Reform of Temporary Employment Law - Is Everything New?

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Introduction

The Federal Ministry for Labour and Social Affairs submitted its first draft bill to amend the Temporary Agency Workers Act (*Arbeitnehmerüberlassungsgesetz* – AÜG; hereinafter referred to as the "Act") and other legislation in November 2015 (*cf. our Newsletter of 4/2015, pp. 2 et seq.*). Following, in part, fierce criticisms and a number of amendments, the act was adopted by the Bundestag and approved by the Bundesrat (*Bundestag publication 18/9232, 18/10064*). Businesses will soon have to become accustomed to the legislative changes. The act will enter into force and effect on 1 April 2017.

Set out below is an overview of the most significant amendments

1. Unlike its predecessor, § 1 (1) sent. 1 of the amended Act contains a legal definition for the hiring out of a temporary employee. Pursuant to § 1 (1) sent. 1 of the amended Act, where, for commercial purposes, a temporary agency hires out an employee (temporary employee) to a third party (hiring entity) to perform work, this will constitute hiring out. Under the newly introduced § 1 (1) sent. 2 of the amended Act, it can be assumed that an employee has been hired out for the purposes of performing work if he or she is integrated into the work organisation of the hiring entity and is subject to its instructions. § 1 (1) sent. 2 of the amended Act is therefore important for distinguishing the hiring out of a temporary employee from other forms of use of outside personnel (contractors). According to the explanatory memorandum, the legislative amendment only seeks to codify the principles laid down by the courts. The legislature does not intend to alter the previous field of application of the Act or the scope of the permit requirement (*Bundestag publication* 18/9232, p. 19).

2. Furthermore, a legal definition of "employment relationship" has been inserted in § 611a (1) of the amended German Civil Code (*Bürgerliches Gesetzbuch* – BGB;) so as to prevent the abuse of temporary employees through their performance of supposedly independent activities as pseudo-contractors. In this case too, the legislature was simply seeking to codify the case law of the Federal Labour Court (*Bundestag publication 18/9232, p. 31-32.*).

3. Other new amendments relate to covert hiring-out of temporary employees. Where there is a covert hiring out of temporary employees, the parties describe the contract as a contract for works and services or a services agreement although same must actually be viewed as a hiring out of temporary employees. Until now, businesses have tried to avoid the classification of hiring out of temporary employees as unlawful, i.e. as hiring out of temporary employees conducted without a permit with the accompanying legal consequences, such as the deeming of a relationship to exist between the temporary employee and the hiring entity (§ 10 (1), (9) No. 1 of the Act); this was done by the contractor or service provider obtaining its own "precautionary" hiring-out permit ("hiring-out permit in reserve").

   This approach will not be suitable in the future. § 1 (1) sent. 5 of the amended Act provides that hiring out in the contract between the temporary agency and the hiring entity must be expressly designated as hiring out of a temporary employee. Furthermore, the name of the temporary employee must be specified in such contract (§ 1 (1) sent. 6 of the amended Act). The temporary agency is obliged to inform the temporary employee that he or she will be deployed

as a temporary employee (§ 11 (2) sent. 4 of the amended Act).

Violations of § 11 (2) sent. 4 as well as of § 1 (1) sent. 5 and sent. 6 of the amended Act constitute administrative offences punishable by a fine (§ 16 (1) no. 1c, 1d, no. 8, (2) of the amended Act). In addition, violations may have consequences for the issue of a permit (§ 3 (1) No. 1 of the Act).

If the "designation duty" contained in § 1 (1) sent. 5 of the amended Act and the "specification duty" in § 1 (1) sent. 6 of the amended Act are violated, this will result in the establishment of an employment relationship between the temporary employee und the hiring entity (§ 10 (1) in conjunction with § 9 (1) no. 1a of the amended Act). The affected temporary employee has a right to object to the establishment of a relationship with the hiring entity, which must be exercised within one month from the proposed date of deployment in keeping with the additional requirements in § 9 (2) and (3) of the amended Act ("declaration by the employee that he or she wishes to remain bound by the employment contract with the temporary agency").

In the course of the amendment to the law, a right to object to the establishment of an employment relationship was also introduced in respect of cases of unlawful hiring out (§ 9 (1) no. 1 of the amended Act).

4. As was provided in the coalition agreement, it will not be possible in the future to hire out a temporary employee to the same hiring entity for more than 18 consecutive months (§ 1 (1b) sent. 1 of the amended Act). A previous hiring out by the same or another temporary agency will count towards the maximum hiring-out period if the period between assignments does not exceed three months (§ 1 (1b) sent. 2 of the amended Act). According to the transitional provision in § 19 (2) of the Act, periods prior to the time when the amendments take effect on 1 April 2017 will not be taken into account for the purposes of calculating the maximum hiring-out period.

   However, it will be possible to agree on different maximum hiring-out periods in collective agreements (§ 1 (1b) sent. 3 of the amended Act). In this respect, the new provisions are based on the collective agreements governing the *sector in which the employees are deployed*. It thus requires that the hiring entity be bound by a collective agreement. The new provision does not contain an upper and a lower threshold.

