The Parachute is (still) Holding – Latent Employee Leasing with "Reserved Permission"

INTRODUCTION

The legislative process concerning the amendment of the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz* = "AÜG") is moving down the final stretch. Some of the issues surrounding personnel leasing that have not only been discussed politically, but by the courts and the employment law literature, are now to be solved by the Act. This concerns, for instance, the question of the maximum duration of an assignment and the legal consequences of non-compliance. Furthermore, the planned law addresses the issue of latent employee leasing.

In its judgment of July 12, 2016, the Federal Labor Court (file no.: 9 AZR 352/15, prior instance: Superior Labor Court of Baden-Württemberg, judgment of May 7, 2015 – 6 Sa 78/14) deals with the still current statute and the rulings of the lower courts, which contradict one another in part. Under that judgment, the precautionary ownership of a license to lease employees can prevent a "free fall" in the event of the faulty classification as a contract for work: An assignment under the scope of latent employee leasing currently does not lead to the establishment of an employment relationship between the "latently" leased employee and the company of assignment.

THE FACTS

The contractual employer of the plaintiff had already been in possession of an unrestricted license to commercially lease out employees since 1995. Since the beginning of her employment relationship, the employee had been assigned to an automotive company under the scope of a contract for work. This assignment lasted from February, 2004 to December, 2013. After the contract between the contractual employer and the sued company ended at the end of 2013, the contractual employer terminated the employment of the employee; the employee filed an action for protection against this termination.

Parallel to this, she initiated the proceedings against the company of assignment which have now been decided by the Federal Labor Court. She invoked, first of all, a possible transfer of undertaking. Secondly, she claimed that the contractual relationships between her original contractual employer and the sued company were to be deemed to be sham contracts for work. Her assignment therefore took place under unauthorized employee leasing and was thus not in compliance with the requirements of Sec. 12 AÜG. Due to the length of her assignment, this could no longer be deemed to be the temporary leasing of an employee. Similarly, the defendant could not invoke the existence of a license for employee leasing.

Both the lower labor court and the superior labor court dismissed the complaint. In the view of the superior labor court, it did not matter whether this was a sham contract for work or not. In the case of latent employee leasing, the sole relevant issue is the existence of a valid, unrestricted license to lease employees. Whether or not this was disclosed to the respective employee and/or the assignment under the scope of latent employee leasing was concealed from the employee is irrelevant. An analogous application of Sections 9 No. 1, 10 (1) sentence 1 AÜG is not possible because the law does not contain any regulatory loopholes that are in contravention of its intention. The case law of the Federal Labor Court (judgment of December 10, 2013 – 9 AZR 51/13) regarding the legal consequences of a not only temporary provision of employees is transferable. An abuse of law by the parties involved in the work contract is not relevant in the present case, either (of a different view Superior Labor Court of Baden-Württemberg, judgment of December 3, 2014 – 4 Sa 41/14). The legal consequence of such abuse would not be the establishment of an employment relationship with the lessee company pursuant to Sections 9 No. 1, 10 (1) sentence 1 AÜG; at the most, the (latently) leased employee would have to be put into the position he would be in as a leased employee.

DECISION OF JULY 12, 2016

In its decision of July 12, 2016, for which as of now there has only been a press release, the Federal Labor Court confirmed this decision of the superior labor court, including its arguments. The governing issue is that the contractual employer of the employee had the license to commercially lease out employees. The legal fiction of the creation of an employment relationship between the (latently) leased employee and the company of assignment only occurs in the event of the absence of a license to lease employees on the part of the (latent) lessor. A regulatory loophole in contravention of the intention of the law that would allow for an analogous application of this provision is missing in the case of latent employee leasing. Lawmakers had consciously not prescribed the legal consequence of the establishment of an employment relationship with the lessee company in the case that the leasing of an employee is not evident.

PRACTICAL SIGNIFICANCE OF THE RULING

The ruling is to be welcomed, but it was easy for the Federal Labor Court to identify the legislative will that had (evidently) been expressed in the past, as the legal consequence sought by the plaintiff is now provided for in the current draft bill. The inclusion of such a rule would be superfluous if the present law was to be applied (analogously) in this manner. Indeed, the grounds for the bill do not assume this application, but confirm the previous regulatory loophole.

The "parachute" of a precautionary license for employee leasing still holds for the current legal situation. If a latent leasing of employees is established, the leased employee may thus only invoke the rights and claims to which he is entitled as such (e.g. equal pay).

Future contract modeling and the actual handling of work contracts and employee leasing, however, must observe the legislative reform. The draft bill provides that the employee must be informed of an assignment under the scope of employee leasing. The contract wording between the lessor and the lessee must include the explicit designation as employee leasing. Deployed leased employees must be identified and reported as such to the company of assignment prior to their assignment. The legal consequence of faulty handling, which includes a failed contract for work, is then generally meant to be the establishment of an employment relationship between the leased employee and the lessee. One reformation of the draft bill, however, is also the possibility of an objection of the leased employee against the change in employer provided for by law. In addition to the modeling of the contract, the actual handling of the use of third-party personnel will take on even greater significance in the future. In preparation for this, the internal monitoring processes should be reviewed now and adapted if necessary.

For further aspects of relevance in the area of Contractor Compliance, Liability Prevention and Case Management in the Use of External Personnel please refer to the recently published **book** and upcoming **seminar**.

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