# (Equal) Pay Day for Temporary Employees? - Order of the Federal Labor Court on the Collective Bargaining Capacity of the CGZP

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| **Introduction** | Already on December 14, 2010, the Federal Labor Court had announced an order that has received much attention and will have far-reaching consequences for the temporary employment business. The key issue before the Court was whether the Association of Christian Unions for Temporary Employment and Employment Services Agencies (*CGZP*) is an umbrella organization with collective bargaining capacity under the provisions of the German Collective Bargaining Act (*TVG*) and is therefore able to enter into collective bargaining agreements. Already in December, it had been announced that the Federal Labor Court's answer to this question was, in principle, negative. In the meantime, the Court has issued a detailed opinion, which allows us to take a closer look at the rationale for the decision and its practical consequences. |
| **Legal background of the decision** | The German Act on Commercial Temporary Work (*AÜG*) provides that, in principle, the employment terms of temporary employees during temporary employment with a temporary employer may not be worse than the employment terms of comparable permanent employees of the employer. This also means that, in principle, temporary employees are entitled to the same compensation for their work as comparable permanent employees of the employer (so-called principle of equal pay).<br><br>Under the provisions of the Act on Commercial Temporary Work, a collective bargaining agreement may however deviate from this principle, an option that was exercised with great frequency in the past. The CGZP, in particular, entered into many collective bargaining agreements that provided for temporary employees to receive lower compensation than permanent employees.<br><br>In this connection, the CGZP was criticized for entering into "token collective bargaining agreements." In addition, deviations from the principle of equal pay, which in practice were quite far-reaching, met with heavy opposition that ultimately caused various parties, including the union ver.di and the State of Berlin, to ask a court to review the question of whether the CGZP has collective bargaining capacity. |
| **The decision of the Federal Labor Court dated December 14, 2010 (case no. 1 ABR 19/10)** | Affirming the judgment of the court of appeals, the Federal Labor Court has now decided that the CGZP does not have collective bargaining capacity and therefore cannot enter into collective bargaining agreements. According to the provisions of the Collective Bargaining Act, collective bargaining agreements can be made, on behalf of employers, only by unions or union associations (so-called umbrella organizations) with collective bargaining capacity.<br><br>In the opinion of the Federal Labor Court, the CGZP is neither an employee association with collective bargaining capacity (since the members of the CGZP itself are not employees) nor an umbrella organization with collective bargaining capacity within the meaning of the law. In the view of the Court, an umbrella organization has collective bargaining capacity only if the member unions themselves have collective bargaining capacity and, above all, fully bestow their collective bargaining capacity upon the umbrella organization. In the view of the Federal Labor Court, the latter requirement was not met in the case of the CGZP, because the authority bestowed upon the CGZP to enter into collective bargaining agreements was limited to the temporary employment business and under the applicable charters was thus limited to only part of the organizational scope of the member unions. Moreover, the Federal |

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| | Labor Court objected that, on the other hand, the authority of the CGZP under its charter to act in certain other areas exceeded the organizational scope of its constituent member unions. |
| **Consequences of the decision for the temporary employment business** | The decision will have quite far-reaching consequences for the temporary employment business: Now that it is settled law that the CGZP lacks collective bargaining capacity, it will no longer be able to enter into collective bargaining agreements, at least as things stand right now. The rationale of the decision also suggests that collective bargaining agreements signed by the CGZP in the past are, in the view of the Federal Labor Court, invalid. This, in turn, has the consequence that in many cases there are no (valid) collective bargaining provisions that could justify a deviation from the principle of equal pay within the meaning of the Act on Commercial Temporary Work. To begin with, this will have grave consequences for temporary employment agencies:<br><br>Temporary employees will now be able to demand payment of (higher) compensation from the temporary employment agency in the same amounts as are paid to comparable permanent employees of the temporary employer. Moreover, it is to be expected that many temporary employees will, within the applicable limitation periods and - to the extent valid - within the limits of any forfeiture clauses included in their employment agreements, also seek to recover compensation shortfalls from the past. Another major problem for temporary employment agencies will be social security premiums. Because many temporary employees will, according to the most recent decision of the Federal Labor Court, retroactively be entitled to higher pay, social security premiums will now have to be paid on compensation shortfalls for up to four years. It should be expected that temporary employment agencies will be subject to claims for massive back payments. The total liability of temporary employment agencies is estimated to reach about two billion Euros. Politicians have already begun considering deferred back payments or instalment payments in order to save temporary employment agencies from going bankrupt in short order. |
| **Consequences for companies not in the temporary employment business** | The risks resulting from the decision furthermore are not limited to temporary employment agencies! Under social security laws, even companies not in the temporary employment business who currently employ or in the past employed temporary employees may now face liability for back payments of social security premiums as additional debtors, if the original debtor, the temporary employment agency, fails to comply with its obligation to make such back payments or, worse yet, is no longer able to do so.<br><br>The decision of the Federal Labor Court that has now been published should therefore provide all companies that employ temporary employees in their operations and that cooperate with a temporary employment agency which directly or through an employers' association has entered into collective bargaining agreements with the CGZP with urgent reason to address this topic in depth and to identify any legal and financial risks. We note however that the last word on these issues has not been spoken yet and that the temporary employment industry will make yet another attempt to oppose the current development of German case law. |
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