

 <p>Liberté • Égalité • Fraternité RÉPUBLIQUE FRANÇAISE</p>	<h2>FREQUENTLY ASKED QUESTIONS</h2> <p>about the new provisions governing application of posted worker legislation to drivers and crew members employed by inland transport companies</p> <p>(Art. L. 1331-1 to L. 1331-3 and Art. R. 1331-1 to R. 1331-11 of the French Transport Code)</p>
 <p>Ministère de l'Environnement, de l'Énergie et de la Mer</p>	

Overview of the new formalities governing the posting of certain employees in the transport sector

What are the general aims of the new French legislation?

With reference to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 and of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014, the new French legislation (articles L. 1331-1 to L. 1331-3 and articles R. 1331-1 to R. 1331-11 of the French Transport Code) are intended to adapt the formalities governing the posting of workers set out in the French Labour Code to the specific requirements of the inland transport sector

All provisions of the French Labour Code governing posting that are not expressly exempted will continue to apply.

The new rules have three purposes:

- to set out the formalities tailored to the specific needs of inland transport undertakings posting driver and crew member employees within France – common law formalities laid down by the French Labour Code in application of Directive 96/71/EC of 16 December 1996 and Directive 2014/67/EU of 15 May 2014.
- to provide posted driver and crew member employees with easier access to information about their rights.
- to strengthen enforcement in order to better combat worker posting fraud – a common unfair competitive practice that harms law-abiding firms and the rights and working conditions of posted workers.

What date will these new formalities enter into force? Are there plans for a transitional period to give businesses time to adapt?

The new formalities come into full effect on 1 July 2016.

Enforcement services are invited to reflect the fact that these formalities are new during the period following the date on which they enter into force.

To what scope do the new formalities apply?

The new formalities are applicable to undertakings established outside France, which meet all of the following conditions:

1°) They carry out one of the inland transport activities defined in article L. 1321-1 of the French Transport Code (in practice, road or river transport activities), or they are a temporary employment undertaking

2°) They post a driver or crew member employee to work in France, in the cases set out in article L. 1262-1 or article L. 1262-2 of the French Labour Code.

These cases are those indicated in article 1 of Directive 96/71/EC of 16 December 1996, i.e.:

- undertakings carrying out a transnational service, where the recipient of the service is established or operates in France
- undertakings posting workers to another undertaking within the same group or to another establishment of the same company
- undertakings providing a temporary worker to an undertaking located in France, where the temporary employment undertaking is located outside France.

The specific formalities for the posting of workers in the inland transport sector do not apply to businesses that are not, themselves, public transport undertakings, such as industrial undertakings that employ drivers or crew members to transport their goods.

Does the new legislation applied to self-employed workers? How are these workers identified?

The situation for self-employed workers remains unchanged:

- they are not covered by the rules governing posting of workers and, therefore, are not bound by the duty of declaration, whether under common law or under the specific provisions governing inland transport
- the status of self-employed workers remains entirely independent from the new rules set out in the French Transport Code. Self-employed workers are under no obligation to gather prior evidence of their situation and to provide such evidence; their status may be proven solely via the documents required under company law and transport regulations.

Why does the French legislation not specify rule application cases for different transport operations?

This is not the purpose of the legislation. The new legislation's sole purpose is to define the specific formalities tailored to the needs of the transport sector.

The scope of posted worker legislation remains governed exclusively by the rules set out in Directive 96/71/EC of 16 December 1996, transposed into French law by articles L. 1262-1 and L. 1262-2 of the French Labour Code.

In practice, international transport operations to or from France and cabotage operations on French territory, performed by an employee temporarily posted to France and retaining his/her employment relationship with the undertaking from which he/she was posted, meet the criteria for application of posted worker legislation, and are therefore subject to the specific declaration obligations governing the posting of workers in the inland transport sector.

However, an operation involving transit across the national territory, with no loading or unloading of goods, or boarding or alighting of passengers, does not meet the criteria for application of posted worker legislation and, therefore, is not bound by any declaration obligations, either under common law or under the specific legislation governing inland transport.

