

Regulations on the obligation to provide information, the obligation to ensure compliance, and the right of inspection

Laid down by the Ministry of Labour and Social Inclusion on 22 February 2008 pursuant to section 8, seventh paragraph and section 9 of the Act of 4 June 1993 No. 58 relating to general application of wage agreements, etc. (General Application Act) and section 339 (2) of the General Civil Penal Code of 22 May 1902 No. 10.

Chapter 1. Introductory provisions

Section 1. Purpose

The purpose of these regulations is to promote compliance with terms of wages and employment that follow from regulations on general application of wage agreements (general application regulations), cf. section 3 of the General Application Act.

Section 2. Scope and extent

These regulations shall apply where work is performed within the scope of general application regulations, cf. section 3 of the General Application Act.

These regulations do not affect rights that follow from collective wage agreements.

Section 3. Definitions

For the purpose of these regulations, the following definitions shall apply:

Purchaser: A natural or legal person who engages contractors or suppliers to carry out an assignment.

Main contractor: Contractor or supplier who has taken on an assignment for a purchaser and who has one or more subcontractors who carry out part of the assignment.

Subcontractor: Contractor or supplier who carries out part of the assignment agreed between the main contractor and the purchaser.

Trade union representatives: Representatives of the trade union that is party to the collective agreement given general application.

Section 4. Persons to whom these regulations apply

The purchaser, main contractor, subcontractor and trade union representatives have obligations or rights pursuant to these regulations.

Chapter 2. The obligation to provide information and to ensure compliance

Section 5. The obligation to provide information

In contracts with contractors or suppliers, the purchaser shall inform that the undertakings' employees shall at least enjoy terms of wages and employment that follow from general application regulations. The same obligation to provide information shall apply to contractors or suppliers when entering into agreements with subcontractors.

Section 6. The obligation to ensure compliance

The main contractor shall ensure that the terms of wages and employment that apply to the undertaking's subcontractors comply with current general application regulations.

The purchaser is correspondingly obliged to ensure the compliance of its contractors in cases where no subcontractors are used. This provision shall only apply in cases where the purchaser is engaged in business activities.

In areas that follow from section 1 of the Provisional Regulations of 19 December 2003 No. 1595 on safety and working environment for certain onshore petroleum installations and associated pipeline systems (provisional regulations), the owner or operator of petroleum installations or pipeline systems, cf. section 4 of the provisional regulations, shall be obliged to ensure the compliance of its contractors and subcontractors.

The obligation to ensure compliance entails that systems and procedures shall be implemented to investigate and, if necessary, supervise compliance with general application regulations. The obligation to ensure compliance may, for example, be fulfilled by including clauses in the contract stipulating that employees shall at least enjoy the terms of wages and employment that follow from general application regulations, and that this is followed up by obtaining documentary evidence of employees' terms of wages and employment.

Chapter 3. Right of inspection

Section 7. *Implementation of trade union representatives' right of inspection*

If trade union representatives in main contractors' undertakings so request, the main contractor shall provide documentary evidence that the terms of wages and employment that apply to the undertaking's subcontractors comply with current general application regulations.

If there are no trade union representatives at the main contractor, trade union representatives at the undertaking's closest subcontractor may request such documentary evidence as referred to in the first paragraph from the subcontractors of the subcontractor concerned.

Section 8. *The form and content of the request*

The request for access to documents must be submitted in writing to the trade union representative's own employer. The request shall state the trade union representative's basis for making the request and the undertakings and employee groups it applies to. Only access to the terms of wages and employment of employees who perform work subject to general application regulations may be demanded.

Trade union representatives and employers shall agree on a time limit for the employer's obligation to provide information. The time limit shall be at least three days.

Section 9. *Provision of documentary evidence*

Information concerning terms of wages and employment shall be supported by copies of employment contracts, pay slips and records of hours worked. Personal data and information not relevant to the request to examine documents shall not be included in the documents provided.

