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Labour Law

Newsletter Special Volume

Brave new (temporary) world of work?

German Cabinet approves bill

"Brave new (temporary) world of work?"

German Cabinet approves bill to combat misuse of temporary work

The German government approved a bill on 1 June 2016 to combat the misuse of temporary work and to fundamentally overhaul personnel leasing. This will finally lead to the implementation of one of the last labour-law projects of the grand coalition – as announced in the coalition agreement - before the end of this legislative term.

The German government wants awareness raised of the benefits of temporary work as being an established instrument of flexible personnel deployment to cover peak periods and short-term personnel needs, prevent abuse of temporary work and strengthen the position of temporary workers, as well as tariff and business partners. With this bill, the German government is responding at the same time to a large number of partly controversial Supreme Court decisions in connection with temporary work.

On 21 October 2016 the bill was passed by the lower and upper houses of the German parliament; this will lead to significant changes associated with the practice of personnel leasing. Temporary employment agencies and their customers should therefore quickly adapt to the changes made to the German Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz - AÜG*) since this new AÜG shall enter into force on 01 April 2017 and partly because it does not contain any transitional arrangements.

What should specifically be changed?

Deployment of personnel for a general maximum duration of 18 months

Up until now, it was permitted to deploy a temporary worker "on a temporary basis" to a hiring business (hirer)– which in individual cases could mean several years - but in future, temporary workers may be deployed to the same hirer for a maximum duration of 18 months only. If this maximum duration is exceeded, an employment relationship shall be deemed to exist between the temporary worker and the hirer. However, a temporary worker has the opportunity to object in writing to the transfer of his/her employment relationship to a hirer. A "precautionary" declared objection at the start of the work assignment to the hirer is supposed to be ineffective.

To calculate the maximum deployment duration, all periods with the same hirer which date back to less than 3 months ago are considered. If a temporary worker has already worked 18 months for a hirer, a "cooling duration" of 3 months must pass before the temporary worker may again be deployed to the same hirer. Beyond that, the maximum deployment duration will be calculated "employee-related" and not "job-related", i.e., all periods that a temporary worker worked for a respective hirer shall be considered regardless of whether the temporary worker was assigned to different tasks by the hirer or deployed to the hirer by different temporary work agencies (lender). With this method the so-called "lender-roundabout" is to be excluded. Conversely, after expiration of the maximum deployment duration, a hirer may "replace" a temporary worker with another temporary worker from the same temporary work agency to do the same job. The "lender-roundabout" could therefore easily become a "temporary worker-roundabout".

Finally, the bill clarifies that in relation to the deployment times that take place before 1 January 2017; these will not be considered in the calculation of the maximum deployment duration. In effect this means that by 30 September 2018 at the latest, a hirer has to decide whether to take on a temporary worker who has already worked in the business for 18 months on a permanent basis or terminate work with this temporary worker.

Under the current legislation a licence is required for "occasional" intercompany personnel leasing if a worker

was only employed for that purpose. This does not change in the reform of the AÜG. However, in the case of intercompany personnel leasing where a licence is required, the deployment duration of a maximum of 18 months shall apply. In future, increased caution is therefore called for among workers who work for several group companies and are specially employed for temporary assignments. These company-wide / group-wide positions are probably already personal leasing subject to a licence and will also be strictly limited in future.

Deviation possibilities by way of collective bargaining agreements

Tariff parties of the employment sector may shorten or (unlimitedly) extend the maximum deployment duration by way of a collective bargaining agreement (*Tarifvertrag*). Even hirers who are not subject to a collective bargaining agreement but are in the tariff zone may take over - by way of a works agreement with the works council (*Betriebsvereinbarung*) - the deviating maximum deployment duration 1: 1 from a collective bargaining agreement.

If the tariff parties agree on a so-called "**opening clause**" in the collective bargaining agreement without specifically defining a permissible maximum deployment duration, any tariff bound hirer may itself fix a maximum duration by way of a works agreement. From this open option, non-tariff bound hirers may only use a maximum duration of up to 24 months.

This means that the parties to a collective agreement - if they want- can agree to extend the maximum deployment duration than provided for by law. However, whether and to what extent the parties will take advantage of this remain to be seen since trade unions are of the opinion that statutory limits can only be extended in exceptional cases.

Equal pay and equal working conditions after 9 and 15 months respectively

The core of the present bill is the implementation of "**Equal Pay**" and "**Equal Treatment**" in cases of long-term deployment of temporary workers: The principle of equal treatment must now be mandatory applied **9 months** after a temporary worker is deployed to a hirer. If industry collective agreements provide for gradual harmonisation of working conditions, this mandatory time limit may be extended up to **15 months**. Time limits - just as in the case of maximum deployment duration - are calculated "employee-related" and not "job-related".

According to **the principle of equal treatment**, a lender is obliged to grant its temporary workers no later than the "acclimatisation period", the same applicable basic working conditions and pay that applies in that hirer's company. With this, the existing possibility to permanently swerve the temporary employment sector from the principle of equal treatment e.g. by referring to collective agreements, will significantly be restricted for a specific time period and limited with regards to content.

To facilitate practical implementation, equal treatment will in any case be assumed with respect to **remuneration** if the standard pay applicable in a hirer's company or in the employment sector is paid. In addition, the explanatory memorandum clarifies that owed remuneration includes any remuneration which is granted as a result of an employment relationship. This should include in particular, holiday pay, continued pay, bonuses, allowances and supplements as well as capital-forming payments and benefits in kind. In the case of benefits in kind such as a privately used company car, vouchers and discounts in the company's own business, the bill allows the lender the possibility to compensate temporary workers in monetary value instead of actually granting similar benefits in kind.

