"Temporary" leased employees – still no clarifying decision by the Federal Labor Court

INTRODUCTION

A new decision of the Federal Labor Court (BAG) on the issue of leased employees had already been the topic of Client Newsletter 02/2013. Over the course of the year, further judgments have been handed down. As we had feared in our earlier Client Newsletter, the BAG departed in the judgment of March 13, 2013 (File no.: 7 ABR 69/11) from its previous principle that, although leased employees may *vote* in works council elections, they do not *count* with view to legal thresholds, provided they regularly work in the company hiring them out. There are thus now three decisions dealing with how to account for leased employees when determining threshold values under Employment Law. The coalition agreement of the new German Federal government also has one point in its program that addresses this issue. The most recently issued decisions of the BAG now primarily deal with the highly relevant problems surrounding the term "temporary" in Sec. 1 (1) sentence 2 Temporary Employee Act (AÜG).

JUDGMENT OF THE BAG FROM JULY 10, 2013, 7 ABR 91/11
PREVIOUS INSTANCE
REGIONAL LABOR COURT OF LOWER SAXONY, ORDER OF NOVEMBER 16, 2011, 17 TABV 99/11

In a decision from July, 2013, the question was raised as to whether or not the replacement of the consent of the works council under Sec. 99 (4) Works Constitution Act (BetrVG) sought by an employer for the hiring of an employee as a leased employee can be granted. It was the intention of the employer to staff all new positions with leased employees. The actual term of employment of the employee in question was thus not to be limited. The works council refused its consent to hire the employee by citing that it was not merely temporary employment and was a violation of Sec. 1 (1) sentence 2 AÜG.

Each of the previous instances had replaced the consent of the works council, where the main argument was that a court's decision had to be made on the basis of the applicable laws and the addition of the word "temporary" would not come into effect until December 1, 2011.

The BAG took the new legal situation into account when making its decision, namely that the new provision Sec. 1 (1) sentence 2 AÜG prohibited employee leasing that was not merely temporary in nature. The element "temporary" that had been newly added to the statute was not just a programmatic statement of no legal consequence, but was a condition for permissible employee leasing. If the lessee not only intended to employ leased employees for a temporary period, the works council of the company acting as lessee could refuse its consent for hiring the employee under Sec. 14 (2) Sentence 1 AÜG in conjunction with Sec. 99 (2) No. 1 BetrVG. In its judgment, the BAG did not address the question of whether considerations relating to the job or those relating to the employee were governing because neither one of these aspects were "only temporary" in the case at hand.

JUDGMENT OF THE BAG OF DECEMBER 10, 2013, 9 AZR 51/13
PREVIOUS INSTANCE
REGIONAL LABOR COURT OF BADEN-WÜRTTEMBERG JUDGMENT OF NOVEMBER 22, 2012, 11 SA 84/12

In its judgment just handed down on December 10, 2013, for which only a press release has been issued so far, the BAG again dealt with the legal consequences of non-temporary employee leasing. In the case at hand, a subsidiary had assigned an employee it had hired in 2008 exclusively as a leased employee at its parent company. The subsidiary had a permit to hire out employees. After the leasing of the employee ended even though the job at the parent company still existed, the employee filed for a declaratory judgment that, due to the legal fiction in Sec. 10 (1) Sentence 1 AÜG, he was in fact an employee of the parent company. He claimed that his hiring out to the parent company was not merely temporary in nature.

The Regional Court of Baden-Württemberg affirmed his complaint after the lower labor court had dismissed it. It argued that, if the lessee has a permanent need for the employment, the leasing of employees is unlawful. The term "temporary" is thus understood to relate to the job. If this is not a temporary provision of employees, this action must be sanctioned under Art. 10 (2) Directive 2008/104/EC in an effective, reasonable and deterrent manner. Although this kind of sanction is not explicitly set down in the AÜG, the sanctions contained in Sec. 10 (1) sentence 1 AÜG for the hiring out of employees without a permit is to be applied accordingly for cases where the provision of employees is not only temporary in nature.

As exhibited in its press release, the Federal Labor Court clearly rejected this. Sec. 10 (1) sentence 1 AÜG only regulates the fiction of an employment relationship between the lessee and the leased employee in the event that the lessor does not have a permit to lease employees. This cannot be deemed to be an unintentional loophole in the statute which allows for an analogous application in the case of a "not merely temporary" provision of employees, nor does Directive 2008/104/EC

provide for any specific sanction for this kind of violation. Given the number of possible sanctions, it is the job of lawmakers, and not of the courts, to set down an appropriate sanction. According to the press release, the BAG once more refrained from deciding on whether or not the provision of employees was temporary. Its reasoning was that the subsidiary had a permit to hire out employees.

OUTLOOK

Unfortunately, the BAG has continued to avoid answering the decisive issue for practitioners of when the provision of employees is no longer "temporary". In the judgment from July 10, 2013, it did not even commit itself to applying either a job-related or employee-related standard. In order to avoid offering works councils in the future a blanket right to refuse their consent, with which they could prevent the assignment of leased employees on a large scale, it is recommended that employers emphasize in their applications to hire leased employees that the assignment, at least of a specific leased employee, is not intended to be permanent.

According to the coalition agreement, the maximum term for leasing employees is to be set down under law at 18 months. Exceptions are only supposed to be allowed in agreements on the collective bargaining level. The situation until this has been specified in the statute continues to be unclear. The press release by the BAG on its judgment of December 10, 2013 gives little reason to hope that more will be said in the grounds of the full judgment. The statement that no employment relationship between a lessee and a leased employee is created when the provision of an employee is no longer temporary is encouraging, however. It still remains to be seen if a legal sanction will be introduced following this decision. ■

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