Temporary Employment Update. Draft of Legislation Governing the Deployment of Temporary Personnel of 16 November 2015 from the Federal Ministry of Labor and Social Affairs (*Bundesministerium für Arbeit und Soziales – BMAS)*

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Introduction

The Coalition Agreement adopted by Germany's Grand Coalition had already made provision for the amendment of the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz* – AÜG) and the introduction of criteria to facilitate the distinction between temporary staffing for legitimate reasons and abusive practices (p*. 69 of the Coalition Agreement*). On 16 November 2015, the Federal Ministry of Labor and Social Affairs submitted a draft of legislation to the Office of the Chancellor that would amend the Temporary Employment Act and other laws (German Civil Code and Works Constitution Act). The content of this draft met with strong criticism from some quarters.

Overview of changes

1. As called for in the Coalition Agreement, deployment of temporary personnel to the same employer would continue to be limited to 18 consecutive months in the future (proposed § 1(1b) of the Temporary Employment Act). Previous employment by the same employer would not be counted if followed by an interruption of more than six months. However, collective agreements, or company-wide agreements or employment contracts incorporating provisions of such collective agreements, would be allowed to deviate from this maximum period. In keeping with the provisions of the Coalition Agreement, the contemplated amendment proceeds from the assumption of the existence of separate collective agreements for individual *sectors* and as a result also requires that hirers be party to such collective agreements (*see also the grounds set forth in the draft, p. 19*). The legislative history shows that – although not reflected in the wording of the draft – such collective agreements must in turn make provision for a limit to the duration of temporary employment (see *grounds set forth in the draft, p. 20*).

   According to the draft, employment in excess of the maximum period would expose the agency to the possibility of losing the right to deploy temporary personnel (proposed § 3(1) no. 1 of the Temporary Employment Act) and constitute an administrative offence (proposed § 16(1) no. 1d of the Temporary Employment Act). Additionally, failure to remain within the maximum limit would also be tantamount to establishment of an employment relationship between the respective temporary employee and his or her hirer (proposed § 10(1) in conjunction with § 9 no. 1b of the Temporary Employment Act). In such cases, employees may contest this change within the month immediately following the maximum period of deployment of 18 months.

2. In keeping with the provisions of the Coalition Agreement, the draft legislation calls for temporary employees to receive the same treatment in terms of remuneration as comparable employees of the hirer after nine months of employment ('principle of equal treatment'). The duration of any deviation from the principle of equal treatment in the case of collective agreements previously allowed under the Temporary Employment Act would thus be limited (proposed § 8(4) of the Temporary Employment Act.). In the case of employees covered by a collective agreement that calls for a gradual increase in remuneration until the level of that received by comparable employees of the hirer is reached, it would on the other hand be possible to deviate from the principle of equal treatment for up to twelve months. The contemplated

legislation would also count all employment with the same employer for the purposes of determining compliance with the prescribed time limits unless interrupted for a period of more than six months.

Violation of the principle of equal treatment would also result in the establishment of an employment relationship between temporary staff and their respective hirers under the contemplated legislation (proposal for § 10(1) in conjunction with § 9 no. 2 and § 8 of the Temporary Employment Act). It is questionable, however, whether this legal implication is intended. In any case, the grounds contained in the draft make no mention of this. Unlike in the case of the other instances of notional employment relationships with hirers newly included in the draft legislation, the draft makes no provision for objection on the part of temporary employees only in the case of violation of the principle of equal treatment.

3. A legal definition of what constitutes an employment relationship that, among other things, distinguishes between works contracts and temporary employment would be included in § 611a(1) of the Civil Code to prevent abusive construction of works contracts and facilitate regulatory oversight. Paragraph (2) of the new § 611a of the German Civil Code would also be expanded to include criteria intended to determine whether an employment relationship exists in the context of the required examination of the overall situation. The enumeration can, however, not be considered exhaustive.

   The proposal for § 611a(3) of the German Civil Code also goes beyond the requirements contained in the Coalition Agreement by requiring that, subject to presentation of evidence to the contrary, the existence of an employment contract be assumed if the findings of the Deutsche Rentenversicherung Bund, a German retirement insurance scheme, show that an employment relationship exists in the context of classification proceedings pursuant to § 7a of Social Code IV (*Sozialgesetzbuch* – SGB). This presumption, which has triggered considerable criticism, would apply regardless of whether the classification of the retirement insurance scheme has become final (*see also the grounds contained in the draft, p. 32*).

4. The draft legislation also contains new provisions governing what falls under covert deployment of temporary employees, which involves designation by the parties of contracts as works or employment contracts when they actually qualify as temporary employment contracts. According to the Coalition Agreement, covert deployment of temporary employees, i.e., deployment without the requisite authorization, is illegal. Previously, contractors or service providers could avoid having covert deployment of temporary employees declared illegal and escape the associated legal consequences by obtaining 'anticipatory' authorization to deploy temporary employees ('contingency authorization', which according to various courts temporary staffing agencies may not rely upon due to the fact that they represent a breach of good faith; *see, for example, Baden-Württemberg Higher Labor Court, judgment of 3 Dec. 2014 – 4 Sa 41/14*). The proposed § 1(1) sent. 5 of the Temporary Employment Act stipulates that temporary deployment must be expressly designated as such in agreements between a temporary staffing agency and hirers. Failure to comply with this formality would establish an employment relationship between a temporary employee and the respective hirer under the contemplated legislation (proposal for § 10(1) in conjunction with § 9 no. 1a of the Temporary Employment Act). Here too, temporary employees would have the right to object within one month after the contemplated date of deployment. In addition, the proposed § 11(2) of the Temporary Employment Act stipulates that temporary personnel must be informed that they will be employed as such.

