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Germany: New Legislation Adjusts Temporary Employment and Contracts for Work and Labour

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On 16 November 2015, Germany's Federal Minister of Labour introduced draft legislation to reform temporary employment and contracts for work and labour. The planned modifications intend to focus on the core function of temporary employment (covering peak workloads) and to prevent abuse in the creation of contracts for work and labour. While amendments to this draft bill are likely, a final version is expected to come into force on 1 January 2017. The most important elements of the draft bill are summarized below.

How long will an employer be able to use temporary employees in the future?

A significant element of the draft imposes an 18-month limitation on the maximum loan period for deploying temporary employees to another company. Temporary employees are those who are made available by their employer (the lending company) to another company (the user employer) for a certain period of time. Once the new law takes effect, the user employer will be required to terminate the deployment of the temporary employee after 18 months, at the latest. The user employer also will not be allowed to deploy the temporary employee to another site after the 18-month period expires. However, the user employer is not precluded from continually filling a job with temporary employees in the future. The "principle of rotation," which has been practically applied thus far through the deployment of temporary employees to a company for six months at a time, shall remain permissible for the time being.

Are deviations from this statutory maximum loan period possible?

A longer or a shorter loan period is possible through an applicable collective agreement between the trade union and the user employer or a company agreement based on such a collective tariff agreement. However, this applies only for employers that are bound by a collective agreement, meaning that many companies not bound by a collective agreement do not have the opportunity for this flexibility.

What happens if the maximum loan period is exceeded?

Exceeding the maximum loan period should, according to the draft, result in justification for finding the existence of an employment relationship between the user employer and the temporary employee. Thus, the temporary employee would have two employment relationships: one that is pursuant to a contract with his employer (the lending company) and one that is based on legal fiction with the user employer. The temporary employee would be entitled to repudiate the employment relationship with the lending employer within a specific period of time – similar to the right to object to a business transfer. Essentially, temporary employees would be entitled to decide with which entity they wish to continue an employment relationship. Therefore, the draft bill intends to prevent a situation where the temporary employee is forced into an employment relationship with user employer. Such a result could be detrimental to the temporary employee, as he or she may have enjoyed better protection against dismissal under the contract with the lending company, or the user employer could be undergoing financial difficulties. In addition, the works council of the user employer still would be allowed to contradict the recruitment of the temporary employee when the transfer period is (expected to be) exceeded.

Will temporary employees and employees of the employing company be treated equally in the future?

According to the draft, temporary employees will be treated equally to comparable employees of the user employer regarding remuneration and any other essential working conditions (e.g. flexible working hours, periods of notice, allowances) after nine months (the so-called principle of equal pay). Through a collective agreement, deviations from this equal treatment within the first nine months after transfer are possible. In contrast to the maximum loan period, this collective agreement opening clause also applies to employers that are not bound by a collective agreement. If the temporary employee receives bonuses for his or her work in a specific field that is subject to a stepwise alignment with the remuneration of the employees of the employing company (*Branchenzuschlagstarifverträge* [collective agreements for bonuses within specific fields]), he or she is not entitled to receive equal pay in the first year.

May temporary employees be deployed as “strike breakers” in the future?

The planned prohibition of deploying temporary employees as strike breakers will have significant effects on restructurings. That means that the user employer will not be allowed to deploy temporary employees when the company is directly affected by labour disputes. Until now, the use of temporary employees was one of the few ways employers could continue to maintain their operations during union strikes. Temporary employees only had the right to refuse taking up their work. In the future, an employment prohibition will apply and a breach thereof will be sanctioned with a financial penalty of up to EUR 500,000.00.

Are there further modifications to reinforce the rights of temporary employees?

In the future, temporary employees shall be taken into greater consideration regarding company and corporate codetermination rights of the works council (with the exception of the regulations for enforcing a social plan). This shall be achieved by taking into consideration temporary employees in determining relevant thresholds specified in the *Betriebsverfassungsgesetz* [German Works Constitution Act] or the managerial codetermination (e.g. the *Drittelbeteiligungsgesetz* [German One Third Participation Act] or the *Mitbestimmungsgesetz* [German Codetermination Act]). Thus, the draft follows the tendency of relevant case law in counting temporary employees in statutory thresholds. Most recently, the *BAG* [German Federal Labour Court] decided on 4 November 2015 (7 ABR 42/13) that temporary employees have to be included in determining the election type of the board members. Case law established that only those temporary employees who are deployed in core positions be counted. This limitation is not included in the draft bill, meaning that short-term temporary employees – which occur frequently in reality - also must be taken into account

How will the abuse of contracts for work and services be reduced?

