Newsletter
Labour Law

ISSUE 01 I 2017

PREFACE

Our first Newsletter in 2017 takes a close look at the reform of the Temporary Agency Workers Act, which is extremely relevant in legal practice. The amended act will enter into force and effect on 1 April 2017.

Another contribution concerns a decision by the Hamm Higher Labour Court, which sets out the requirements for a valid signature on a letter of reference. In addition, we address the Cologne Higher Labour Court's acceptance of the imposition of a EUR 40 penalty for late payment of wages and salaries. Finally, in the contribution "Drugged Driving – Dismissal of a Truck Driver for the Use of Drugs", we elaborate a recent decision of the Sixth Senate of the Federal Labour Court.

Reform of Temporary Employment Law – Is Everything New?

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 EUR 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.

Dr. Piero Sansone

Signature on Employment References

Introduction

Employees have a right to receive a letter of reference when they leave a company. However, the parties frequently disagree over the details of the formulations used in such letters, and even formalities can represent a source of pitfalls for employers. For example, letters of reference may not contain any hidden "codes". The Hamm Higher Labour Court was recently called upon to rule on the legality of such an encoded message in connection with a rather curious legal dispute that revolved around the way an employer affixed his signature.

Headnote

The law requires that letters of reference be personally signed and that the signatures also reflect the signors' usual practice when signing other important company documents (Hamm Higher Labour Court, Order of 27 July 2016, 4 Ta 118/16).

Decision

In the case at hand, an employer had, in the context of a legal settlement, agreed to give the plaintiff a positive interim letter of reference, containing an evaluation of her work performance. The resulting letter of reference did not, however, meet the expectations of the plaintiff, who then initiated enforcement proceedings (for payment of a penalty), for the managing director's signature differed from his usual signature and looked more like what a child might have scribbled. The managing director then provided a new letter of reference. This time, however, he did affix his "real" signature, but it sloped downward at an angle of about 30° from left to right. The plaintiff again demanded payment of the penalty.

The Hamm Higher Labour Court ruled in favor of the plaintiff, stating that the employer had not properly fulfilled his duty. According to the court, the scribbling did not constitute a signature; the signature on a letter of reference must reflect the writer's usual practice when signing other important company documents and the unusual "child's" handwriting did not make it possible to identify the signor. The court added that the second letter had also not been properly signed since the downward sloping signature was thoroughly unusual in legal practice and a neutral party would interpret it as a desire on the part of the signor to disassociate himself from the content of the reference. – However, precisely such secret codes are not permissible.

Comments

This decision provides a good occasion for taking a look at the formalities involved in employment references. Not only is the content often a source of dispute; the form can also give rise to problems. In order to save time and avoid aggravation, it is advisable to make sure that letters of reference comply with all formalities from the very beginning. This following check list can help:

– Proper stationery with letterhead/company logo
– Consistent layout and format (font size, etc.)
– Spell check

– Dated as of the last day of work
– Horizontal signature in usual handwriting
– Blue or black ink
– Unfolded
– Use of plastic sleeve to protect document

Obviously, the document should have no dog-ears or coffee stains. As a rule of thumb, the appearance a letter of reference should correspond to what one would expect of a proper application for employment. Application of the same standard is likely to save unnecessary aggravation due to failure to pay attention to formalities when preparing references.

Jens Völksen

EUR 40 Penalty for Late Payment of Wages and Salaries by Employers

Penalty for late payment pursuant to § 288(5) of the German Civil Code (Bürgerliches Gesetzbuch – BGB)

Since § 288(5) of the German Civil Code went into effect on 29 July 2014, creditors have had the right to claim payment of a penalty in the amount of EUR 40 for late payment of invoices, except in the case of amounts due by consumers. The introduction of § 288(5) of the German Civil Code is based on the implementation of Directive 2011/7/EU on combating late payment in commercial transactions of 16 February 2011. The provision was originally intended to pertain only to amounts due after it entered into effect. Now, however, the provision also applies to debts that fell due prior to that date.

Application in connection with labour law

Application of § 288(5) of the German Civil Code in the area of labour law or to the payment of wages and salaries is the subject of dispute in the scholarly literature on labour law, and both the Düsseldorf Labour Court (2 Ca 5416/15) and the Aachen Labor Court (1 Ca 2772/15 h) ruled against such application in the first instance. One argument against the application of the penalty emphasises that such a penalty for late payment is inconsistent with the legal system and therefore unacceptable because labour law – unlike general civil law – makes no provision for reimbursement of out-of-court expenses. This follows from the application of § 12a of the Labour Court Act (Arbeitsgerichtsgesetz – ArbGG). It is argued that the provision contained in § 12a of the Labour Court Act must therefore be considered a provision in a lex specialis that supersedes § 288(5) of the German Civil Code, thereby eliminating the possibility of recourse to § 288(5) of the German Civil Code in matters pertaining to labour law.

The Cologne Higher Labour Court (judgment of 22 November 2016 – 12 Sa 524/16) has now decided that an employer who fails to make timely or complete payment of wages or salaries must pay the corresponding employee a late penalty in the amount of EUR 40. According to the Higher Labour Court, such penalties are now also applicable in the area of labour law.

