Update on the Reform of the Temporary Employment Act 2017: The Federal Employment Agency has published *material instructions!*

INTRODUCTION

As is well known, the reformed Temporary Employment Act ("AÜG") will come into effect on April 1, 2017. The challenges this presents have already been explained at length in our **Client Newsletter 06/2016**. As several controversies relating to core aspects of the new statute have given rise to uncertainty in the period since then, the Federal Employment Agency (FEA) updated its **"Material Instructions concerning the Temporary Employment Act"** (MI) on March 20, 2017. They offer extensive orientation for practitioners just in time for the effective date of the new statute.

"LESSEE" = „LEGAL ENTITY"

Of initial, central significance is the term "lessee", which is associated with several of the major rules of the Temporary Employment Act such as the 18-month maximum leasing period or the 9-month period allowing for certain equal pay discrepancies. The FEA now clearly states that this term refers to the respective **legal entity** or legal organization (MI 1.2.1.). With respect to the stated maximum periods, the mere relocation to a different assigned operation or job does not interrupt the ongoing lease; however, the relocation to a different assigned entity, even within a group of affiliated companies, does. And, as is known, the clock starts to tick again after an interruption of at least 3 months.

LAWFULNESS OF "ROLLING SYSTEMS"

This means that also "rolling systems" that provide for the exchange of leased employees between companies after they have reached the 9-month or 18-month limit can basically be deemed to be lawful. In extreme cases, however, a judicial correction due to an **abuse of law** remains possible**.** For example, one should be careful in forming a subsidiary for the sole purpose of exchanging leased employees (it would be conceivable, in an extreme case, that there is a deployment to a joint operation, that is, without an actual change in the place of work, to avoid equal pay requirements). The exact boundary, however, can only be decided on a case-by-case basis.

CALCULATION OF MAXIMUM PERIODS

With respect to the calculation of these periods, the FEA clearly states that the **full-time or part-time work** of the employee is not decisive (MI 1.2.1) The fact that Sundays, holidays and vacation days, etc. cannot be deducted when making the calculation, as had been argued by some, was already clear even prior to the MI.

In specific terms, this means that a lease starting on January 1, 2018 is possible for a maximum period until June 30, 2019 regardless of whether or not a two-day or five-day week has been negotiated, how many vacation days the employee had or how often he or she was out sick.

The only exception to this rule will be made if the employment contract is **mutually terminated**, such as in the case of his or her absence for two months during this period. These periods may not be taken into account in the calculation. Another exception from the strict calculation is possible if the lease **is only on a very irregular basis and only to a very limited extent**. The FEA does not give any guidance on where this boundary may be, but it can only be settled on a case-by-case basis in any event.

EQUAL PAY = EQUAL TREATMENT

The FEA furthermore clearly states that, in addition to ongoing wages, "Equal Pay" is not only comprised of the other **components of compensation** such as vacation pay, special payments, allowances and premiums, but that the overall issue is one of "**Equal Treatment"**. Leased employees are equal to comparable employees of the lessee with respect to breaks, overtime and mandatory time off, as well vacation (MI 8.1). In the cases in which there are no collective rules (e.g. collective bargaining agreements) to provide assistance, the establishment of specific "Equal Treatment" principles can prove to be difficult, but here as well, the individual case will decide.

NO WRITTEN FORM SPECIFYING LEASED EMPLOYEES

A high degree of administrative effort for practitioners continues to be caused by the statutory duty to specify (by name) the deployed leased employees **prior to** their deployment and upon reference to the employee lease agreement. The FEA provides some relief here. If the lessor and the lessee enter into a master agreement - the customary choice in practice - without designating the employees to be deployed, the written form requirement of the employee lease agreement (that is, not only "in writing", but also with signature) must not be observed for the required specification.

For verification purposes, the specification should be made at least in text form. The MI explicitly states that, for instance, an **E-mail referencing the Lease Agreement** which is filed with business papers will suffice (MI 1.1.6.7.).

OUTLOOK

In addition to these core aspects, the MI contains numerous further clarifications of the new Temporary Employment Act on a total of 101 pages and thus constitutes an excellent reference work for practitioners.

One must bear in mind in this context that, strictly speaking, the MI has only two areas of application: for the review activity of the FEA with regard to issuing and renewing employee leasing licenses and as orientation for the customs agencies who monitor compliance with the provisions of the Temporary Employee Act and usually consult these instructions.

On the other hand, the MI are not binding under civil law. A judge is free to decide otherwise. However, experience has shown that judicial practice agrees to the broadest extent with the FI in its rulings, and major deviations are not to be expected here, either.

FURTHER INFORMATION

You can find further information on the topics of employee leasing and work contracts on our homepage under the heading **Contractor Compliance**.

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