Will different formalities apply to employees driving vehicles weighing less than 3.5 tonnes?

No. The specific formalities set out in the French Transport Code also apply to posted employees driving light commercial vehicles. This legislation therefore applies to these employees.

Will different formalities apply to employees in the passenger transport sector? What types of passenger transport will be covered?

No. The specific formalities set out in the French Transport Code are not dependent on the nature of the activity (goods or passenger transport).

Regular passenger road transport services performed by drivers working for non-resident undertakings may fall under the scope of specific decoration formalities if their activity involves the boarding or lighting of passengers on French territory. The decision on whether or not the undertaking is covered by the posted workers rules will be based on the original copy of its service operator authorisation, or a certified copy carried on board the vehicle, stating the stops and timetables of the service.

Where this authorisation includes passenger boarding or alighting points in France, the driver of the vehicle will be covered by the posted workers rules. However, where the service only passes through French territory, the posted workers rules will not apply.

Moreover, for cabotage operations carried out as part of a regular service, the driver will be subject to the posted workers rules.

Occasional international services departing from another Member State – whether organised as part of a package travel service in the meaning of Directive (EU) No. 2015/2302 of 25 November 2015 or otherwise – are not covered by the legislation governing posted workers, since this type of service involves the transportation of a fixed group of passengers, with no other passengers boarding or alighting the service during the route.

However, cabotage operations carried out as part of an occasional service or a special regular service, as defined in Regulation (EC) No. 1073/2009/EC, are subject to the posted workers rules.

The decision whether a transport operation is subject to the posted workers rules will, ultimately, be based on the precise nature of the operation in question. This will be determined on the basis of the journey form, a template of which is provided in Annex I of Commission Regulation (EU) No. 361/2014 laying down detailed rules for the application of Regulation (EC) No. 1073/2009 as regards documents for the international carriage of passengers by coach and bus.

Undertakings carrying out individual passenger transport services (e.g. taxis) are not covered by the scope of the new legislation.

Certificate of posting

Why is a certificate of posting required and when do employers have to produce one?

For drivers and crew members employed by inland transport undertakings, the certificate of posting replaces the declaration of posting mentioned in the French Transport Code. This means that inland transport undertakings do not have to use the declaration of posting required for other employees when posting drivers and crew members.

A certificate of posting must be produced for each posted employee prior to the commencement of the first operation involving the posting of the driver or crew member, irrespective of the nature of the transport operation. The certificate of posting will remain valid for the period indicated by the undertaking, up to a maximum of 6 months for all transport operations included in the scope of the posting. This means that the certificates may cover multiple posting operations.

The six-month period is a rolling period, from one date to another, over six consecutive months. The certificate does not have to state a deadline for the transnational transport services scheduled during the period.

The certificate of posting must be appended to the host company's single personnel registry, both for intra-group posting and for posting by a temporary employment undertaking.

Where can the certificate template be obtained from and what will it include?

Under the current technical arrangements, the certificate may be downloaded from the following website: travail-emploi.gouv.fr. It contains a number of fields that can be completed directly in the document prior to printing.

There are three types of form, depending on the specific information required for each type of posting operation. The employer must complete the appropriate form for its employee's situation.

Some undertakings, due to national legislation, are not registered with the national electronic register of transport undertakings. How do these undertakings complete the corresponding section of the certificate?

This situation applies only to transport operations performed using vehicles with a permitted laden weight exceeding 3.5 tonnes. In addition, and on a temporary basis, it only concerns road transport undertakings from Member States that are not yet fully compliant with their obligations under European law, by which they are required to establish a national electronic register of road transport undertakings, as set out in article 16 of Regulation (EC) No. 1071/2009.

In such cases, the undertaking should complete the certificate with the licence number allocated under the existing system in the Member State in question.

Who produces the certificate?

Posting situation	Individual responsible for producing the certificate
Transnational transport service	<ul style="list-style-type: none">The director of the transport company employing the individual in question.
Intra-group posting	<ul style="list-style-type: none">The director of the company normally

	<p>employing the individual in question.</p> <ul style="list-style-type: none">• Or, failing that, the director of the transport company to which he/she is posted in France.
Posting by a temporary employment undertaking	<ul style="list-style-type: none">• The director of the temporary employment undertaking• Or, failing that, the director of the transport company to which he/she is posted in France.