The draft bill also seeks to combat the improper use of contracts for work and labour. One focus of the revision is on so-called fictitious

contracts for work and labour that have sometimes occurred in practice. These are situations in which the client (fictitiously) enters into a contract with the contractor for the completion of specific work, but then transfers his employees to the client for the provision of services. The contractor obtains a personnel leasing permit as a precaution. Until now, this has led to the situation in which the user company's use of temporary employees was not illegal, even if a contract for work and labour did not exist, as it constituted personnel leasing. The present statutory provisions only require, in a very formal way, the existence of valid personnel leasing rather than contract execution. Thus far, temporary employment executed under the guise of a contract for work and labour has been "illegal" only when the contractor is not in the possession of a personnel leasing permit. In the future, personnel leasing only will be permissible if the deployment is formulated as such from the beginning and if the deployed employees are named. Otherwise, an employment relationship between the temporary employee and the user employer will be presumed, as is the case when the use of a temporary employee exceeds the maximum loan period. Furthermore, invalid personnel leasing will remain a legal offense and subject to a financial penalty.

Will the concept of "employee" be redefined?

Another significant revision is planned for the distinction between an employment relationship and the deployment of external personnel in the form of a contract for work and labour or contract of employment. The draft includes a list of eight criteria to distinguish between an employment relationship and self-employment. A number of criteria are likely to justify the finding of an employment relationship, including whether the deployed person:

- is not allowed to decide on his working time, the owed services or his workplace;
- predominantly renders owed services within the offices of third parties;
- regularly uses the resources of third parties for rendering owed services;
- renders owed services together with others who are deployed or charged by a third party;
- works exclusively or predominantly for another party;
- does not own an operational organisation to render the owed services;
- renders services that are not focused on manufacturing or reaching a specific work product or a specific work result; and
- does not guarantee the result of his work.

The draft focuses on criteria for determining whether an employment relationship exists that case law has not completely addressed (e.g., the use of equipment or the work within the offices of the customer). This is why this list of criteria is more likely to lead to problems in practice, rather than supporting innovative ideas for deploying personnel with legal certainty. On the one hand, an employment relationship or self-employment has to be determined on the basis of an evaluative overall view, a practice that already leads to difficulties concerning the status assessment. On the other hand, the German Federal Government is pursuing the simplification of the legal framework for employers in a world of work that is becoming more and more digitalized (*Arbeiten 4.0* [Work 4.0]). With this draft, the government creates provisions that do not meet these new requirements. For example, a client is allowed to commission self-employed IT specialists for maintaining its IT systems. These specialists have to work "in the offices" of the customer as a matter of course. The same applies to self-employed persons who work together with other employees or contractors in the client's company "on-site." New forms of organisations and projects, like "scrum" or "crowdsourcing," are seen by some as the future of work, but their legal implementation might be made much more difficult due to this draft.

Furthermore, a presumption provision shall apply in the future. According to this provision, the employment relationship will be determined through the *Deutsche Rentenversicherung Bund* [German statutory pension insurance] (clearing office DRV Bund) in the course of an evaluation of the deployment of external personnel regarding social security (so called *Statusfeststellungsverfahren* [procedure to determine status]) which will justify the refutable existence of an employment relationship. This refutable presumption shall apply irrespective of the enforceability of the decision of the clearing office DRV Bund.

Will the rights of the works council be strengthened?

The already-existing rights to information of the works council on the deployment of persons that are not employed by the employer of the user employer (so-called external personnel) shall be strengthened in the future. The works council shall be entitled to get information about the number and the contractual arrangement of the deployed external personnel from the employer. On the basis of this information, the works council will be entitled to review to what extent they have participation rights for the deployment of external personnel. Such rights include not only matters of recruitment but also occupational safety.

What are the next steps?

The discussion draft was submitted to the *Bundeskanzleramt* [German Federal Chancellery] on 16 November 2015 for a preliminary referendum. Afterwards, it will be submitted to the departments, federal states and organisations for referendum and to the parliament groups. This reform of the *Arbeitnehmerüberlassungsgesetz* [Act on Temporary Employment Businesses] shall come into force on 1 January 2017.

What is the employer expected to do at this time?

Before the draft takes effect, employers should plan for these expected changes. Regarding the deployment of temporary employees, employers should review to what extent and for what positions they need to use temporary employees in the future. Many employers have agreed on provisions with their operating partners regarding the deployment and contingents of temporary employees, which only provide for the deployment of temporary workers on a temporary basis. Existing contracts and procedures should be reviewed with the planned changes in mind, and amended early, if appropriate. Furthermore, employers should review the external personnel that are deployed via contracts for work and labour and contracts of employment, and make any needed changes.