If the information is not provided within the agreed time limit, cf. section 8 of these regulations, the trade union representatives may demand the information directly from the subcontractor(s) concerned.

Chapter 4. Handling of information

Section 10. *Handling of information*

Information provided as a result of the obligation to ensure compliance or the request for access to documents pursuant to these regulations may only be used to investigate compliance of terms of wages and employment with general application regulations.

The information shall be deleted when there is no longer need for it, including when the information shows that the employees to whom the request to examine documents applies receive at least the terms of wages and employment that follow from general application regulations.

Section 11. *Duty of confidentiality*

Anyone who receives information concerning terms of wages and employment pursuant to these regulations has a duty of confidentiality concerning the information.

The duty of confidentiality shall not apply in relation to the Norwegian Labour Inspection Authority or the Petroleum Safety Authority Norway. Nor shall the duty of confidentiality apply in relation to advisers who are necessary for obtaining linguistic, financial, legal or other professional assistance. If information is discussed with advisers, the duty of confidentiality shall also apply to them.

Chapter 5. Final provisions

Section 12. *Penalties*

Wilful or negligent violation of sections 10 and 11 shall be liable to fines, cf. section 339 (2) of the Penal Code.

Section 13. *Commencement*

The regulations enter into force on 14 March 2008.

Guide to the Regulations on the obligation to provide information, the obligation to ensure compliance, and the right of inspection

Re section 1

The general purpose of these regulations is to promote compliance with the terms of wages and employment that follow from regulations on general application of wage agreements (general application regulations), cf. section 3 of the General Application Act.

Re section 2

First paragraph

These regulations shall apply where work is performed within the scope of general application regulations, cf. section 3 of the General Application Act.

There are currently three sets of regulations concerning general application. The Regulations of 21 November 2006 No. 1291 on general application of wage agreements for construction sites in Norway entered into force on 1 January 2007. These are the most extensive regulations. The regulations provide general application for parts of the Construction Agreement (2006–2008) between the Confederation of Norwegian Business and Industry and the Federation of Norwegian Construction Industries on the one hand and the Norwegian Federation of Trade Unions and the Norwegian United Federation of Trade Unions on the other, and set out minimum provisions concerning terms of wages and employment for all employees performing construction work at construction sites throughout Norway.

The Regulations of 26 June 2006 No. 703 on general application of wage agreements on certain onshore petroleum installations provide general application for parts of the Engineering Industry Agreement (2006–2008) and the Electrical Installation Agreement (2006–2008). The regulations apply to employees who fall under the scope of these agreements, and who work at one of seven specific onshore petroleum installations.

The Regulations of 26 June 2006 No. 704 on general application of wage agreements for construction sites in the Oslo Fjord Region applies to general application of parts of the Electrical Installation Agreement (2006–2008) in Oslo and Akershus.

If further general application regulations are issued at a later date, the scope of the Regulations on the obligation to provide information, the obligation to ensure compliance and the right of inspection will automatically be extended in accordance with the scope of the new general application regulations.

Second paragraph

This provision specifies that the regulations are not intended to restrict rights that follow from collective wage agreements, e.g. the right of inspection. It already follows from a number of collective wage agreements, among others the Engineering Industry Agreement for 2006–2008, that employers are obliged to provide trade union representatives with documentary evidence of the terms of wages and employment of workers employed by subcontractors.

Re section 3

In order to ensure user-friendliness, clarify ambiguous terms and help make the regulations as simple as possible, section 3 contains definitions of a number of key terms used in the regulations.

Purchaser is defined as a natural or legal person who engages contractors or suppliers to carry out an assignment.

The definition refers to the top level of a contract hierarchy, typically a building owner or purchaser or a shipowner who orders a ship. By “assignment” is meant any assignment subject to general application regulations. Examples are large assignments, such as construction of buildings, ships, oil rigs and mobile installations for use in petroleum activities, as well as smaller assignments, such as cleaning and other maintenance work.

The definition shall be interpreted as also applying to hiring of employees.

