Mishcon de Reya

Briefing

How to transfer staff within Europe without a work permit

The ability to transfer staff readily throughout Europe is critical to a company's ability to meet contractual commitments. This poses little problem where your employees are EEA nationals but represents a considerable headache when they are not!

The 1994 decision of ***Vander Elst*** by the European Court of Justice ("ECJ") aimed to address exactly this point. The ECJ determined that an employer based in one European Economic Area ("EEA") state providing services in another, may transfer third country nationals i.e. non-EEA nationals ("TCN") who are lawfully in their employ to service such contracts on a "temporary basis".

This would, for example, allow a UK based software company to transfer a TCN employee to Germany to fulfil a contract without establishing a trading presence in Germany or obtaining German work permits. The same is applicable in reverse as long as it is for a "temporary period".

The Vander Elst Principle

A TCN employee, employed lawfully in the UK can be "transferred" to another EEA State for the purposes of work if the following requirements are satisfied:-

- the TCN employee is lawfully resident in an EEA member state in which his employer is established (for example under a work permit or if the employee has permanent residence);

- the employee has lawfully and habitually been employed by the employer: in the case of the UK, this is interpreted as requiring at least 12 months lawful employment in the sending member state;

- the employee does not intend to take any other employment; and

- the employee intends to work in the receiving member state for a temporary period (generally up to 6 months) for the same employer who is providing services under a contract in the receiving member state.

Generally the term "temporarily" means the length of the contract although an employee should only be required in the receiving member state on a short term basis and the contract should not be for such a length of time that the individual loses their rights of residency in the sending member state or becomes an integral part of the workforce of the receiving member state.

Inconsistencies in the application throughout member states

As with all laws, this ruling is open to interpretation and there is no consistency in the application of the *Vander Elst* provisions throughout the EEA. Some countries, such as the UK and Germany, have embraced it fully and the application procedures are very user friendly and quick.

However, a quick survey of other states indicates as follows:-

The Netherlands – the Dutch Embassy in London requires such applications to be made in a similar way to their work permit applications, but can then "fast-track" the applications which meet the *Vander Elst* requirements – however, it is still likely to take 4-6 weeks. This is clearly contrary to the requirement that you will need to establish a trading presence in Holland to get the work permits in the first place!

France has integrated the *Vander Elst* principle entirely into its own regulations and can offer Temporary Work Permits (or "Detache") by following the same stipulations. This is slightly more flexible than the *Vander Elst* principle in that it allows for "new hires" of third country nationals without the requirement that they have already worked under a work permit for 12 months prior to making the application. However, this is subject to a limit of up to 18 months with a possible 9 month extension.

In Spain it is possible for employers in other member states who have a contract with a Spanish-based company to transfer their third country national employees to work under that contractual agreement, as long as they have been working for their employer for at least 12 months.

However, neither Italy nor Luxembourg recognise the *Vander Elst* decision and this failure remains unchallenged as yet.

The Future – a European Directive proposed

Such anomalies have caused the European Parliament to try and develop a cohesive EEA wide policy. Proposals and amendments being debated include a special EU service provision card to be available to European employers as of right, in order to remove the existing legal uncertainties and avoid any potential abuses.

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Encompassing the spirit of the *Vander Elst* principle, if/when the Directive comes into being, employers will, on the production of supporting documentary evidence, be entitled to request a service provision card for each of their workers to be posted within the EEA so that they may work more easily.

Currently the proposal is that each card will be valid for a maximum of 12 months and will not attach itself to a specific project, but will allow the employer to transfer the employee concerned at any time within the EEA market.

Conclusion

Mechanisms are currently in place to facilitate the pan-European business needs of employers based in EEA states, but the inconsistencies between the theoretical approach taken by the European Court and the practical implementation by the individual governing states means that further clarification is required. While *Vander Elst* goes some way towards addressing the needs of companies providing services in more than one EEA state, a more regulated policy, such as the proposed EU service provision card will be a very welcome resource. Watch this space for further developments.

If you require any further information on the transfer of third country nationals to another EEA state for the temporary provision of services, or on the Vander Elst principle, please do not hesitate to contact:

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IMPORTANT: This update is only intended as a general statement of the law and no action should be taken in reliance on it without specific legal advice.