

Review of Lex Laval Summary

REPORT OF THE INQUIRY ON
THE POSTING OF FOREIGN
WORKERS TO SWEDEN



STATENS OFFENTLIGA
UTREDNINGAR

SOU 2015:83

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The Inquiry on the posting of foreign workers to Sweden, a cross-party committee of inquiry, was tasked with reviewing *lex Laval*, i.e. the changes to the legislation on the posting of foreign workers to Sweden introduced on 15 April 2010 as a result of the Court of Justice of the European Union judgment in the Laval case. In September 2015 the Inquiry submitted the report *Review of Lex Laval* (SOU 2015:83) to the Swedish Government. This document contains an English translation of the Inquiry's summary of its proposals and a number of chapters of the report, including an overview of the Swedish labour market model and a summary of the provisions currently applicable in Sweden with respect to the posting of workers. It also contains an English translation of the legislative amendments proposed by the Inquiry.

The Swedish labour market model

Introduction

The Swedish model for regulating conditions on the labour market is usually characterised by a low level of central government intervention, with conditions principally regulated through collective agreements and the application of these agreements supervised by the organisations that are party to them. Furthermore, there are few legislative obstacles to taking industrial action to force the opposite party to conclude a collective agreement. One prerequisite if the Swedish model is to work is a high degree of organisation among both workers and employers. The low level of central government intervention has been considered to contribute to ensuring that the social partners shoulder their responsibility for society and its development, and are able to reach consensus. In normal circumstances, relatively few working days are lost to industrial action in Sweden compared with other European countries. There has long been broad support for the Swedish labour market model among the social partners and the parties represented in the Riksdag.

This also generally applies to the public sector. Given the focus of the Inquiry's remit, however, only the situation in the private sector was considered.

High degree of organisation

Around 65 per cent of workers – both blue-collar and white-collar – are members of some kind of employees' organisation. The degree of organisation among employees has declined since the 1990s.

More than three quarters of workers are employed by an employer that is a member of an employer organisation. This has remained constant since the 1990s. More than 80 per cent of workers are employed by an employer that is either a member of an employer organisation (78 per cent in 2012) or has concluded its own collective agreement (application agreement¹; 6 per cent in 2012). The level of collective agreement coverage has been relatively stable since the 1990s, with a minor decline in recent years. The proportion of blue-collar workers covered by collective agreements is greater than that of white-collar workers: 94 per cent compared with 78 per cent in 2012. The proportion of blue-collar workers covered by application agreements is 12 per cent, compared to just 2 per cent of white-collar workers.

International comparisons that include both the public and private labour markets show that the Nordic countries have the highest degree of organisation among workers in the EU. The degree of organisation among workers in the EU varies considerably. In 2008, the degree of organisation in France and Estonia was less than 8 per cent. Among the EU Member States, Sweden has the highest proportion of workers employed by employers that are members of an employer organisation apart from Austria, where it is obligatory for employers to be members of such an organisation. The EU average in 2008 was approximately 58 per cent. Moreover, by EU standards Sweden has a high level of collective agreement coverage, although there are countries with a higher level. This is partly because other countries may have systems for declaring collective agreements universally applicable, i.e. a system whereby employers that are not members of the organisation that is party to an agreement have to apply the agreement anyway. In 2008, approximately two thirds of workers in the EU were covered by collective agreements, on average.

The principle of industrial unionism is applied to the organisation of workers. This means that, as a rule, all of the workers at a given factory can belong to the same employees' organisation, regardless of their job. There are more than 115 central

¹ An application agreement is concluded between an employees' organisation and an individual employer. Application agreements usually involve the application of the majority of provisions in the sectoral collective agreement that already exists between the employee's organisation and an employer organisation.

organisations in the labour market as a whole: around 55 employer organisations and approximately 60 trade unions. Central collective agreements concerning wages and other general terms and conditions of employment are normally concluded for a whole sector. The organisations on the two sides do not often argue openly with each other; instead there is a tradition of coordination and cooperation concerning the organisations' recruitment areas and demands for certain collective agreement terms and conditions.

Low level of central government intervention

In Sweden there is a longstanding, deliberate strategy whereby central government regulates the conditions on the labour market as little as possible – with the exception of the work environment, protection against discrimination, labour market policy measures (including vocational education and training and unemployment benefits) and certain leave of absence benefits. It is considered that the conditions should instead, as far as possible, be regulated by the social partners, preferably through collective agreements. This is considered particularly applicable to issues of wage formation. Only in exceptional cases has the Government considered general legislation on wages. This happened most recently in 1990, when a government proposal to criminalise elevated final salaries was rejected by the Riksdag.

Legislation provides basic provisions on the right of association, collective agreements and their effect, and a court system to adjudicate on legal disputes on collective agreements when the parties cannot resolve the dispute themselves via the dispute negotiation process, which is obligatory before recourse can be made to the courts. Central government also provides a tax-funded National Mediation Office to assist the social partners in various ways in agreeing and concluding collective agreements.