Main contractor is defined as a contractor or supplier who has taken on an assignment for a purchaser and who has one or more subcontractors who carry out part of the assignment.

According to the definition, in order to be designated a main contractor, one or more parts of the undertakings’ obligations pursuant to the agreement with a purchaser shall be carried out by subcontractors. The term main contractor is often used in another sense, i.e. to designate a contractor who carries out most of a large assignment, such as construction or shipbuilding. Please note that this is not a requirement of the main contractor as defined in these regulations.

Subcontractor is defined as a contractor or supplier who carries out part of the assignment agreed between the main contractor and the purchaser.

The definition shall be interpreted in such a way that the subcontractor may also have its own subcontractors further down a contract hierarchy.

Trade union representatives shall in the regulations be understood to mean representatives of the trade union that is party to the collective agreement that is given general application.

Cf. section 8, fifth paragraph, of the General Application Act. Pursuant to this provision of the Act, the right of inspection applies to trade union representatives employed by the contracting entity, and who represent the trade union that is party to the collective wage agreement that is the basis for the general application regulations. For further information concerning which trade union representatives have right of inspection, see the comments to section 7 of the regulations.

Re section 4

This provision specifies the parties subject to obligations or rights laid down in the regulations, i.e. purchaser, main contractor, subcontractor and trade union representatives. For further information on these terms, see section 3 of the regulations and the comments to the section.

Re section 5

According to this provision, in contracts with contractors or suppliers, a purchaser shall inform that the undertakings' employees shall enjoy terms of wages and employment that at least comply with current general application regulations. The same obligation to provide information shall apply to contractors or suppliers when entering into contracts with subcontractors.

The purchaser's obligation to provide information applies to all entities subject to the definition of purchaser given in the regulations, i.e. including cases where the purchaser is not engaged in business activities. Cf. the information on the obligation to ensure compliance, below.

It will be appropriate for the information to refer to the relevant general application regulations and to specify the supervisory authority.

Section 5 of the regulations replaces the provision of section 10A of the Regulations of 21 April 1995 No. 377 concerning security, health and working environment at construction sites (Construction Client Regulations) concerning information on terms of wages and employment.

Re section 6

First paragraph

This provision obliges the main contractor to ensure that the terms of wages and employment provided by the undertaking's subcontractors comply with current general application regulations.

The obligation of the main contractor to ensure compliance includes all levels of the hierarchy of subcontractors that perform work subject to general application regulations. This is because of the need to protect employees of subcontractors at the lowest level of the hierarchy. The obligation to ensure compliance also includes hired employees, cf. section 3 and the comments to the section.

Second paragraph

Pursuant to the second paragraph, a purchaser is obliged to ensure that contractors and suppliers that do not use subcontractors comply with general application regulations. This particularly involves preventing avoidance of the obligation to ensure compliance by altering the structure of the assignment, for example by distributing the assignment between a number of contractors at the same hierarchical level. This obligation to ensure compliance only applies where the purchaser is engaged in business activities, cf. second paragraph, second sentence.

Third paragraph

In the third paragraph, a special provision for the petroleum sector is laid down. This provision entails that the owner or operator of petroleum installations or pipeline systems shall be obliged to ensure compliance pursuant to the regulations in areas

subject to the provisional regulations of 19 December 2003 No. 1595 on safety and working environment for certain onshore petroleum installations and associated pipeline systems, and involves laying down in regulations a practice that has been followed in parts of this area. This has been done in order to harmonise the obligation to ensure compliance pursuant to the General Application Act with the current obligation to ensure compliance in relation to health, safety and the environment within the scope of the provisional regulations. The same interpretation of the term “owner or operator”, is adopted as follows from section 4 of the provisional regulations. This entails that it is normally the operating companies, e.g. StatoilHydro as operator at Melkøya, that are subject to legislation. Here too, the obligation to ensure compliance shall include all levels of the hierarchy of contractors, including the main contractor and subcontractors who perform work subject to general application regulations, including hired employees.