What guarantees are offered in terms of processing the data entered in the form?

The online form is a document that can be downloaded. The data entered by the employer are not recorded.

How many copies of the certificate must be produced?

Two copies of the certificate must be printed.

One copy is given to the posted employee and is kept on board the vehicle for inspection purposes.

The other copy is held:

- either by the employer's representative (in cases of posting for a transnational service)
- or by the company to which the driver or crew member is posted in France (for intra-group posting or posting by a temporary employment undertaking).

For practical reasons, the second copy – i.e. the copy held by the representative, or by the company to which the employee is posted in France (intra-group posting or posting by a temporary employment undertaking) – may be retained in electronic (PDF) format and does not have to be printed on paper. It may also be forwarded in electronic format, if requested by the relevant enforcement services.

In addition to the certificate, what other posting-related documents must be kept on board the vehicle?

The documents that must be kept on board the form of transport used to carry out the service (i.e. on board the vehicle or boat) are listed in article R.1331-7-III of the French Transport Code.

In all situations involving the posting of driver or crew member employees, the employee's contract of employment must be kept on board the vehicle. The contract of employment does not have to be translated into French.

In situations involving intra-group posting, a French translation of the secondment agreement and the addendum to the contract of employment must also be kept on board.

These two documents are explicitly required for not-for-profit labour lending between companies, pursuant to article L. 8241-2 of the French Labour Code. The secondment agreement between the lending company and the host company sets out the duration of the loan and the identity and qualification of the employee in question. It also specified the method by which the wages, social security contributions and professional fees billed by the lending company to the host company are determined. The addendum to the contract of employment details the work that the employee will carry out in the host company, his/her working hours and place of work, and the specific characteristics of his/her workstation.

In situations involving posting by a temporary employment undertaking, a French translation of the temporary contract of employment (contract between the worker and his/her temporary employment agency) and the secondment agreement with the undertaking established in France must also be kept on board.

Where translations are required, must these translations be produced by a certified translator?

The translations do not have to be produced by a certified translator.

How does this certificate provide the employee with easier access to information about his/her rights as a posted worker?

A copy of the certificate must be kept on board the vehicle. This means that the driver is fully informed of his/her situation and, where applicable, is able to exercise his/her rights.

What about the “eight-day rule”, under which there was no requirement to make a formal declaration of posting for employees performing cabotage operations for a period of less than eight days?

Under the previous system, transport undertakings posting driver or crew member employees to perform cabotage operations for a period of less than eight consecutive days were not required to make a formal declaration of posting.

This rule will no longer apply from 1 July 2016.

The certificate of posting, which replaces the declaration of posting, must be completed prior to the commencement of the first transport operation involving the posting of the employee.

The employer's representative in France

Who may be designated as the employer's representative in France?

Pursuant to article 9-1.e) of Directive 2014/67/EU 15 May 2014, article L. 1262-2-1 of the French Labour Code states that any employer that posts employees to France must appoint a representative on the national territory, and that such representative is responsible for liaising with the enforcement services.

There are no specific rules for the inland transport sector when it comes to the designation of the representative. The representative may be any natural or legal person, from within or outside the undertaking (at the employer's discretion), with the necessary resources and skills to fulfil the duties of the role. Such person must also be physically present in France. The representative's remuneration is determined by a formal contract with the undertaking by which the representative is designated. Where the representative fails to fulfil its obligations, it shall be held civilly liable towards the employer by which it was designated.

For how long is the representative of the employer posting driver or crew member employees in France required to respond to the enforcement services?

This period, within the inland transport sector specifically, is set at 18 months following the date on which the employee's posting period ends.

What happens if the employer decides to change representative?

The former representative must continue to respond to the enforcement services for the operation(s) occurring during the period in which it was designated, and for 18 months following the date on which the employee's posting period ends.

