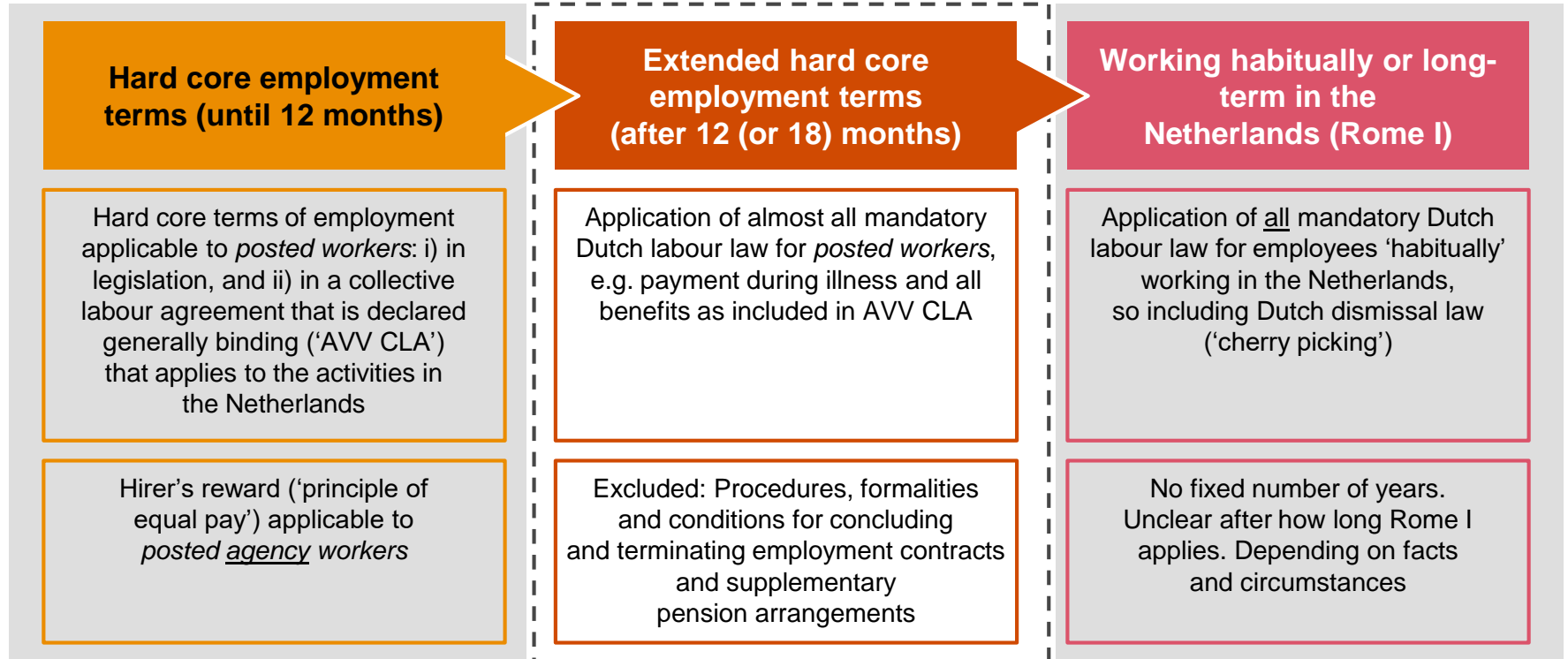


The new 'hard core' terms of employment include allowances related to the posting

The hard core terms of employment will include allowances for costs that have been made due to the travelling nature of the position:



Extended 'hard core' terms of employment



After 12 (or 18) months, the 'extended hard core' terms of employment must be applied

The maximum duration of temporary posting will be set at 12 months

After 12 months, almost all mandatory provisions as included in Dutch legislation apply (the 'extended hard core terms of employment') to posted workers:

- Payment during first two (2) years of illness: 70% of last earned salary (with a minimum equal to the monthly statutory minimum wage of € 1,680 gross (as per 1 July 2020) and a maximum equal to 70% of the maximum daily wage of € 4,769.34 gross)