Fourth paragraph

The fourth paragraph further specifies the obligation to ensure compliance. According to this provision, the obligation to ensure compliance is an obligation to implement systems and procedures to investigate and, if necessary, supervise that employees of contractors enjoy terms of wages and employment that comply with general application regulations, but where the main contractor, purchaser or owner or operator of petroleum installations or pipeline systems (hereafter referred to by the collective term *contracting entity*) itself has no direct responsibility for the employees’ terms of wages and employment. This responsibility shall still lie with the employer.

The obligation to ensure compliance may, pursuant to the fourth paragraph, second sentence, be for example be met by the contracting entity informing of current general application regulations, making it a contractual condition that the contractor complies with such regulations and by making random checks on employees’ terms of wages and employment. It will be possible to gain access to such documentary evidence on the basis of a contractual obligation for subcontractors to provide relevant documentary evidence on request.

The example specified in the regulations must be interpreted in such a way that, if the contracting entity has satisfactorily implemented a system in accordance with the example, the obligation to ensure compliance must be deemed to be met. However, provision is made for the possibility that alternative systems and procedures may be envisaged that would meet the requirements of the regulations to ensure compliance with general application regulations. In other words, the regulations provide the undertakings with a certain discretionary leeway. For example, it would hardly be necessary for the contracting entity to adopt such a thorough approach when the contractor/subcontractor is well known to the contracting entity through previous cooperation as a reliable and law-abiding undertaking. It must in all cases be viewed as a minimum requirement that the contracting entity has a good overview of and is able to list undertakings that are contractors and subcontractors.

Although no formal requirements concerning this are provided in the regulations, we stress that in many cases it would be appropriate that the contracting entity make it a contractual condition that failure to comply with general application regulations is a breach of contract subject to penalties, for example withholding of payment. A number of undertakings already include such clauses in their contracts as a matter of routine.

A natural consequence of failure by the contractor to fulfil his obligations pursuant to general application regulations may be that the contracting entity does not wish to enter into further agreements with the undertaking concerned. Although no duty to notify has been introduced, contracting entities should moreover notify the Norwegian Labour Inspection Authority or the Petroleum Safety Authority Norway if breaches of general application regulations are detected or if there is a well founded suspicion of such breaches.

Pursuant to section 8, first and second paragraph, of the General Application Act, the Norwegian Labour Inspection Authority and the Petroleum Safety Authority Norway shall oversee that the obligation to ensure compliance is complied with. If breaches are detected, the these authorities may implement their usual measures, i.e. orders, coercive fines and stoppage.

As mentioned above, the obligation to ensure compliance does not entail that the contracting entity shall take over the employer's responsibility for ensuring that employees enjoy terms of wages and employment pursuant to general application regulations. The Norwegian Labour Inspection Authority and the Petroleum Safety Authority Norway shall still oversee that the employer follows up this responsibility. Nor does the obligation extend to entering subcontractors' premises to establish the true circumstances on suspicion, for example, of double sets of contracts or the like. These boundaries entail inter alia that there may be cases where supervisory authorities detect breaches of general application regulations, while at the same time being unable to establish breaches of the obligation to ensure compliance.

As an example of a possible model for implementation of the obligation to ensure compliance, we refer to the contractual clause specified in *Circular No. 2/2005, Terms of wages and employment for workers who carry out service assignments and building and construction assignments for the state*, see below. Please note that the circular that implemented ILO Convention No. 94 on labour clauses in public contracts was recently replaced by the Regulations of 8 February 2008 No. 112 on terms of wages and employment in public contracts. The clause is rather more extensive than required in respect of the obligation to ensure compliance, since it also regulates the question of penalties. The clause reads as follows:

“The contractor shall ensure that employees of its own organisation and employees of any subcontractors do not have poorer terms of wages and employment than follow from [...]. This shall only apply to employees directly involved in fulfilling the contract. The manager of the undertaking shall be responsible for ensuring compliance with this provision.