Are there any specific sanctions against the representative, for example if it fails to respond – or does not respond comprehensively – to requests from the enforcement services?

No. However, if the representative fails to carry out its duties, this may lead to criminal or administrative sanctions against the employer (e.g. an administrative fine against an employer that has failed to produce a certificate).

What is the role of the employer's representative?

The representative must be able to respond to requests from the enforcement services.

It must therefore be in possession of a certain number of documents.

For posted driver or crew member employees, it must retain copies of the employee's payslips covering the posting period. These payslips may be replaced by other documents, provided that such documents contain precise and specific details of the employee's gross hourly pay, working hours (including separate details of hours paid at a higher rate), leave, public holidays, and a breakdown of his/her remuneration.

The representative must also hold documents:

- showing that the employee has actually been paid
- mentioning its designation by the undertaking
- mentioning the title of the collective bargaining agreement applicable to the posted employee.

Within what deadline and in what format is the representative required to respond to the enforcement services?

The representative must be able to present or communicate the documents requested by the enforcement

services without delay. These documents must exist prior to the communication request, and must not be created solely for the purpose of responding to requests from the enforcement services. Documents may be submitted in a standard electronic format (such as PDF).

What should the contractor do when its co-contractor posts employees covered by the scope of the new legislation?

The contractor must verify that the certificate of posting has been produced.

Under the transport contract, what obligations are incumbent on the recipient?

Generally speaking, the recipient has no specific obligations under the transport contract.

However, where the recipient is a business established in France, it may be contacted by the enforcement services, on a secondary basis:

- if the posting takes place as part of a transnational transport service
- and if neither the contractor nor the carrier is established in France.

Where both of these conditions are met, the enforcement service may request that the recipient contact the employer and ask the employer to address certain irregularities (non-payment of the minimum wage, unfit accommodation conditions, non-compliance with the core principles of labour law).

The recipient may be declared jointly liable for such breaches only where it fails to act on such request, or where it fails to report on its actions.

The rights of posted driver or crew member employees

What legal rights do posted driver or crew member employees have?

There are no specific legal rights assigned to posted driver or crew member employees. These employees enjoy the same fundamental rights as posted employees in other sectors.

These rights are set out in article L. 1262-4 of the French Labour Code.

- 1° Individual and collective freedoms in the employment relationship
- 2° Discrimination and gender equality
- 3° Maternity protection, maternity, paternity and childbirth leave, leave for family events
- 4° Secondment conditions and guarantees due to employees by temporary employment undertakings
- 5° Right to strike
- 6° Working time, rest periods, public holidays, paid annual leave, working time and night work for young workers
- 7° Conditions governing application of the inclement weather lay-off funds
- 8° Minimum wage and wage payment, including additional pay for overtime, and perquisites set by law or collective bargaining agreement
- 9° Rules governing health and safety at work, minimum working age and child labour
- 10° Illegal labour.

The posted employee must be paid in line with the minimum wage in France, or the wage set by collective bargaining agreement, where this is higher than the wage set by the law by which the contract of employment is governed.

However, the rights guaranteed by French law shall not prevent the employee from enjoying more favourable rights, where such rights arise from the law by which the posted employee's contract of employment is governed. For example, the employee will retain his/her contractual wage where this is higher than the minimum wage in France or the wage set by collective bargaining agreement.

Does the new French legislation introduce new rights for workers in the inland transport sector posted in France?

The new French legislation does not introduce any new rights for workers. Instead, it adapts the existing arrangements governing application of posted worker legislation, to provide stronger guarantees that driver and crew member workers in the inland transport sector enjoy their full rights as recognised by Directive 96/71/EC of 16 December 1996 and as set out in article L. 1262-4 of the French Labour Code.

In practical terms, what elements should be considered when calculating the reference minimum wage?

Within the framework of article 3§1 of Directive 96/71/EC of 16 December 1996, article L. 1262-4 of the French Labour Code states that the reference minimum wage applicable in France must include the following elements:

- the minimum pay (hourly or monthly)
- additional pay for overtime
- and perquisites set by law or collective bargaining agreement.