5. The legality of arrangements under which hirers assign temporary employees to work for another enterprise was previously the subject of dispute in the scholarly literature. *The addition of a clarifying third sentence under § 1(1) of the Tempora*ry Employment Act is proposed to reflect previous practice of the authorities responsible for issuing permits (*see 1.1.2(11) of the Procedural Guidelines of the Federal Employment Agency Regarding the Temporary Employment Act (Geschäftsanweisung der Bundesagentur für Arbeit zum AÜG).* The purpose of this addition would be to limit the right to deploy personnel exclusively to their actual employers.

   Failure to comply with this provision would entail the possibility of regulatory consequences. The proposed § 16(1) no. 1b of the Temporary Employment Act also makes provision for the introduction of a new administrative offense.

6. In addition, the draft would afford public authorities special rights. A new no. 2b and a new no. 2c would be added to § 1(3) of the Temporary Employment Act:

   “(3) This law is, with the exception of § 1b sent. 1, § 16(1) no. 1b and (2) through (5) as well as §§ 17 and 18, not applicable to the deployment of temporary employees
   (…)
   2b. between employers if duties of an employee are transferred from the previous employer to another employer and on the basis of a public sector collective agreement a) the employment relationship with the previous employer remains in place and b) the work will in the future be performed for the other employer,

   2c. between employers if such employers are public law corporations and the respective applicable public sector collective agreements or requirements of public law religious bodies so allow or“

   According to the draft (*see p. 20*), the addition of no. 2b to subsection 3 would mean that provisions of the Temporary Employment Act will to a great extent not apply to personnel measures contained in public sector collective agreements (e.g., § 4(3) of the Collective Agreement for Public Service Employees (*Tarifvertrag für den öffentlichen Dienst* – TVöD)). The provision contained in no. 2c is intended to create a further exemption from the application of the Temporary Employment Act in the case of transfers of personnel between public law corporations if the respective applicable public sector collective agreements or requirements of public law religious bodies stipulate that the Temporary Employment Act is not applicable.

7. The Coalition Agreement had already contained an understanding to the effect that the use of temporary personnel as strike breakers was to be prevented. Whereas § 11(5) of the Temporary Employment Act currently affords temporary personnel a right to refuse to work in the case of a strike, the draft of the legislation intended to implement the requirements contained in the Coalition Agreement would essentially prohibit them from working. According to the proposed § 11(5) of the Temporary Employment Act, companies would not be allowed to hire temporary personnel while involved in a labor dispute. This provision prohibits deployment of ‘new’ temporary personnel or temporary personnel already working for a hirer at the beginning of the labor dispute regardless of whether such workers are willing to work or not (*see the argumentation contained in the draft, p. 25 and 26*). The proposed § 16(1) no. 8a and (2) of the Temporary Employment Act calls for fines of up to € 500,000 in the case of violation.

   There is some doubt as to the constitutional legitimacy of the contemplated arrangement, which has already been the subject of much criticism, and not only because of its effect as regards the parity of employers in labor disputes; considerable reservations also arise from the ‘enforced solidarity’ between temporary personnel with the regular workforce of the hirer involved in the labor dispute.

8. The proposed § 14(2) of the Temporary Employment Act is intended to make it clear that temporary personnel must in the future regularly taken into account by hirers for the purposes of compliance with threshold values called for in works constitutions (with the exception of § 112a of the Works Constitution Act (*Betriebsverfassungsgesetz* – BetrVG)) as well as for the purposes of co-determination. The Coalition Agreement made provision for this only at the level of threshold values under co-determination law and then only if this did not conflict with the purpose of the respective norm. In keeping with recent case law of the Federal Labor Court (*Federal Labor Court, order of 4 Nov. 2015 - 7 ABR 42/13*), such a provision was also included in the draft as regards thresholds called for in law governing co-determination (*see the grounds advanced in the draft, pp. 26 and 27.*).

9. The new § 80(2) and § 92(1) sent. 1 of the Works Constitution Act are also designed to provide legal clarity as to the scope of the rights of work councils to receive information on the deployment of individuals who are not employees of the enterprise. According to the proposed § 80(2) sent. 2 of the Works Constitution Act, the documentation to be made available to works councils would include the agreements underlying the employment of outside personnel (*see also the previous legal situation: Federal Labor Court, order of 31 Jan. 1989 – 1 ABR 72/87*).

Conclusion

The draft of the legislation makes provision for significant changes in the previous legal situation. In some cases, these changes go significantly beyond what is called for in the Coalition Agreement. If the draft legislation, which calls for implementation with effect as of 1 January 2017, becomes law, this will have a significant effect on current operational practices. It remains to be seen whether and what changes will be made in the draft of the legislation in the context of the impending preliminary negotiations and the subsequent legislative proceedings.

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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