There is no general legislation on minimum wages in Sweden. Instead, the National Mediation Office is to work for effective wage formation. When it comes to legislation on other working terms and conditions – apart from the work environment and protection against discrimination – it is often permissible to deviate from the legislation via collective agreements, at least if this means

that the regulations are more favourable to workers or if it at least complies with what is expected of Sweden under EU law. This happens regularly. For example, it is estimated that the proportion of the labour market directly governed by the Working Hours Act (1982:673) is very limited, as collective agreements containing deviating regulations have been concluded in all labour market sectors.

Requirements under EU law are the reason for a large proportion of the labour law legislation in Sweden or the details of it, e.g. the Posting of Workers Act, the legislation prohibiting discrimination against part-time workers and workers in fixed-term employment, and legislation on automatic changes of employer in connection with transfers of business. Although Sweden has deliberately forgone legislation on labour market conditions in favour of self-regulation by the social partners, Sweden has also consciously surrendered power to legislate to the European Union, which does not necessarily have to show the same restraint when it comes to regulating labour market conditions.

There is no system for declaring collective agreements universally applicable in Sweden. The closest equivalent is probably the legislation on extended collective licences, which apply to provide compensation for authors' work and rights.

Collective agreements are only binding on the parties to them and, in the case of organisations that are parties to such agreements, to their members. Nonetheless, unless something else is explicitly agreed collective agreements confer an obligation on the employer to also apply the terms and conditions in the agreement to workers who are not members of the employees' organisation that is party to it. Furthermore, the employer that is party to a collective agreement may also, as a rule, apply agreed terms and conditions that deviate from legislation to such workers. Moreover, certain statutory effects of collective agreements apply even during a temporary period without a collective agreement.

It can be said that the labour law legislation that exists in Sweden largely builds on the fact that there are, or can be, collective agreements containing deviating regulations, and that the social partners ensure compliance with regulations in the labour market. The legislation often aims to enable the two sides to cooperate to achieve the desired results, for example in matters to

do with the work environment, protection against discrimination or significant changes in a workplace, including labour force cuts.

In the absence of general legislation on minimum wages and a system for declaring collective agreements universally applicable, Sweden does not have a public authority to generally ensure that employers apply decent terms and conditions to their workers or pay the agreed wages. The social partners have to play this role instead. However, in one case the Labour Court ruled that this is not a matter of ‘general interest’, but rather an expression of the vested interest that primarily lies with the organisation and its members. In matters of the work environment, working hours and protection against discrimination, there are public authorities that ensure compliance with legislation where appropriate. In the case of protection against discrimination, however, the authority’s role is subsidiary, in so far as it can only pursue a discriminated worker’s rights in court in cases where the worker’s employees’ organisation does not do so.

In several other EU Member States, central government intervenes in wage formation in various ways. Legislation on minimum wages or systems by which central government can extend concluded collective agreements (declare them universally applicable) are also customary in the EU.

There is no general legislation on non-profit organisations. No state-level registration or similar is required to form an employees’ or employer organisation, and there is no legal recourse for the authorities to ban a non-profit organisation as such.

Regulation through collective agreement

The usual way to regulate labour market conditions in Sweden is thus the conclusion and application of collective agreements. Legislation and case-law ensure that employers that conclude collective agreements themselves, or are members of organisations that conclude agreements, apply the terms and conditions in the agreement to all employees, as far as possible. The terms that apply under the predominant collective agreement in the sector in question are also, in practice, considered normative for employers

and workers who are not bound together by collective agreement and who have not agreed terms and conditions on a specific issue.

There is no obligation to conclude a collective agreement, even if the parties are essentially in agreement as to what should apply. The Industrial Agreement is an example of a collective agreement containing provisions on how the parties are to agree on a new collective agreement concerning wages and other terms and conditions in connection with the expiry of such an agreement.

If requested to do so, a party that has concluded a collective agreement on wages and general terms and conditions of employment must submit a copy of it to the National Mediation Office. The Office regularly attempts to gather in all collective agreements concluded between organisations and, in accordance with the provisions on public access to official documents, make the agreements available to all. The Office estimates that there are approximately 670 applicable nationwide agreements concluded by organisations for an entire sector, and more than 70 000 employers that have concluded application agreements.

The terms and conditions in individual collective agreements can vary widely. There is also great variation in the extent to which it is permitted to deviate from or supplement a nationwide agreement through a local collective agreement or other agreement between local parties. It is not uncommon for there to be no collective agreement provisions stating what wage a worker carrying out a particular job should receive. Of the more than 500 nationwide agreements concluded in 2013, however, almost two thirds contained provisions on minimum wages or tariff wages.

It is primarily up to the organisations that are party to an agreement to ensure compliance with the agreement reached. An individual worker or employer bound by a collective agreement can, however, pursue their rights under the agreement in the courts. A worker who is not a member of the organisation that is party to the agreement cannot do so. An organisation that is party to a collective agreement is entitled to bring an action on behalf of its members to enforce their rights under the agreement, but cannot pursue an action for those who are not or have never been members. Any party that breaches a collective agreement is liable to pay not only compensation for any financial damage caused, but also general damages for the failure to comply with the collective

agreement. Damages for breaching a collective agreement must, as a rule, be paid even if the party that has breached the agreement did its best to comply with it. An employees' organisation may, despite a collective agreement, decide to launch industrial action to obtain clear and due compensation for work done.