The amounts are expressed gross.

An up-to-date list of elements for **driver** employees can be found in an online fact sheet available at the following address: <http://www.developpement-durable.gouv.fr/Formalites-declaratives,47857.html>.

An up-to-date list of elements for **crew member** employees can be found in an online fact sheet available at the following address: <http://www.developpement-durable.gouv.fr/Detachement-dans-le-transport.html>.

It is important to remember that the employee retains the wage payable under the law by which his/her contract of employment is governed, where this wage is higher than the reference minimum wage.

What elements of the pay received by the employee from an undertaking not established in France may be considered when verifying compliance with the minimum wage in France?

Pursuant to paragraph 7 of article 3 of Directive 96/71/EC of 16 December 1996, the following elements may be considered:

- the employee's wage
- any additional pay for overtime
- any perquisites (e.g. length of service bonus)
- any allowances specific to the posting (e.g. expatriation bonus)
- any benefits in kind.

These amounts are expressed gross.

However, any allowances paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging – and including any such amounts paid on a fixed-rate basis – may not be included.

What exchange rate should be used if the wage is not paid in euros?

The wage paid in foreign currency is converted into euros at the most recent [reference exchange rate](#) published by the European Central Bank on the date on which the posting is scheduled to commence. The undertaking may use the exchange rate published for the week, or the rate published for a shorter reference period.

In practical terms, how are the French territory entry and exit dates and times established?

There are no specific rules for the transport sector.

Generally speaking, where there are suspicions that the amount of time worked in France has been artificially reduced, the burden of proof rests with the enforcement services. The employer is entitled to contest the findings of the inspectors by any appropriate means.

How are the working time rules applied, particularly for short-term postings?

Compliance with French legislation on maximum working time and minimum rest periods is only required where the employee is posted in France for a period at least equal to the reference period.

For example, the employee may not work more than the maximum number of hours per week if he/she is posted in France for a period of at least one week. This rule does not apply if the posting period is shorter than one week.

The reference rules for **driver** employees can be found in an online fact sheet available at the following address: <http://www.developpement-durable.gouv.fr/Formalites-declaratives,47857.html>.

An up-to-date list of elements for **crew member** employees can be found in an online fact sheet available at the following address: <http://www.developpement-durable.gouv.fr/Detachement-dans-le-transport.html>.

Enforcement policy and sanctions

How will these new rules be enforced?

The enforcement services are required to implement the new legislation with careful judgement, taking into account the severity of any breaches of this legislation and the characteristics of the tasks carried out by the employee posted in France.

The services are expected to be particularly vigilant in situations where there is apparent infringement of the basic rules and formalities set out by posted worker legislation, where such infringement causes manifest and significant harm to the employee and constitutes serious anti-competitive practice. Effective application of the new rules to cabotage operations is a particularly important priority.

Generally speaking, the enforcement strategy will be adapted on an ongoing basis, to ensure that it reflects the reality on the ground.

What sanctions will be applied to those who infringe these new rules?

Failure to carry a valid, compliant certificate on board the vehicle will be punishable by a class 4 fine (up to a maximum of €750). Failure to carry the employee's contract of employment and, where applicable, the employee secondment agreement on board the vehicle will be punishable by a class 3 fine (up to a maximum of €450).

Infringement, by the employer, of the obligations to declare the posting and designate a representative – as set out in article L. 1264-1 of the French Labour Code – shall also be punishable by administrative fines. Failure to comply with the obligations relating to the certificate of posting shall be subject to the same sanctions as failure to comply with the obligations relating to the declaration of posting.

However, the same offence for the same employee may not be punishable by multiple criminal and administrative fines.

Does the administrative authority have the power to suspend the transport operation if it finds irregularities relating to the posting of workers?

As in all other sectors, the administrative authority has the right to suspend the service in the event of certain serious or repeated infringements, as set out in the French Labour Code.

However, the authority must first issue an injunction calling on the undertaking to address the irregularities before proceeding with the suspension. Under this arrangement, the procedure should only apply to a small number of situations in which the transport service is carried out over a sufficiently lengthy period of time.