In addition to mandatory obligations based on Dutch laws: If activities performed in the Netherlands fall under scope of AVV CLA à all terms of AVV CLA must be applied to posted workers

2 categories excluded:

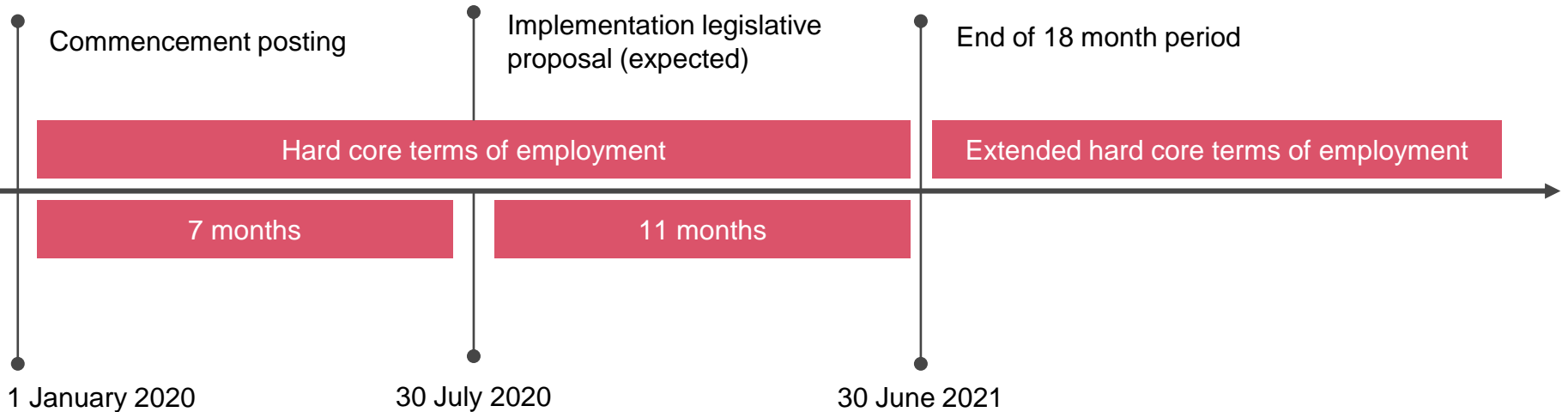
1. Procedures, formalities and conditions for concluding and terminating employment contracts (including non-compete clauses)
2. Supplementary pension arrangements

Extension to 18 months will be possible by means of submitting a motivated request to the Minister of Social Affairs. This will probably be a strict test.

Transitional arrangement 1/2

For workers posted prior to 30 July 2020, the posting period of 12 months is 'assumed' to be set at 18 months

Example:



