

Draft bill for stricter rules on fixed-term contracts

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Shortly before the end of the 19th parliamentary term the Federal Ministry of Labour and Social Affairs (BMAS) presented a draft bill to change the general law on fixed-term employment contracts (as at: 14/04/2021). The stated aim of the bill is to restrict fixed-term employment contracts that do not have an objective reason for limiting the term of employment and so-called fixed-term chains, which result from multiple fixed-term employment contracts being strung together.

What does the bill seek to change?

The draft bill contains provisions which reduce the permitted maximum duration of fixed-term contracts without an objective reason, introduce a quota for such fixed-term contracts and impose a maximum total duration for fixed-term contracts which have an objective reason for their use, amongst others. The following amendments, in particular, are planned:

- Restricting the duration of an employment contract **without** an **objective reason** would in the future only be permitted for a period of **18 months** instead of the previous two years. **Extending** the term up to this total duration would only be permitted **once** instead of the three times permitted currently.
- The applicability of fixed-term contracts without an objective reason would continue to be restricted to **new hires** to limit the possibility of creating fixed-term chains. The draft bill misses the opportunity to clarify when a period of previous employment with the same employer is no longer relevant. The threshold for such previous employment being "a very long time" ago is likely to be 20 years as suggested by the case law of the Federal Labour Court (Bundesarbeitsgericht, BAG). It also remains unclear what exactly constitutes a "very different type of job" and is therefore also deemed irrelevant. Thus, a lack of legal certainty remains.
- Employers who generally have **more than 75 employees** would only be allowed to have a maximum of **2.5%** of their employees on fixed-term

contracts without an objective reason. Note that the draft bill applies to employers and not to businesses. The definitive calculation date is to be the first calendar day of the preceding quarter. Fixed-term contracts that were concluded or extended before the new rules on fixed-term contracts come into force are excluded when calculating this percentage of fixed-term contracts.

- A **citation requirement** (Zitiergebot) is proposed to enforce the fixed-term contract quota whereby it is to be stated in the written agreement on the fixed term whether it is limited to a maximum of 18 months for no objective reason or the fixed-term contract is concluded after the founding of a company or with an older, previously unemployed employee. If this is not stated the employer can no longer rely on the contract being a fixed-term contract without an objective reason.
- Chaining fixed-term contracts would be further restricted alongside this. Fixed-term employment contracts with an **objective reason** would not be permitted if the total duration of the chain of fixed-term employment contracts for the same employer exceeded a **maximum duration of five years**. Periods of time before where the employee was already employed on a fixed-term employment contract with the same employer will be counted towards the maximum duration unless these periods occurred more than three years ago. This also applies to periods in which the employee was working for the same employer as a temporary worker via an employment agency. To date the Act on Part-Time Work and Fixed-Term Employment (Teilzeit- und Befristungsgesetz, TzBfG) has not provided any maximum duration for fixed-term contracts that were justified on objective grounds. The BAG only carries out reviews in extreme cases to prevent so-called institutional abuse of rights.

What are the practical consequences?

If the draft bill is actually passed it would have wide ranging practical implications.

For example, in the future a company with a total of 100 employees across multiple businesses would only be able to employ two employees on fixed-term contracts without an objective reason. If the allowed percentage of fixed-term contracts was exceeded this would result in each additional fixed-term employment contract without an objective reason coming into force as a permanent contract. This results in legal uncertainty.

Companies with 75 or fewer employees would be allowed to continue to enter into fixed-term employment contracts without an objective reason with as many employees as they wish. The planned reduction in the permitted maximum duration for fixed-term contracts without an objective reason and the maximum total duration for fixed-term contracts with an objective reason would however also have a significant effect on staff planning for such SMEs.

The planned citation requirement is also problematic. If, in the future, the employer specifies in the written agreement on a fixed term of employment that the term is fixed without an objective reason, they can no longer later alternatively rely on objective grounds in the event of a fixed-term contract review procedure. Until now it has not played a role whether the written agreement on a fixed term is justified by another objective reason or uses the

fact that it is a fixed term without an objective reason as justification. It is sufficient that the objective reason was present from an objective point of view when the contract was entered into. This would no longer be possible in the future.

Furthermore the fixed-term contract quota will generate a significant amount of extra administration work. In the future employers with multiple businesses would have to bear in mind the number of fixed-term employment contracts without an objective reason that are in place across all their businesses and the individual firms would have to coordinate their staff planning with each other.

The planned legislation bears the hallmark of a long outdated image of the world of work. The draft bill misunderstands how the instrument of fixed-term employment contracts helps people start their career, especially in uncertain times. Discouraging employers in times of crisis, such as now, from recruiting staff by imposing on them the need for permanent planning rather than medium-term planning will lead to companies choosing not to recruit at all. And this really does not serve anyone.

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Note

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