Controls of compliance with applicable collective agreement terms and conditions in a workplace can be undertaken by union representatives who are appointed by the employees' organisation and employed by the employer, during working hours and at the employer's expense. In certain areas there are, or at least have been, cases of collective agreements containing provisions on fees to the employees' organisation for the organisation's scrutiny of the employers' application of collective agreements. There are also collective agreements containing various kinds of provisions aiming to enable or facilitate employees' organisations' efforts to control employers' application of the collective agreement. There are no government grants to finance efforts by organisations that are party to a collective agreement to control the application of the agreement. Proposals that aim to strengthen the possibilities for employees' organisations to monitor compliance with collective agreements when that organisation does not have any members working for that employer have been commissioned by the Government, only to be immediately dismissed when the main labour market organisations agreed on a recommendation.

Industrial action to bring about collective agreements

The strategy of avoiding central government intervention in the regulation of labour market conditions also applies to regulation of industrial action. The social partners have a constitutional right to take industrial action on the labour market, unless otherwise prescribed by law or agreement. There are few statutory exemptions from the right to take industrial action. The most important exemption is the legal regulation concerning the obligation to maintain industrial peace that is brought into effect when a collective agreement is concluded. An organisation that is party to a collective agreement cannot, for example, take industrial action in disputes on the meaning of an agreement, or to amend the

agreement. An organisation that is party to an agreement can, however, take sympathy measures in relation to the opposite party to the agreement. Sympathy measures are taken in support of lawful industrial action for own demands or for another party's demands for a collective agreement with another party.

Another statutory exemption from the right to take industrial action means that industrial action may not be taken to conclude a collective agreement with a company that does not have any employees, or at which only the entrepreneur and their family members are employed. Other than these, and the Posting of Workers Act, there are no explicit statutory prohibitions on industrial action to bring about a collective agreement with an employer that is not party to such an agreement. However, if a Swedish employer already has a collective agreement it is prohibited to take industrial action to bring about another collective agreement that would supersede the application of the existing agreement.

There are, therefore (again, disregarding the Posting of Workers Act) no statutory requirements that industrial action – which almost always intentionally harms both the opposite party and outsiders – must be proportionate in relation to what it aims to achieve, or that industrial action taken by an employees' organisation must in any other way have a reasonable trade union aim. It is left to the organisation taking action to decide for itself what is proportionate and reasonable. However, since 1938 the social partners in the private sector have undertaken, via provisions in a collective agreement that outlives wage bargaining rounds, to respect certain basic restrictions to the right to take industrial action. This collective agreement – known as the Saltsjöbaden agreement – led the Government to forego introducing legislation on such restrictions. Apart from in the shipping sector, it is unusual for the social partners to take industrial action in an attempt to influence labour market conditions abroad. Industrial action usually aims to achieve regulation of terms and conditions of employment (e.g. wages) for workers via a collective agreement. The possibilities for an employees' organisation to take industrial action can be assumed to have an impact on an employer's willingness to conclude application agreements, and on employer organisations' willingness to conclude collective agreements, and

thus on the level of collective agreement coverage and the low number of working days lost to conflicts.

It is always possible for the Government to break ongoing industrial action through special legislation, for example as a last resort in the event of industrial action that has a devastating effect on society. This last happened in 1971.

The Posting of Workers Act notwithstanding, it is up to the social partners to find employers that are not party to collective agreements, without direct Government assistance, and attempt to get them to commit to collective agreements. Naturally, the organisations can, like anyone else, make use of the information found in public registers.

The public authorities usually apply a principle of neutrality in the event of industrial action. One way in which this is expressed is the Act restricting social support in the event of labour disputes (1969:93). Workers who strike or have been locked out of a workplace in a labour dispute do not receive state-financed unemployment benefit or financial aid for studies, for example, but rather must support themselves by other means. If this is done through municipal income support, the municipality can later demand repayment of the amount in question. However, any person already receiving unemployment benefits will not lose those benefits if he or she refuses an offer of work at a workplace at which lawful industrial action is ongoing.

If an employees' organisation that is a member of the Swedish Trade Union Confederation takes industrial action to get an employer that is not party to a collective agreement to conclude one, the dispute usually ends with the employer committing to a collective agreement (by concluding an application agreement or joining an employer organisation), or winding up its operations. Industrial action and notice of industrial action by employees' organisations to bring about a collective agreement with a company have become less and less common in the last 15 years. In 2013, industrial action was taken against seven companies; one of these cases concerned shipping vessels. In 2014, notice of industrial action to bring about a collective agreement was given to 27 companies, but in the majority of cases the action was never brought. Trade unions within the Swedish Trade Union Confederation give notice of industrial action to bring about collective

agreements with companies more frequently than unions in other umbrella organisations.

If requested to do so, the Labour Court can take an interim (i.e. temporary) position on whether upcoming or existing industrial action is lawful. The Court's decisions are generally observed by the social partners.

There are some formal rules concerning giving prior notice to the opposite party and the National Mediation Office that are supposed to be followed in the event of industrial action to bring about a collective agreement. However, the industrial action is not automatically unlawful if these rules are not followed. There are also rules concerning mediation in connection with industrial action and the possibility for the National Mediation Office to postpone industrial action.

