

Posted workers in France: why the A1 posting certificate is not enough



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One might think that the A1 certificate of posting protects a foreign company and its French principal from criminal and financial penalties for undeclared work. However, this is not the case. Here are some explanations to ensure your compliance with the law:

First of all, let us remember that, in order for it to be legal, the exercise of a business activity and the employment of persons in France require the completion of formalities (registration of the company in a trade register, income declarations to the Social Security or tax authorities, declaration of hirings to the URSSAF, remittance of pay slips to the employees, etc.).

Failure to comply with some of these formalities constitutes the criminal offence of **concealed work** as defined by articles L.8221-3 and L.8221-5 of the French Labor Code.

The penalties incurred are numerous. These include 3 years' imprisonment for managers, a fine of up to €225,000 for the company, and a lump sum compensation for the employee equal to 6 months' salary.

- **In principle, a foreign company that posts its employees to France and produces an A1 certificate cannot be prosecuted for concealed work.**

A company established in a European Union country and the employee it sends to France remain **subject to the social security legislation of their country of origin**.

Thus, a foreign company is not subject to French obligations, the breach of which constitutes the offense of concealed work.

The lawfulness of the situation of the foreign company and that of the employee is attested by an A1 certificate issued by the social organizations of their country of origin.

For each secondment, the foreign company must be able to produce this certificate to French authorities.

Before each posting, and then every 6 months, as part of its **obligation of vigilance**, the French principal must obtain, among other documents, the A1 certificate.

This certificate has very significant value: as long as it is not withdrawn or declared invalid by the authorities that issued it, it can be put forward before French administrative authorities and judges.

In a way, the A1 certificate constitutes a bulwark, both for the French principal and for the foreign service provider, against criminal prosecution in France for concealed work.

In a series of recent decisions, the Cour de Cassation (French Supreme Court) has reaffirmed that this bulwark is not indestructible.

➤ **In case of withdrawal of the A1 certificate, the foreign company is liable to conviction for concealed work, and the French principal may be declared financially responsible.**

At the request of French authorities, the Social Security organization to which the foreign company belongs may declare the A1 certificate invalid.

What then, according to the Cour de Cassation (Cass. Soc., Nov. 4, 2020, n°18-24.451), are the (serious) consequences of this withdrawal?

The withdrawal of the A1 certificate leads to the application of French legislation to the seconded employees.

Consequently, **the foreign company** is obliged to affiliate the employees to the French social security system and to pay French social security contributions.

In addition, it is liable to penalties for concealed work.

As for the **French principal**, it may be ordered to guarantee the payment of the compensation for concealed work, under their **joint liability**.

The decision of the Cour de Cassation raises the question of the level of control that must be exercised by the principal as part of its obligation of vigilance.

In order to avoid liability, it would seem that the principal cannot rely simply on a formal control of the documents submitted.

The principal must also ensure that the A1 certificate has not been obtained fraudulently.

- **Even in the presence of valid A1 certificates, the foreign company and its French principal can be convicted of concealed work.**

This was decided by the Criminal Division of the Cour de Cassation in four rulings on January 12, 2021.

How was this possible?

It was "sufficient" for the judges to note the existence of a **false secondment**:

This is the case if the foreign company has **no substantial activity** in the country in which it is established (whose social legislation is attractive), and recruits employees there with the sole purpose of "seconding" them to France.

This is also the case of a foreign company that has a substantial activity in its country of origin but also has a **stable, continuous and permanent activity in France for which it seconds employees instead of establishing facilities in France** to which the employees would be attached.

In these cases, the Cour de Cassation states that the foreign company's activity in France no longer falls under the rules of secondment.

The foreign company must then set up facilities in France and apply for registration with the RCS or the trade register.

It must also declare the hiring of employees in France.

Should it fail to do so, it will be liable to the offence of concealed work for concealing activity and employment.

The company does not have to pay social security contributions in France but may be sentenced to the aforementioned penalties for concealed work.

As for the French principal, it can also be prosecuted for having used the services of employees who are victims of concealed work.

The decisions of the Cour de Cassation leave open the question of the liability of the principal with respect to its obligation of vigilance.

Can the principal be reproached for not having fulfilled its obligation of vigilance by only formally verifying the documents submitted by the foreign company without seeking to detect a situation of false secondment?

The answer will undoubtedly be given in future court decisions.

In the meantime, foreign companies that engage in stable, continuous and permanent activities in France should be cautious: they cannot do so simply with the help of seconded employees.

As for French principals, they must undoubtedly ensure that their foreign contractor is entitled to avail itself of the provisions applicable to secondment.