All agreements entered into by the contractor involving performance of work under this contract shall contain corresponding provisions.

If the contractor fails to comply with this clause, the contracting entity shall have the right to withhold parts of the agreed remuneration until it is documented that the matter is in order. The amount withheld shall approximately correspond to twice the amount saved by the employer.

The contractor shall on request present documentary evidence of the terms of wages and employment applied. The obligation to provide documentary evidence shall also apply to subcontractors.”

Re section 7

First paragraph

The right of inspection is generally assigned to trade union representatives at the main contractor. Cf. the definition of trade union representative in section 3, according to which trade union representatives shall be understood to mean representatives of the trade union that is party to the collective agreement given general application, and the comments to the above provision.

If there are two or more trade union representatives with the right of inspection at the main contractor, it is expected that the right of inspection will be coordinated, e.g. in such a way that the right of inspection is exercised by a senior union representative.

The right of inspection shall be exercised when the main contractor (i.e. the employer of the trade union representative) at the request of the trade union representative provides documentary evidence that terms of wages and employment at subcontractors comply with current general application regulations.

The regulations entail that the main contractor is obliged to obtain information from subcontractors concerning terms of wages and employment and to pass this on to trade union representatives in the undertaking if so requested by the trade union representatives. As in the case of the obligation to ensure compliance, it may be appropriate for contracting entities to include the obligation to provide information in the contract, while possibly also specifying the method to be adopted when obtaining and providing information, and any penalties for failing to fulfil this obligation.

The right of inspection shall apply downwards throughout the contract hierarchy. As in the case of the obligation to ensure compliance, the right of inspection shall also apply to the terms of wages and employment for hired employees.

Second paragraph

The exception laid down in the second paragraph concerns cases where the main contractor does not have trade union representatives in the sense that applies in the regulations, i.e. representatives of the trade union that is party to the collective wage agreement given general application. According to the regulations, the right of inspection in these cases shall be moved down one level of the contract hierarchy to any such trade union representatives at the main contractor’s closest subcontractor. One of the purposes of this provision is to prevent avoidance of the right of inspection by means of administrative enterprises, where the entity that has a contract with the building owner or purchaser, and is thus the main contractor pursuant to the regulations, has no employees of its own.

Re section 8

First paragraph

The request for access to documents shall be submitted in writing to the main contractor/trade union representatives’ employer.

The request shall specify the basis of the right of inspection. This entails that the trade union representative shall supply information concerning his or her association with the collective wage agreement concerned, and refer to the general application regulations that regulate the terms of wages and employment to which access is requested. The request for access to documents shall further specify the undertakings and employee groups to which it applies. Only access to the terms of wages and employment of employees who perform work subject to general application regulations may be demanded.

Second paragraph

In order to ensure the effectiveness of the right of inspection in verifying compliance with general application regulations, the information must be provided as soon as possible following submission of the request for access to documents. Pursuant to the second paragraph, a final date for provision of information shall be stated in the request for access to documents. A certain flexibility is allowed, in that the time limit is to be agreed between the trade union representative and the employer in each case, but so that the time limit is at least three days. See under the comments to section 9, second paragraph, on the possible consequences of the parties' failing to agree on a time limit.

Re section 9

First paragraph

According to this provision, trade union representatives may request to examine copies of employment contracts, pay slips and records of hours worked. This is the same documentary evidence that is normally requested by the Norwegian Labour Inspection Authority and the Petroleum Safety Authority Norway.

In order to safeguard protection of privacy and competitive considerations, the regulations specify that documentary evidence shall not contain information beyond that which falls directly within the scope of the request for access.

Nor, as a general rule, shall documentary evidence include information that can be associated with individuals. This entails that the information provided shall be anonymised, for example by deletion of personal data. This is in order to ensure protection of the employees' privacy.

The Norwegian Data Inspectorate has assumed that, in undertakings with few employees, genuine anonymisation will not be possible. This will apply to groups of five or less employees in the same category of posts. In these cases, the Norwegian Data Inspectorate has made it a condition that a duty of confidentiality is imposed on persons who receive access to the information. In order to ensure that this is complied with, among other reasons, the draft regulations contain special provisions concerning duty of confidentiality (see below).