As a rule, any party that takes unlawful industrial action is liable to pay not only compensation for the financial damage caused by the action, but also general damages for breaching the statutory industrial peace. The damages for which an individual worker could be liable for participating in unlawful industrial action were previously restricted to a maximum of SEK 200, but the restriction was removed in 1992, and thus such action may now be more costly to the individual worker.

The regulations on the posting of workers in brief

Within the European Union there is a basic freedom to provide services. An enterprise established in an EU Member State (State of origin) can, for example, temporarily pursue its operations in the Member State in which the service is provided (host State) on the same terms as that State offers its own citizens. To provide the service, the provider can take with it – post – its workers, regardless of whether they are EU citizens or citizens of a third country. It is, in principle, prohibited to discriminate against foreign service providers or otherwise restrict their freedom to provide services. Even regulations that are not directly discriminatory, but rather are equally applied to domestic and foreign enterprises posting workers, can be prohibited under EU law. This applies if services supplied by foreign enterprises are prohibited, impeded or made less attractive to use or offer.

However, it is permissible to restrict the right to provide services under certain circumstances.

Firstly, it is permissible to directly discriminate against foreign enterprises when this is necessary “on grounds of public policy, public security or public health”.² Aims such as promoting healthy competition on equal terms for Swedish and foreign enterprises and giving employees’ organisations the possibility to work to ensure that all employers in the Swedish labour market apply terms and conditions of employment that are customary in Sweden are not, according to the Court of Justice of the European Union, based on such grounds.

² Article 52 of the Treaty on the Functioning of the European Union (ex Article 46 of the Treaty establishing the European Economic Community).

Secondly, according to Court of Justice case-law it is permissible to base restrictions that are not directly discriminatory on overriding reasons relating to the *public interest*. Protecting domestic workers against social dumping or unfair competition, or protecting posted workers and their terms and conditions can, according to the Court, constitute such legitimate public interests. However, restrictions based on overriding reasons relating to the public interest require *firstly* that the regulation applies equally to all business operators in the host State, and *secondly* that the interest in question is not already protected via the provisions that apply to the service provider in the State of origin. The Member States must always recognise each others' protection regimes. The application of restrictions on foreign enterprises must also be suitable to ensure the attainment of the objective in question, and must not go beyond what is necessary to attain it, i.e. it must be appropriate and proportionate.

If the parties to an employment contract have not agreed anything else, their employment relationship is regulated under the law of the State in which the worker usually performs his or her work, even if he or she is temporarily posted in another State. According to Court of Justice case-law, this, along with the freedom to provide services, has not been considered to prevent a host State from prescribing that legislation or universally applicable collective agreements also apply to workers who are only working in the territory of that State temporarily. The Posting of Workers Directive³ introduced an obligation to do this for posted workers with respect to certain minimum terms and conditions that apply in the host State, e.g. minimum wages and maximum work periods (the 'hard core' terms and conditions). The Member States must also ensure that adequate procedures are available to posted workers and/or their representatives to claim their rights, and that it is possible to institute proceedings in the host State.

The Posting of Workers Directive outlines certain ways to establish minimum terms and conditions, such as legislation or declaring them universally applicable, but according to the Court

³ 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 (OJ L 018, 21/01/1997).

of Justice, the host State is free to choose some other system as long as it does not impede the freedom to provide services. The provisions on minimum terms and conditions must, for example, be sufficiently precise and accessible that they do not make it unreasonably difficult for a posted worker to understand his or her obligations in practice.

It is permissible for a posting employer to apply terms and conditions that are more favourable to the workers than the minimum, whether voluntarily or due to regulations in the State of origin. However, the host State cannot require a posting employer to apply terms and conditions that exceed the established minimum. This is only permissible if the requirement is based on reasons of *ordre publique*, i.e. overriding provisions that are so crucial for the protection of the political, social or economic order in the host State that they must apply to all persons in the national territory of that State, e.g. prohibition of forced labour. According to the Court of Justice, only the State (not, for example, employees' organisations) can cite the provision on *ordre publique*. This provision is also to be applied restrictively, and the host State's assessment can be reviewed by the Court of Justice.

The labour market right to organise and bargain collectively is protected by several international instruments. In some cases, such instruments also protect the right to take industrial action. The question of whether industrial action is permissible and the liability for damage caused by such action is determined by the law in the country in which the action is taken. Under Swedish law, the social partners have a right to take industrial action on the labour market, unless otherwise prescribed by law or agreement.

Protection of fundamental rights, such as the right to take industrial action, can in itself constitute such a legitimate interest that in principle can justify a restriction of the freedom to provide services. But, in the view of the Court of Justice, the right to take industrial action must still be exercised in a way that is consistent with the freedom to provide services, and be proportionate. With respect to posted workers, this means that employees' organisations in the host State may not be given the possibility to take industrial action to get the posting employer to apply terms and conditions that exceed the minimum, i.e. are more favourable to the posted workers or concern areas other than those outlined in

the Posting of Workers Directive. Nor is it permitted to give employees' organisations the possibility to take industrial action to get the posting employer to negotiate what wages are to apply.

