In the Spotlight: External Personnel in the Era of the New Temporary Employment

INTRODUCTION

Well, it is finely here. The "Act to Amend the Temporary Employment Act and other Statutes" passed the Bundesrat on November 25, 2016 and thus took its final hurdle. As of April 1, 2017, the planned date on which the Act comes into force, things will get serious for the lessors and lessees of leased personnel, just as it will be for customers, contractors, solo freelancers and the providers of "contracting models". The extent to which long-standing structures for deploying external personnel can continue has now become an urgent issue. Established business models will quickly become questionable.

WHAT IS NEW

The most far-reaching changes will affect "bona fide" employee leasing under the Temporary Employment Act *(Arbeitnehmerüberlassungsgesetz* = "AÜG"). The centerpiece of the revision is a maximum leasing period of 18 months as related to the individual employee. Collective bargaining agreements - please note, however, that this means a collective bargaining agreement of the sector to which the employee is deployed - can modify this without a maximum statutory limit. Employers who are not bound by a collective bargaining agreement may take over the exact wording of an appropriate rule in collective bargaining by a shop agreement/service agreement. In the case of interruptions in a deployment of a leased employee of up to three months, the periods before and after this interruption must be added up. If the maximum duration of the deployment is exceeded, an employment relationship with the lessee will be created; the leased employee will have a right to object, however.

No matter how vigorously the maximum duration of the deployment was discussed during the legislative process, it may be of little relevance in practice, for the rule on equal pay may prove to act as a "hidden time limit". From now on, collective bargaining agreements may only deviate from the equal pay obligation in the first nine months of deployment. Longer periods are only possible in collective bargaining agreements if the pay of of the leased employee is gradually brought into line with the wages of comparable employees in the same sector of deployment by the end of the 15th month of deployment. Here as well, deployment periods that took place no more than three months previously will be added up. Because equal pay after nine months signifies considerable effort and at least considerable paperwork for both the lessee and the lessor, it is fairly obvious that the use of leased employees will be limited, in principle, to nine months wherever possible. Furthermore, the agreement as such must be called an employee lease agreement (mandatory specification) and the leased employee who will actually be assigned must be specified prior to his deployment (mandatory identification). In addition, the law contains the prohibition of strike breakers.

For solo freelancers, contractors (with their "own" employees) and providers under freelance contracting models (such as the Dutch Model for interim management), the Act comes across as being fairly unexciting. As opposed to a service/work contract, the employment contract has a statutory definition /Sec. 611a BGB-E) which reflects the case law to date. This does not change anything. However, a new era is commencing for contractors or providers because these forms of outside personnel deployments can no longer be secured under a reserved employee leasing license, the so-called "parachute". As has always been the case when solo freelancers are used, the "safety net" is missing in three-party constellations of this kind. In addition to the threat of a fine, there is the danger that this will be deemed to be an employment relationship with the company where the work is performed. This legal situation is prescribed by the Act if violations of the specification and identification duties have been committed. The leased employee is entitled to object to such a presumptive employment relationship.

WHAT IS TO BE DONE AND BY WHOM

The timing of when a company should review its models for using external personnel will be governed by the transition periods stipulated in the draft bill. Deployment periods prior to April 1, 2017 do not fall under the rules governing the maximum duration of deployment and equal pay. This means that the maximum of 18 months of deployment will not become relevant until October 1, 2018, and equal pay will come into effect, upon an equivalent utilization of the nine-month period in collective bargaining agreements, as of January 1, 2018. No transition periods are provided for with regard to the specification and identification duties.

From a legal standpoint, this leaves some breathing space for employee leasing to find out if any collective bargaining negotiations will deviate from the maximum deployment period. There have been indications of these developments in collective bargaining in some sectors. And compliance with the specification duty is already the common practice. A review of whether all of the deployed leased employees are personally identified should conducted prior to the date when the Act comes into effect, and prior noncompliance should be corrected before April 1, 2017. Past practical experience should serve as a warning.