Second paragraph

If the main contractor fails to fulfil the obligation to provide the information within the agreed time limit, cf. section 8, the trade union representatives, pursuant to the second paragraph, have a right to demand the information directly from the subcontractors concerned. This must also apply if it should prove difficult to reach an agreement on a time limit with the employer. In the event of failure to provide

information, The trade union representatives may also notify the supervisory authorities.

If there are subcontractors who fail to comply with the obligation to provide information, it will be natural for the main contractor to notify the Norwegian Labour Inspection Authority or the Petroleum Safety Authority Norway so that the supervisory authorities can follow up the matter. As mentioned above, it may moreover be appropriate that the parties specify in the contract the consequences of failure to comply with the request for access to documents.

Re section 10

In order to ensure responsible handling of information and safeguard protection of privacy and competitive considerations, this provision sets out requirements regarding handling of information provided on the basis of the obligation to ensure compliance and the right of inspection.

First paragraph

This provision specifies that the obligation to ensure compliance and the right of inspection apply only to investigation of whether terms of wages and employment comply with general application regulations. In other words, the obligation to ensure compliance and the right of inspection may not be invoked in relation to purposes other than those mentioned in the provision. It is therefore a breach of the regulations if, for example, information received by the contracting entity on the basis of its obligation to ensure compliance is used in connection with competitive tendering, or if information received by trade union representatives on the basis of the right of inspection is used to implement a boycott or as part of their own wage negotiations.

Second paragraph

This provision provides that the information shall be deleted as soon as there is no longer need for it, including in cases where the submitted documentary evidence shows that general application regulations have been complied with.

Re section 11

First paragraph

Both trade union representatives and contracting entities who receive information concerning terms of wages and employment pursuant to the regulations shall be subject to a duty of confidentiality, cf. section 11. The grounds are primarily privacy considerations and the regard to effective competition between the undertakings. The duty of confidentiality is also intended to help to ensure that the right of inspection and the obligation to ensure compliance shall not constitute a disproportionate measure pursuant to EEA law.

Second paragraph

This provision specifies that the duty of confidentiality shall not apply to the Norwegian Labour Inspection Authority or the Petroleum Safety Authority Norway.

It follows from the regulations that the trade union representative will also be able to discuss the matter with his or her own employer without regard to the duty of confidentiality. In relation to a main contractor, there may moreover be two or more

trade union representatives with the same right of access pursuant to the regulations (e.g. the workplace branch, deputy trade union representatives, etc.). These trade union representatives will be free to discuss the matter fully among themselves.

It is assumed that the trade union representatives in most cases will have access to necessary legal, linguistic, financial or other professional assistance from other persons, including their own union, without needing to pass on information subject to confidentiality. For example, when arranging for translation of employment contracts, problems associated with the duty of confidentiality can easily be avoided by providing translators with documents where the names of the parties and other personal data are deleted.

However, section 11, second paragraph, second sentence of the regulations, provides for being able to discuss information subject to confidentiality with advisers with legal, financial, linguistic or other professional expertise, including knowledge of collective wage agreements. This provision specifies that the advisers in such cases shall be subject to a duty of confidentiality corresponding to that of the trade union representatives.

We stress that the duty of confidentiality is not intended to prevent the contracting entity from following up the obligation to ensure compliance downwards through a contract hierarchy.

Re section 12

This section provides that breaches of sections 10 and 11 of the regulations are subject to penalties. This entails, inter alia, that anyone who negligently or wilfully provides information received in connection with the implementation of the right of inspection or the obligation to ensure compliance may be liable to fines. The same applies in connection with the use of such information for purposes not within the scope of the regulations. The legal basis of such penalties is the general penal provision laid down in section 339 (2) of the Penal Code, which regulates penalties imposed in response to breaches of regulations.