The Swedish Posting of Workers Act (1999:678) implements the Posting of Workers Directive, but applies equally to employers outside the EEA that post workers. The Act only applies where there is an employment relationship during the period of posting in three cases: 1) when an employer on its own account and under its own direction posts workers to Sweden in accordance with a contract with a service recipient operating in Sweden, e.g. for contract work; 2) when an employer posts workers to an establishment or undertaking owned by the same group; 3) when an employer hires out workers to a user undertaking in Sweden.

The Act outlines the minimum statutory terms and conditions that are to apply to posted workers. Since Sweden does not have legislation on minimum wages or a system to declare collective agreements containing minimum wages universally applicable, the Act does not contain any provisions concerning the minimum wage to be paid to posted workers. Instead, the Posting of Workers Act regulates the circumstances in which industrial action may be taken to regulate minimum wages and other 'hard core' minimum terms and conditions for posted workers through a collective agreement. All other industrial action to regulate the terms and conditions for posted workers through collective agreements is unlawful.

Under the Posting of Workers Act, it is permissible to take industrial action solely to obtain a collective agreement concerning minimum wages or other minimum terms and conditions in the permitted areas on the condition that the terms and conditions demanded are equivalent to those contained in a central collective agreement that applies throughout Sweden to corresponding workers in the sector in question, and are more favourable to the posted workers than those that would otherwise have applied under the Act. This applies even if the aim of the industrial action is to supersede a foreign collective agreement. If the employer can show that, as regards rates of pay or other permitted areas, the posted workers already enjoy terms and conditions that in all essential respects are at least as favourable as the minimum terms

and conditions in the central collective agreement, industrial action may not be taken.

With respect to the terms and conditions for posted temporary agency workers, the recourse to industrial action is not limited to demands for minimum wages and other minimum terms and conditions. It is thus permitted to take industrial action to obtain a collective agreement concerning minimum wages or other minimum terms and conditions in the permitted areas for posted temporary agency workers on the condition that they are equivalent to those contained in a central collective agreement that applies throughout Sweden to corresponding workers in the temporary work sector and are more favourable to the posted workers than those that would otherwise have applied under the Act. The terms and conditions demanded must also respect the overall protection provided under the EU's Manning Directive⁴. If the employer can show that in the relevant areas the posted workers already enjoy terms and conditions that in all essential respects are at least as favourable as the minimum terms and conditions in the central collective agreement, industrial action may not be taken.

An employees' organisation is supposed to submit the collective agreement terms that it may demand via industrial action to the Swedish Work Environment Authority. However, industrial action is not rendered unlawful if the organisation has failed to do so, nor is this obligation associated with any other sanctions. The Swedish Work Environment Authority is required to provide information about the terms and conditions of employment that may become applicable upon a posting to Sweden.

Since 1 July 2013, a posting employer must notify the Swedish Work Environment Authority and give details of a contact person in Sweden who is authorised to receive service of documents.

There is nothing prescribing that a collective agreement with a posting employer concluded following industrial action has any other legal effect than other collective agreements in Sweden. If Swedish law is applicable, such a collective agreement therefore means that the posting employer is obliged to initiate co-

⁴ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9.

determination negotiations and inform the organisation that is party to the agreement, even if corresponding obligations apply under the law of the State of origin in relation to a foreign organisation or other representative of the posted workers. The Swedish legislator has considered this to be permissible under EU law because the posting employer can avoid industrial action and collective agreements by voluntarily applying at least the terms and conditions that may be demanded via industrial action.

Moreover, the collective agreement means that if Swedish law is applicable, the posting employer is obliged to pay damages to the organisation that is party to the agreement if it fails to comply with the agreed terms and conditions for the posted workers. However, posted workers who are not members of the organisation that is party to the collective agreement cannot themselves demand the agreed terms and conditions of the employer.

The Inquiry's proposals

The Inquiry makes a number of proposals to safeguard the Swedish labour market model and status of collective agreements in situations involving posted workers. The proposals, which the Inquiry considers to be compatible with EU law, and which are proposed to enter into force on 1 January 2017, are essentially as follows.

A posting employer must, when requested to do so, appoint a representative who is authorised to negotiate and conclude collective agreements

If requested to do so by an employees' organisation, the employer must, within ten days, appoint a representative who is authorised to negotiate and conclude collective agreements on behalf of the employer, and notify the organisation of who has been appointed and of their contact details. The request from the employees' organisation must state that the organisation wishes to conclude collective agreements and whether or not the organisation has members working for the employer, and include details of the minimum terms and conditions in the sector in question and the contact details of a representative who is authorised to negotiate and conclude collective agreements on behalf of the organisation.

Within seven days of the deadline for appointing a representative, the employer's representative must contact the employees' organisation's representative and report the employer's stance on the request to conclude collective agreements.

If the employer or its representative fails to honour any of these obligations, the employer must pay damages to the employees' organisation that made the request. The damages are to include compensation for losses incurred and for the infringement

committed. Damages may be reduced or cancelled if it is reasonable to do so. With regard to statutory limitation, rules corresponding to those in the Employment (Co-determination in the Workplace) Act (1976:580) should apply.