The Higher Labour Court applied the traditional approaches in its construction and justified the application of the penalty for late payment to claims for compensation under labour law first of all by looking at the literal wording of § 288(5) sent. 1 of the German Civil Code, which it argues supports application. According to the court, a historical interpretation of the section also does not lead to a different conclusion. According to the court, § 288(5) of the German Civil Code does serve to implement the EU Directive on combating late payment in commercial transactions (and therefore not really in the case of transactions between companies and consumers).

However, the deliberate decision of the legislature (see on this Bundestag Publication 18/1309, p. 18) and as a result therefore the content of § 288(5) of the German Civil Code, which also covers creditors that are consumers, constitute “overfulfillment” of the requirements contained in the Directive, Furthermore, in the court’s view, the application of the methodological method of statutory interpretation, taking into account the intended purpose of § 288(5) of the German Civil Code,

also cannot result in any other assessment. The court concluded that the existence of § 12a of the Labour Court Act, which prevents employees from claiming out-of-court expenses, does not automatically make payment of a fixed sum for late payment incompatible with the methodology of the Act, for the fixed sum of EUR 40 is namely not a flat amount intended to cover the costs of legal enforcement, but rather a penalty imposed on employers who fail to make timely payment of wages and salaries.

Implications for practice

The courts are likely to have to deal with the question as to the applicability of § 288(5) of the German Civil Code to claims in connection with the payment of wages and salaries in the near future since the provision now also covers cases occurring after 30 June 2016 due to Art. 229 § 34 sent. 2 of the Introductory Act to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB). Employers are therefore advised to pay wages and salaries on a timely basis and in full in order to avoid unnecessary detriment and additional expense. In the case of actions brought to enforce payment of wages and salaries, payment of the penalty for late payment in the amount of EUR 40 is therefore likely to be sought.

Opinions differ as to whether claims for payment of the late penalty will apply to each individual instance of failure to make payment on time or in full (against cumulative monthly accrual: Diller, NZA 2015, 1095 and 1097; in favor of cumulative accrual: Hülsemann ArbRAktuell 2015, 146 and 148), which means that a fixed amount of EUR 40 that may at first seem trivial can amount to a significant sum in the case of several months' wages, especially when a large number of employees are affected. The Higher Labour Court has in fact not decided whether cumulative accrual will be allowed since this issue was irrelevant for the purposes of the case at hand.

The Higher Labour Court admitted an appeal.

Lena Jordan

Employers are therefore advised to pay wages and salaries on a timely basis and in full in order to avoid unnecessary detriment and additional expense.

"Drugged Driving" – Dismissal of a Truck Driver for the Use of Drugs

In its judgment of 20 October 2016 (6 AZR 471/15), the Federal Labour Court ruled that the use of amphetamines and methamphetamines can justify immediate dismissal of a truck driver even if it is not certain that the driver's performance was actually impaired while at work.

Decision

The decision involved an action brought against a shipping company by a truck driver who had been employed by the former. The plaintiff had ingested amphetamine and methamphetamine on a Saturday while off work and then worked the early shift on the following Monday. On the day thereafter, he was controlled by the police after work and subjected to a saliva test, the results of which were positive. The plaintiff then phoned his employer and said that he would not be able to make his next regular run because he could not find his driver's licence and the police had informed him that he was not allowed to drive. Since no replacement was available, the employer convinced the plaintiff to drive the scheduled run anyway, but the excuse given by the driver had made the employer suspicious. He questioned the driver, who then admitted what had happened. The Federal Labour Court upheld the validity of immediate dismissal without notice.

Implications for practice

The recent decision of the Federal Labour Court confirmed the court's established case law to the effect that a breach of secondary duties can constitute reason for dismissal since the existence of such obligations means that employees must avoid situations that would make them unable to perform their duties or endanger others if they did. The court thereby built on its ample case law regarding driving under the influence of alcohol (most recently Federal Labour Court decision of 20 March 2014 – 2 AZR 565/12) and created legal clarity as regards cases involving the use of drugs. When weighing the respective interests of the parties, the Federal Labour Court also found itself unable to rule in favor of the employee, in particular because of the seriousness of the driver's transgression.

What also makes this decision important is that the Federal Labour Court saw a second breach of duty in the employee's failure to mention the saliva test and misrepresentation of the police control, which would already in and of itself have justified immediate dismissal. The Federal Labour Court also emphasised more than in the past the employee's duty to keep damages to a minimum.

In that regard, the Federal Labour Court is therefore consistent in concluding that the plaintiff cannot mitigate his responsibility by arguing that the traffic control involved the "private sphere". This is convincing in view of the considerable time it takes for the body to metabolise drugs and the fact that the plaintiff was scheduled to drive the morning after the drug control in combination with the dangers associated with the use of drugs in general, which can entail implications under criminal law (see § 315c(1) no. 1 a) of the German Criminal Code (Strafgesetzbuch – StGB)).

Dr. Kevin Lukes

Content

Note

This Newsletter was prepared according to our best knowledge and belief. It is meant to be a general outline of the law and cannot be a substitute for personal advice in an individual case. We therefore do not accept any liability whatsoever for damage. If you no longer wish to receive a copy of this Newsletter, please let us know by sending an e-mail to jmoeltgen@goerg.de.

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