Transitional arrangement 2/2

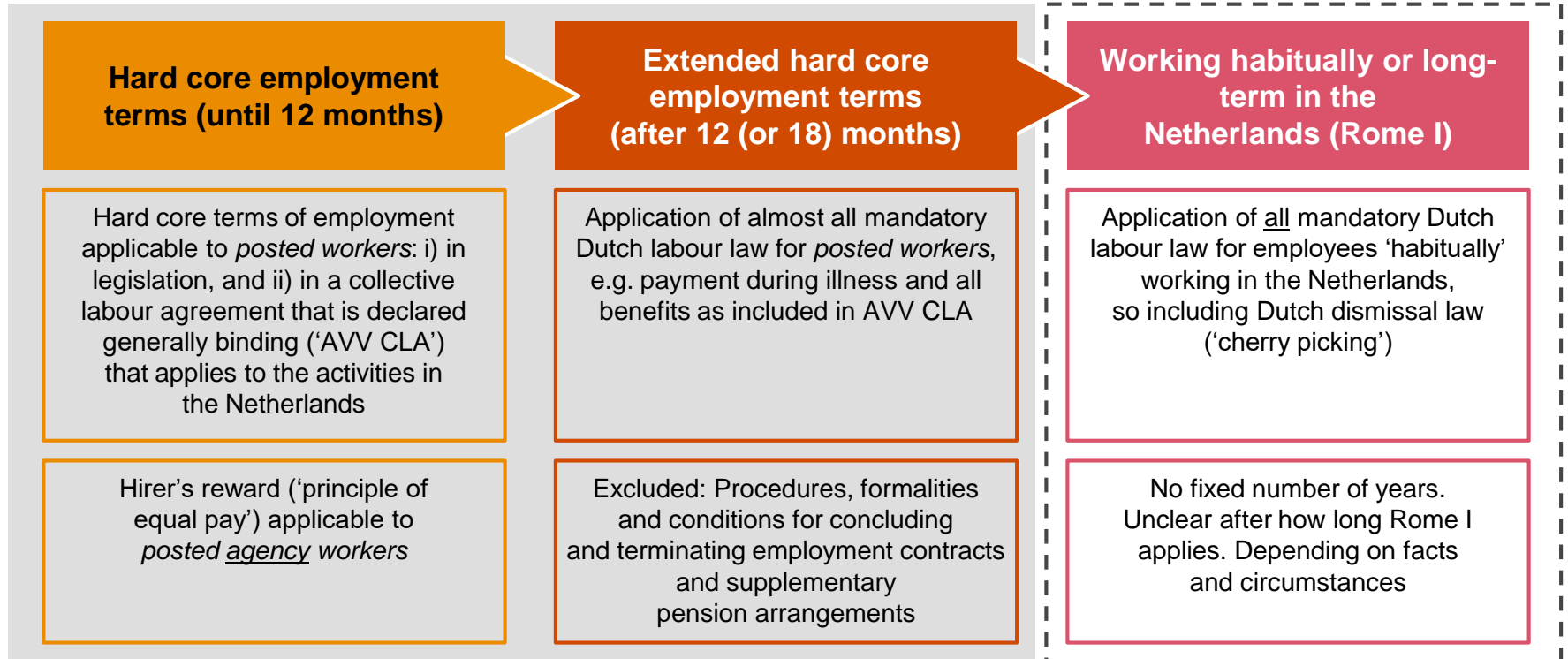
If a posting has lasted more than 18 months on 30 July 2020, the extended hard core provisions will apply as of 30 July 2020, but not retroactively. **Example 1:**



For postings commencing after 30 July 2020, the new rules apply immediately. **Example 2:**



Rome I regulation



Working habitually / long-term in the Netherlands

Employees could successfully claim that Dutch dismissal law applies:

- **Reasonable ground:** It is in principle not possible to terminate an employment contract without a reasonable ground
- **Statutory severance payment:** Upon termination (including after sickness or expiration of a definite term contract), employees are entitled to a statutory severance payment of 1/3 of the gross monthly salary per service year (prorated per day worked) with a cap of €83k gross or 1 gross annual salary, whatever is the highest
- **Statutory notice period:** The statutory notice period is 1 month for the employee and 1 up to 4 months for the employer (depending on the length of service)

When is an employee habitually working in the Netherlands?

No fixed number of years, but depending on all facts and circumstances.

Example:



France

Situation:

French employer has posted its workers for more than 3 years in the Netherlands. Besides receiving salary from the French employer, there is no longer a factual connection.

Possible consequence:

The posted workers could successfully claim applicability of Dutch dismissal law if their French employer wants to terminate their employment contracts



The Netherlands

Key takeaways with the new legislation coming up

- Monitoring the duration of the posting of workers is more important with the risk that more and more Dutch benefits apply to the foreign employment contract in the course of time
- Gain insight in employment terms that must be applied during the posting and make a comparison between the home and host benefits, including investigating if a AVV CLA must be applied
- For intended postings of more than 12 months, look into the contractual set-up (e.g. consider offering a local employment contract)
- Inform foreign companies that they must register at the Dutch Chamber of Commerce. Prevent claims based on the chain liability
- Review assignment policies and secondment addenda and check what modifications may be required as a result of the upcoming changes

Questions & Answers



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Key takeaways

The implementation of the EU Posted Workers Enforcement Directive and the revised Directive in local legislation throughout Europe requires insight in your international workforce

- Exchange of information between authorities
- As a result of the upcoming changes assignment policies might require modifications

Closing

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