Industrial action is always permitted to achieve a collective agreement for posted workers containing minimum terms and conditions under applicable Swedish sectoral agreements

The regulations on industrial action under *lex Laval* will be replaced by a new regulation, to apply when a Swedish employees' organisation wishes to take industrial action against an employer with the aim of obtaining regulation of the terms and conditions for posted workers via a collective agreement. Such industrial action may only be taken if the terms and conditions demanded correspond to the minimum terms and conditions, including minimum wage, or, in the case of the hiring-out of workers, the terms and conditions, including wages, in the applicable sectoral agreement⁵ and fall within the 'hard core'⁶ of the Posting of Workers Directive. Industrial action is permitted regardless of whether the posted workers already have better terms and conditions, and the terms and conditions demanded may not prevent the application of such terms and conditions that are more favourable to workers. If there are several applicable central collective agreements in the sector in question, this means the terms and conditions in whichever collective agreement offers the most favourable terms and conditions for an employer. Any industrial action taken in contravention of this provision is unlawful under the Employment (Co-determination in the Workplace) Act (1976:580). However, this prohibition of industrial action in cases of posted workers applies only when the posting employer is established within the EEA or in Switzerland, i.e. not in cases of third country postings.

⁵ A collective agreement concluded at central level that is generally applied throughout Sweden to corresponding workers within the sector in question.

⁶ The 'hard core' is defined in Section 5 of the Posting of Workers Act (1999:678) via references to other acts, e.g. the Work Environment Act and the Working Hours Act.

Collective agreements that regulate the terms and conditions for posted workers will have special legal consequences in relation to other collective agreements. However, the provisions to this effect are only to be applied to collective agreements concluded after entry into force.

If a collective agreement for posted workers is concluded following industrial action or notice of such action, it does not entail any obligations on the part of the employer in relation to an employees' organisation, its union representatives or the public under any legislation other than the Posting of Workers Act. Nor should such a collective agreement be taken into account when applying the provisions on the order of selection for termination of employees' contracts due to shortage of work (redundancy) or the preferential right to re-employment under Sections 22 and 25 of the Employment Protection Act (1982:80). These restrictions do not apply in the case of third country postings.

The minimum terms and conditions in a collective agreement for posted workers, whether entered into voluntarily or following industrial action, also apply to workers who are not members of the employees' organisation that concluded the agreement. In terms of minimum terms and conditions, this means that an employer that is bound by a collective agreement for posted workers cannot with valid effect make arrangements that conflict with the agreement with a posted worker who is not bound by it. Moreover, such a posted worker is entitled to demand these terms and conditions of the employer. With respect to damages in the case of breaches of minimum terms and conditions in a collective agreement for posted workers, statutory limitations and legal proceedings in cases of disputes, rules corresponding to those in the Employment (Co-determination in the Workplace) Act are to apply.

Furthermore, a collective agreement for posted workers, whether entered into voluntarily or following industrial action, confers supervisory powers on the contracting employees' organisation. Any employer that is bound by a collective agreement for posted workers must, if requested to do so by the contracting employees' organisation, submit within three weeks documentation of all employment contracts, wage specifications, timesheets and certificates of wage disbursements needed by the organisation

to allow it to assess whether the collective agreement has been followed with respect to minimum terms and conditions. The employer is also obliged, if requested to do so by a contracting employees' organisation, to submit within three weeks a translation to Swedish of the documentation in question. These obligations apply while the worker to whom the documentation pertains is posted here in Sweden, and for four months afterwards. Any employer that breaches these obligations must pay damages to the contracting employees' organisation for losses incurred and for the infringement committed. Damages may be reduced or cancelled if it is reasonable to do so.

With respect to what terms and conditions can be demanded via industrial action, the Inquiry's assessment is firstly that it should be possible to consider that demands for the payment of premiums for occupational injury insurance or life insurance that offer financial compensation to the employee, or their surviving relatives, where there are shortcomings in safety, health or hygiene at work, come under Article 3(1)(e) of the Posting of Workers Directive. The Court of Justice of the European Union has not yet ruled on whether this is the case. Secondly, the Inquiry considers that the term 'minimum wage' should be clarified in the Posting of Workers Act such that 'minimum wage' refers to the minimum wage under the collective agreement without deductions to compensate for expenses engendered by the posting.

Predictable terms and conditions for posted workers

Where an employees' organisation has not already done so, or where there are grounds to do so, the Swedish Work Environment Authority is to analyse which terms and conditions in central collective agreements may be demanded through industrial action under the Posting of Workers Act. The Authority's assessment is not binding, but should be made public.

Reservation and separate statement of opinion

A joint reservation has been entered by Anti Avsan (Moderate Party), Katarina Brännström (Moderate Party), Annika Qarlsson (Centre Party), Frida Johansson Metso (Liberal Party) and Désirée Pethrus (Christian Democrats).

Berit Bengtsson (Left Party) has issued a separate statement of opinion.

Legislative proposal

Proposal for an act amending the Posting of Workers Act (1999:678)

It is hereby prescribed, concerning the Posting of Workers Act (1999:678),

firstly, that Sections 1, 5a, 5b, 9, 9a and 21 of the Posting of Workers Act (1999:678) shall be worded as stated below;

secondly, that seven new sections, Sections 4a, 5c, 5d, 7a and 20a–c, shall be added to the Act and that new headings worded as stated below shall be added immediately before Sections 7a, 20a and 20c;

thirdly, that the heading immediately before Section 9a shall be placed immediately before Section 21.