For models for the deployment of outside personnel through a provider (independent contracting), on the basis

of work or service contracts (using employees of the contractor/service provider, particularly "onsite work contracts"), there is no statutory period of grace. As of April 1, 2017 the companies using leased personnel may no longer protect themselves with the "parachute solution" from hidden employee leasing. Even more attention has to be given to the actual deployment of external personnel. From the standpoint of the company using leased employees this means that it must document the current and often multi-layered manifestations of how external personnel is being used and to review and, if necessary, optimize the strategies it has already implemented to avoid an integration of external personnel into its own work organization. Depending on the manifestations of the use of external personnel, different preventive measures, including combined measures, are feasible; these should include written guidelines and training measures, at least for points of contact between the company's own personnel and external personnel. This applies both to the customer and the contractor (for the details of preventive measures cf. Klösel/Klötzer-Assion/Mahnhold, Contractor Compliance, pp. 248).

However, it would be a mistake to think a "statutory grace period" regarding employee leasing means one can relax. January 1st and October 1st 2018 are coming, and a lot of considerations must be made by then. This not only applies when alternatives to employee leasing need to be found because of the maximum deployment period and/or equal pay with their limitations on flexibility, the additional paperwork and higher costs. Rather, it is important to find out within the relationship of the lessor/lessee who is responsible and liable for complying with the legal requirements on the maximum duration of deployment, equal pay and the specification duties or how the lessor and lessee will cooperate on this. Quite apart from a contractual allocation of liability risks that is often subject to review under the Standard Terms and Conditions of Contract Act and thus cannot be unilaterally delegated to the other party, this will also require organizational measures. With respect to the specification duties and the maximum duration of deployment, it would probably be advisable, given the statutory allocation of risk (misdemeanor on the part of the lessor and/or lessee, presumptive employment relations with respect to the maximum duration of deployment) if both the lessor and the lessee provide for arrangements to monitor and document compliance with the statutory requirements. As far as equal pay is concerned, this is primarily the duty of the lessor, whereby the lessee should at least think about having itself granted rights to information, given the fact that a claim can be made against the lessee, who had given an absolute guarantee for social security payments (Sec 28e (2) Social Code IV) if the lessor, as the party owing social security contributions, fails to make payment.

ALTERNATIVES

The search for opportunities to retain personnel leasing models despite the maximum deployment duration for each employee and equal pay has been underway for some time. Rotation models are currently the focus of discussion. In these models, leased employees would be assigned to other lessees (according to a schedule) before they return to the first lessee. The wording of the Act does not prevent such models as long as there are at least three months between leaving and returning. The clock would be set back in terms of the duration of employment and equal pay, but the intention of legislators to prevent the permanent substitution of the permanent company workforce would quickly be thwarted by such models. The more institutionalized the rotation model is designed to be (such as between affiliates, multiple and permanent back and forth between the same companies), the more tangible the conflict with the protection of the permanent company workforce intended by legislators will be. Judicial corrections of such models, such as on the basis of an institutional abuse of the law are at least conceivable. It thus remains to be seen what the development of the law will bring.

In light of such risks, it will not be surprising that outsourcing models, that is, the outsourcing contracts on a work-contract or service-contract basis, will continue to increase despite the heated discussion of sham work contracts. Even if the "safety net" of the parachute is no longer available, these models are controllable in many constellations, at least if strategies to prevent misqualification are instituted. That the legal reform, on the other hand, will lead to an increase in the permanent workforce of companies should more or less remain nothing other than a political hope.

FURTHER INFORMATION

This Client Newsletter is a reprint of an article published in AnwaltSpiegel on November 30, 2016. You can find more detailed information in our book "Contractor Compliance – Haftungsprävention und Fallmanagement beim Einsatz von Fremdpersonal" [Liability Prevention and Case Management When Using External Personnel“].
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