   Pursuant to § 1 (1b) sent. 5 of the amended Act, *hiring entities bound by a collective agreement* may deviate from the maximum hiring-out period through an enterprise agreement or equivalent agreement for public servants, which was concluded on the basis of a collective agreement governing the relevant sector. This presupposes that the collective agreement contains a saving clause that allows deviating provisions to be agreed on in an enterprise agreement or equivalent agreement for public servants.

   On the one hand, where a collective agreement for the relevant sector applies, *hiring entities* that are not bound by a collective agreement have the option (§ 1 (1b) sent. 4 of the amended Act) of adopting, in enterprises and public service departments, provisions "with the same content" as the deviating provisions in collective agreements on the maximum hiring-out period through the use of enterprise agreements or equivalent agreements for public servants (§ 1 (1b) sent. 3 of the amended Act). The adoption of such provisions is only possible if the collective agreement is, among other things, relevant in terms of the geographical area and the sector that it covers as well as the period for which it is valid. According to the explanatory memorandum, the provision in the collective agreement should normally form an indivisible whole and therefore it should only be possible to adopt it as a whole without any amendments ("with the same content") (*Bundestag publication 18/9232, pp 20-21*).

   On the other hand, § 1 (1b) sent. 6 of the amended Act also allows hiring entities which are not bound by a collective agreement to make use of a saving clause in a collective agreement to agree on deviating provisions in an enterprise agreement or equivalent agreement for public servants. However, the maximum permissible period in this case is generally 24 months if the collective agreement does not itself specify a different maximum hiring-out period for deviating provisions in enterprise agreements or equivalent agreements for public servants. If several collective agreements apply in an enterprise, a hiring entity that is not bound by a collective agreement must, according to § 1 (1b) sent. 7 of the amended Act, conclude an enterprise agreement or equivalent agreement for public servants pursuant to § 1 (1b) sent. 4 or sent. 6 of the

amended Act on the basis of the collective agreement which is "representative" for its sector.

§ 1 (1b) sent. 8 of the Act lays down special provisions for churches and religious communities recognised as public-law entities.

Violation of the maximum hiring-out period may result in the withdrawal of a hiring-out permit (§ 3 (1) no. 1 of the amended Act) and will constitute an administrative offence (§ 16 (1) no. 1e of the amended Act). Furthermore, if the maximum hiring-out period is exceeded, this will result in the establishment of an employment relationship between the temporary employee and the hiring entity (§ 10 (1) in conjunction with § 9 (1) no. 1b of the amended Act). The temporary employee once again has a right to object to the establishment of a relationship with the hiring entity within a period of one month, starting from the date when the maximum hiring-out period is exceeded. The validity of the objection is subject to the additional requirements in § 9 (2), (3) of the amended Act

5. The permissibility of what are known as successive fixed-term contracts, under which a hiring entity assigns a temporary employee to work for another person's business under such person's instructions, has until now been controversial among legal writers. In accordance with the current practice of the authorities that issue permits, a new sentence three has been inserted in § 1 (1) of the Act to the effect that only the person with whom the temporary employee has an employment relationship is authorised to hire out the employee.

   Violations of this prohibition may have consequences according to the rules that apply to permits. In addition, they amount to administrative offences for the temporary agency and the hiring entity (§ 16 (1) no. 1b, (2) of the amended Act).

   Furthermore, the legislature has introduced § 10a of the amended Act in order to prevent abuses of contracts with outside personnel. According thereto, the provisions on invalidity in § 9 (1) no. 1 to 1b and § 10 of the amended Act are also applicable if the employee is assigned by another person contrary to § 1 (1) sent. 3 of the amended Act and that by doing so such person violates the permit requirement pursuant to § 1 (1) sent. 1 of the Act, the designation duty pursuant to § 1 (1) sent. 5 of the amended Act, the specification duty pursuant to § 1 (1) sent. 6 of the amended Act or the maximum hiring-out period pursuant to § 1 (1b) of the amended Act.

6. In addition, the new Act grants privileges to public authorities. The following new provisions no. 2b and no. 2c will be inserted in § 1 (3) of the Act:

   "*(3) With the exception of § 1b sent. 1, § 16 (1) no. 1f and (2) to (5) as well as §§ 17 and 18, this Act does not apply to the hiring out of temporary employees*
   (…)
   2b between employers if an employee's tasks are transferred from his or her current employer to another employer and due to a collective agreement for the public service a) the employment relationship with the previous employer remains in effect and b) work will be performed at the other employer in the future,

   2c between employers if they are public law entities and collective agreements for the public service or regulations for religious communities recognised as public-law entities apply,".