Current wording

Proposed wording

Section 1⁷

This Act applies when an employer established in a State other than Sweden posts workers to Sweden in the framework of the transnational provision of services by the employer.

Furthermore, Section 8 contains provisions concerning employers that have their domicile or registered office in Sweden and post workers to another Member State within the European Economic Area (EEA) or Switzerland.

The provisions of Sections 5a and 5b only apply to employers established within the EEA or Switzerland.

⁷ Latest wording 2001:65.

Section 4a

The term ‘minimum wage’ means the minimum wage under a collective agreement without deductions for compensation for expenses incurred on account of the posting.

Section 5a⁸

Industrial action against an employer aimed at bringing about a regulation by collective agreement of the terms and conditions applying to posted workers, *other than in cases referred to in Section 5b*, may only be taken if the terms and conditions demanded:

1. correspond to the terms and conditions contained in a collective agreement concluded at central level that applies throughout Sweden to corresponding workers in the sector in question;

2. relate only to a minimum rate of pay or other minimum terms and conditions within the areas referred to in Section 5; and

3. are more favourable to workers than those prescribed by Section 5.

Such industrial action may not be taken if the employer shows that, as regards rates of pay or within the areas referred to in

Industrial action against an employer aimed at bringing about a regulation by collective agreement of the terms and conditions applying to posted workers may only be taken if the terms and conditions demanded:

2. relate only to a minimum rate of pay or other minimum terms and conditions within the areas referred to in Section 5, *without prejudice to the application of terms and conditions that are more favourable to workers*; and

If the intended regulation refers to the terms and conditions applying to posted temporary agency workers, the industrial

⁸ Latest wording 2012:857.

Section 5, the workers enjoy terms and conditions that in all essential respects are at least as favourable as the minimum terms and conditions in a central collective agreement as referred to in the first paragraph.

action may instead only be taken if the terms and conditions demanded:

1. correspond to the terms and conditions contained in a collective agreement concluded at central level that applies throughout Sweden to corresponding workers in the temporary work sector and that respects the overall protection of workers referred to in Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work;

2. relate only to rates of pay or terms and conditions within the areas referred to in Section 5, without prejudice to the application of terms and conditions that are more favourable to workers; and

3. are more favourable to workers than those prescribed by Section 5.

If there are several applicable central collective agreements in the sector in question, the terms and conditions referred to are those in the collective agreement that offers the most favourable conditions for the employer.

Section 5b

Industrial action against an employer aimed at bringing about a regulation by collective agreement of the terms and conditions applying to posted temporary agency workers may

A collective agreement concluded after industrial action under Section 5a or notice of such action under Section 45 of the Employment (Co-determination in the Workplace) Act (1976:580)

only be taken if the terms and conditions demanded:

1. correspond to the terms and conditions contained in a collective agreement concluded at central level that applies throughout Sweden to corresponding workers in the temporary work sector and that respects the overall protection of workers referred to in Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work;

2. relate only to rates of pay or terms and conditions within the areas referred to in Section 5; and

3. are more favourable to workers than those prescribed by Section 5.

Such industrial action may not be taken if the employer shows that, as regards rates of pay or within the areas referred to in Section 5, the workers enjoy terms and conditions that in all essential respects are at least as favourable as the terms and conditions in:

1. a central collective agreement as referred to in the first paragraph; or

2. the collective agreement applicable in the user undertaking.

does not entail any obligations on the part of the employer with respect to an employees' organisation, its union representatives or the public authorities under any legislation other than this Act.

A collective agreement of the type referred to in the first paragraph shall not be taken into account when applying Sections 22 and 25 of the Employment Protection Act (1982:80).

Section 5c

In so far as the terms and conditions concerned are such as are referred to in Section 5a, an employer bound by an applicable collective agreement regulating the terms and conditions applying to posted workers cannot with valid effect make arrangements contrary to the agreement with a posted worker who is not bound by it. Any such posted worker is entitled to demand these terms and conditions of the employer.

Section 5d

Any employer bound by a collective agreement regulating the terms and conditions applying to posted workers must, if so requested by an employees' organisation bound by the agreement, provide within three weeks documentation of all employment contracts, wage specifications, timesheets and certificates of wage disbursements needed by the organisation to allow it to assess whether the collective agreement has been followed with respect to the terms and conditions referred to in Section 5a. The employer is also obliged, if so requested by an employees' organisation bound by the agreement, to provide a Swedish translation of the documentation within three weeks.

The obligations set out in the first paragraph apply as long as

the worker to whom the documentation pertains is posted here in Sweden, and for four months afterwards.

Authorised representative in collective agreement negotiations

Section 7a

If requested to do so by an employees' organisation, the employer must, within ten days, appoint a representative who is authorised to negotiate and conclude collective agreements on behalf of the employer, and notify the organisation of who has been appointed and their contact details. The request from the employees' organisation must contain the following information:

1. notice that the organisation wishes to conclude a collective agreement;

2. information as to whether or not the organisation has members working for the employer;

3. information on the terms and conditions referred to in Section 5a that apply in the sector concerned; and

4. contact details for a representative who is authorised to negotiate and conclude collective agreements on behalf of the organisation.

Within seven days following the expiry of the time within which a representative must be appointed, the employer’s representative must contact the employees’ organisation’s representative and report the employer’s stance on the wish to conclude a collective agreement.