However, the legislature still leaves open what it wants understood under "**basic working conditions**", - as already under the applicable legal position –.

On the side of the lending company, a breach of the principle of equal treatment is punishable - as has been the case up to now - by a fine of up to EUR 500,000.

Prohibition of use as "strike breakers" in labour disputes

The bill allows a significant intervention at inconspicuous places in accordance with the principle of parity regarding a labour dispute.

To date, the maxim: "Who wants to work may work!" has prevailed. This principle also applied to temporary workers deployed to a company on strike and nevertheless still wanted to work there.

Under the bill, lending companies may not deploy temporary workers to a hirer's company if the company is directly affected by a strike ("fundamental prohibition of use"). Use of temporary workers is only exceptionally permitted if a hirer can ensure that no core jobs affected by a strike or jobs of permanent workers on strike will be taken over by temporary workers. A breach of this prohibition by a hirer is punishable with a fine of up to EUR 500,000.

Should this legislative change stand up to constitutional scrutiny, - which is unclear – this will once again show that dispute parity in labour dispute law is tightly limited at the expense of employers. "Yes" to flash mob, "No" to

precautions against strike by way of external workers (temporary work).

Elimination of "licence in reserve"

In accordance with the previous legal position, the practice that had prevailed in many companies during the last few years was to hold a licence at the same time for third-party personnel deployment in case of actual uncertainties concerning the classification of a service contract relationship (so-called "in reserve or drawer licence"). If it subsequently turned out that a supposed service contract was actually "practised" as a temporary employment contract e.g. due to the fact that the customer gave labour-law related instructions to the temporary worker on site then the companies involved were able to refer to the licence in reserve in order to also avoid – administrative–sanctions in cases of "illegal" supply of temporary workers.

Under the previous law, this design option was often branded as an "abuse of temporary work". The bill now provides that the lender and the hirer both refer to the use of temporary workers **expressly** in the personnel leasing agreement as "**supply of temporary workers**". If the lender and the hirer violate this disclosure obligation, an employment relationship between hirer and temporary worker shall be deemed to have been simulated and a fine of up to EUR 30,000 can be imposed. Thus, it is no longer possible to retroactively legitimise or secure in advance by way of an "in reserve licence" an actually "practised" personnel leasing that has previously been declared as a service contract.

Prohibition of chain, continuity, intermediate or hiring out to third parties

The bill explicitly states that an employment relationship must directly exist between the lender and temporary workers and that only the lender may as employer supply temporary workers. This makes it clear that any form of **chain, continuity, intermediate or hiring out to third parties** is now prohibited by law.

Temporary workers shall be included in threshold calculations of hirers'

The bill also expressly provides that temporary workers are to be included in matters of co-determination as regards threshold values in the business of a hirer. This applies - with the exception of thresholds in social plans for pure staff reduction in accordance with Sec. 112a Works Council Act (*Betriebsverfassungsgesetz – BetrVG*) - both to **co-determination on the works council level** (*betriebliche Mitbestimmung*) and **co-determination on the supervisory board level** (*Unternehmensmitbestimmung*).

In order for temporary workers to be "included" in the calculation of operating and company size like permanent workers, the deployment duration in the hirers' business must exceed 6 months. According to the explanatory memorandum, the total deployment duration is in this case relevant. Already at the beginning of the assignment of the temporary worker, a **forecast decision** should be made on whether at each due date of the relevant thresholds, the period of use has exceeded six months.

Definition of workers concept

Finally, a new legal provision (Sec. 613a BGB) is to be introduced in the German Civil Code (*Bürgerliches Gesetzbuch - BGB*) which contains its own **definition of the concept of workers**. The provision determines who is a worker from a partly literal reproduction of Supreme Court rulings. The instruction observance required from workers for this purpose- inter alia - should refer in particular to **content, implementation, time, duration** and **location** of activity. To weigh individual criteria, an evaluation of the overall view should be performed.

Privileged status of public sector

The bill provides that the AÜG provisions are in future not applicable in large parts to the supply of workers taking place due to a collective agreement of the public sector. The same applies to the supply of workers prescribed by law and - following this special legal regulation – a legal entity of the public law assigning or making workers available to another legal entity.

Effects of the practice

The German government wants the new AÜG to enter into force on 01 April 2017. It is strongly recommended – in order to check compatibility with the new legal situation - to critically review any current and future use of external workers which is not yet completed by the end of this year. **Avoidable costs risks** can only be minimised this way even after the bill is adopted.

Furthermore, it is necessary to closely examine the - partly substantial – **design options** for agreements in the bill both at the collective agreement level as well as at the operational level for one's own business or company in order to use them effectively for local needs. Parties to collective agreements are requested to adapt the applicable collective agreements for temporary work to the new legal situation including industry collective agreements. At operational level, the employer and works council will have to check which rules regarding the assignment of external workers in the company are to be adapted to the new legal situation or if required, re-negotiated.

Ultimately, it is important - by way of strike defence concepts that can be implemented without the use of temporary workers - to "cushion" the intervention in dispute parity as regards the right to industrial dispute which consequently falls at the expense of employers. This may also make the defence concepts of employers in individual cases have a more significant negative effect on the interest of trade unions and employees than the previous short-term bridging of strikes through the use of temporary workers.

Please contact us if you have any questions about this topic area or need further information.

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