   According to the explanatory memorandum, the insertion of no. 2b in subsection (3) is intended to ensure that the requirements of the Act are, in largest part, not applicable to the staffing arrangements laid down in collective agreements for the public service (e.g. § 4 (3) of the Collective Agreement for the Public Service (*Tarifvertrag für den öffentlichen Dienst* – TVöD)) (*Bundestag publication* 18/9232, p. 22). The provision in no. 2c sets forth another exception to the scope of the Act for assignments of staff between public-law entities if they apply collective agreements for the public service or regulations for religious communities recognised as public-law entities.

7. The equal treatment principle is codified through the amendment in § 8 of the Act. The provision in the Act which makes it possible to avoid the equal treatment principle through the use of collective agreements is now subject to a time limit. In accordance with the coalition agreement, § 8 (4) sent. 1 of the amended Act provides that temporary employees must in the future receive the same pay as comparable employees of the hiring entity after nine months.

According to § 8 (4) sent. 2 of the amended Act, a longer period of different treatment for an assignment of up to 15 months is only possible if the employment relationship is subject to a collective agreement which provides for a gradual adjustment of the temporary employee's pay to the same amount as that of a comparable employee of the hiring entity following an induction period of six weeks.

In addition, a previous hiring out to the same hiring entity will count for the purposes of these time limits if the period between assignments for the same hiring entity is three months or less (§ 8 (4) sent. 4 of the amended Act). § 19 (2) of the Act also deals with the taking into account of hiring-out periods prior to the entry into effect of the Act on 1 April 2017. However, if the wording of the provision is interpreted strictly, this would only apply to deviations under a collective agreement pursuant to § 8 (4) sent. 1 of the amended Act.

Another change is the introduction in § 8 (1) sent. 2 of the amended Act of a presumption that a temporary employee receives equal pay if he or she receives the same pay as a comparable employee of the hiring entity under the collective agreement applicable to the hiring entity's enterprise or, in the absence of such an agreement, the same pay as a comparable employee under the collective agreement applicable to the relevant sector in which he or she is deployed. In conformity with the prevailing opinion among legal writers, § 8 (1) sent. 3 of the amended Act makes clear that temporary employees can be paid the monetary value in euros of payments in kind made to comparable employees.

Violation of the equal pay principle, which temporary employees may sue to enforce, may result in the withdrawal of a hiring-out permit (§ 3 (1) no. 3 of the amended Act) and will constitute an administrative offence (§ 16 (1) no. 7a, b, (2) of the amended Act). If construed literally, it would also establish an employment relationship between the temporary employee and hiring entity (§ 10 (1) in conjunction with § 9 (1) no. 2, § 8 of the amended Act). According to the explanatory memorandum, this legal consequence was not, however, intended (*Bundestag publication* 18/9232, p. 26).

8. While until now § 11 (5) of the Act only granted temporary employees a right to refuse to work during a strike, the amended § 11 (5) extends this to a complete ban on work. According to § 11 (5) sent. 1 of the amended Act, a hiring entity is not permitted to allow temporary employees to work where its business is directly affected by a labour dispute. § 11 (5) sent. 2 of the amended Act provides that this will not be the case if the hiring entity ensures that temporary employees do not take over activities which were previously performed by employees who are on strike or take over activities for employees who have themselves taken over activities for other employees who are on strike.

   Violations of the ban on work are punishable by fines of up to € 500,000 (§ 16 (1) no. 8a, (2) of the amended Act).

   Due to its effects on employers' "parity in industrial disputes", there are doubts about whether the provision, which has been criticised by many, is constitutional. The fact that temporary employees are forced to unite with the hiring entity's permanent employees during industrial action gives rise to significant doubts.

9. § 14 (2) sent. 4 to 6 of the amended Act reflects changes in the Federal Labour Court's case law, requiring that, as a rule, temporary employees must also be taken into account when assessing the thresholds for the purposes of employee participation and codetermination at the hiring entity (exception: § 112a of the Works Constitution Act). According to § 14 (2) sent. 6 of the amended Act, temporary employees should only be taken into account in determining the thresholds for the application of codetermination, i.e. whether the thresholds for the application of the statute have been reached, if the entire term of the hiring-out exceeds six months.

10. § 80 (2) and § 92 (1) sent. 1 of the amended Works Constitution Act codify the content of the works council's right to information about the deployment of persons who are not in an employment relationship with the employer to the extent recognised by the case law. § 80 (2) sent. 1 of the amended Works Constitution Act makes it clear that the right to information includes the right to information on the term and place of deployment as well as the activities assigned to the outside personnel. § 80 (2) sent. 2 of the amended Works Constitution Act also provides that the contracts underlying the employment of the outside personnel must be made available to the works council (*cf. Federal Labour Court, order of 31 January 1989 - 1 ABR 72/87*, which shows the previous legal position).

Conclusion

The amendment of the law on temporary employment results in considerable changes to the previous legal position. It will have a significant influence on business practice. It is already evident that some provisions will provoke further discussion for as long as doubt exists as to their constitutionality or conformity with 2008/104/EC on temporary agency work.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Piero Sansone on +49 221 33660-534 or by email to psansone@goerg.de. For further information about the author visit our website www.goerg.com.

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