Section 9⁹

The Swedish Work Environment Authority shall be the liaison office and provide information about the terms and conditions of employment that may become applicable upon a posting to Sweden.

The Swedish Work Environment Authority shall also assist in providing information about collectively agreed terms and conditions that may be demanded with the support of industrial action under *Section 5a or 5b* or that may otherwise become applicable.

The Swedish Work Environment Authority shall also assist in providing information about collectively agreed terms and conditions that may be demanded with the support of industrial action under *Section 5a* or that may otherwise become applicable.

The Swedish Work Environment Authority shall also collaborate with the corresponding liaison offices in other States within the EEA and in Switzerland.

Section 9a¹⁰

An employees’ organisation must submit to the Swedish Work Environment Authority collectively agreed terms and conditions that the organisation may demand with the support of industrial action under

An employees’ organisation must submit to the Swedish Work Environment Authority collectively agreed terms and conditions that the organisation may demand with the support of industrial action under

⁹ Latest wording 2012:857.

¹⁰ Latest wording 2012:857.

*Section 5a or 5b.**Section 5a.*

In so far as an employees' organisation has not yet submitted collectively agreed terms and conditions under the first paragraph, the Swedish Work Environment Authority must analyse which terms and conditions contained in central collective agreements and applied throughout Sweden an employees' organisation may demand with the support of industrial action under Section 5a. If the Swedish Work Environment Authority finds reason to do so, it must make such an analysis in other cases as well.

*Damages**Section 20a*

An employer that violates a collective agreement with respect to the terms and conditions referred to in Section 5a must pay damages for the loss that has arisen and for the infringement that has occurred to:

- 1. the posted worker, even if the worker is not bound by the collective agreement; and*
- 2. the employees' organisation that is party to the agreement, if the collective agreement has been concluded after industrial action under Section 5a or notice of such action under Section 45 of the Employment (Co-determination*

in the Workplace) Act (1976:580).

An employer that violates Section 5d must pay damages for the loss that has arisen and the infringement that has occurred to the employees' organisation that made the request.

If the employer or its representative violates Section 7a, the employer must pay damages to the employees' organisation that made the request. The damages are to include compensation for the loss that has arisen and for the infringement that has occurred.

Section 20b

Damages under Section 20a can be reduced or remitted if it is fair to do so.

Statutory limitation

Section 20c

For matters concerning a claim for performance under Section 5c, second sentence, Section 5d, first paragraph and Section 7a, or damages under Section 20a, Section 64, first paragraph and Sections 65 and 66 of the Employment (Co-determination in the Workplace) Act (1976:580) apply with regard to the time limit within which a negotiation must be requested or an action brought.

If a negotiation is not requested or an action brought within

the prescribed time, the right to a negotiation or to bring an action is forfeited.

Institution of proceedings

Section 21¹¹

Cases concerning the application of Section 5, first or third paragraph, and Section 7 are to be dealt with in accordance with the Labour Disputes (Judicial Procedure) Act (1974:371). In these cases the following provisions apply:

- Section 33 of the Annual Leave Act (1977:480) concerning statutory limitation;
- Section 23, second paragraph of the Parental Leave Act (1995:584) concerning judicial proceedings;
- Section 9 of the Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act (2002:293) concerning statutory limitation, etc.; and
- Chapter 6, Sections 2–5, 8, 10 and 11 of the Discrimination Act (2008:567) concerning burden of proof, the right to bring actions, statutory limitation, etc.

In connection with the posting of temporary agency workers, Section 16, third and fourth paragraphs, of the Hiring Out of Workers Act (2012:854) also apply.

Cases concerning the application of Sections 5c, 5d, 7a and 20a are to be dealt with in accordance with the Labour Disputes (Judicial Procedure) Act (1974:371).

An action may be brought at the district court in the district where the employee is or has been posted.

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1. This Act enters into force on 1 January 2017.

¹¹ Latest wording 2012:857.

2. The provisions of Sections 5b–d and Section 20a, first and second paragraphs, shall only apply to collective agreements concluded after the entry into force of this Act.

Proposal for an act amending the Employment (Co-determination in the Workplace) Act (1976:580)

It is hereby prescribed that Sections 41c and 42a of the Employment (Co-determination in the Workplace) Act (1976:580) shall be worded as follows.

Current wording

Proposed wording

Section 41c¹²

Industrial action taken in breach of Section 5a or 5b of the Posting of Workers Act (1999:678) is unlawful.

Industrial action taken in breach of Section 5a of the Posting of Workers Act (1999:678) is unlawful.

Section 42a¹³

The provisions of Section 42, first paragraph, shall not apply when an organisation takes action in response to working conditions to which this Act does not directly apply.

Notwithstanding the first paragraph, Section 42, first paragraph shall apply when action is taken against an employer posting workers in Sweden in accordance with the Posting of Workers Act (1999:678).

Notwithstanding the first paragraph, Section 42, first paragraph shall apply when action is taken against an employer established within the European Economic Area or in Switzerland that posts workers in Sweden in accordance with the Posting of Workers Act (1999:678).

This Act enters into force on 1 January 2017.

¹² Latest wording 2012:855.

¹³ Latest wording 2010:229.