NEWSLETTER
TEMPORARY EMPLOYMENT AND CONTRACTORS

TRENDS 2018 – A LOOK AT ACTUAL PRACTICE

Content

Dear Readers,

It is time for a first résumé, because one and a half years have passed since the new regulations on the German Personnel Leasing Act (*Arbeitnehmerüberlassungsgesetz* or hereinafter referred to as "**AÜG**") came into force with “much ado” on the part of politicians, associations and entrepreneurial practice. As was to be expected, the end of entire sectors, which had so far been based on various concepts of flexible employment models, did not occur. Nonetheless, the new legal framework conditions have brought about a lot of movement with regard to all kinds of models of external personnel deployment – regardless of whether this happened on the basis of employee leasing or work or service contracts with independent individual contractors or one's own employees.

To begin with, this applies to the preventive level, because the more recent case law of the German Federal Labor Court (*Bundesarbeitsgericht* or hereinafter referred to as the "**BAG**"), the German Federal Social Court (*Bundessozialgericht* or hereinafter referred to as the "**BSG**") and finally the German Federal Supreme Court (*Bundesgerichtshof* or hereinafter referred to as the "**BGH**") for Criminal Matters too regarding intent and/or attribution questions levels the way for effective compliance concepts, in order to mitigate the comprehensive risks of illegal leasing of employees and pseudo self-employment (“Contractor Compliance”). Secondly, this also applies to the repressive level, because many companies have recently found themselves confronted with a look at extremely restrictive administrative practice on the part of German Pension Insurance (*Deutsche Rentenversicherung* or hereinafter referred to as the "**DRV**"), German Federal Employment Agency (*Bundesagentur für Arbeit* or hereinafter referred to as the "**BA**") and customs authorities, which has led to comprehensive subsequent payments of social security contributions and administrative fine notices, even against the persons acting on the part of the company itself, which, however, often do not stand up to judicial review in the end.

After one and a half years of diverse practical experience with the new AÜG – whether in the implementation of preventive models or in judicial and extrajudicial disputes with BA, DRV, customs or private actors (including Social Security Benefits Office) – it is time for a first summary. Here, we do not simply want to present a colorful bouquet of court decisions or the like, but embed them in the “Trends 2018” that are most important to us, in order to give you the best possible overview and outlook on past and expected developments and to derive concrete tips for your practical work from them.

Enjoy your read!

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1. IT, Consulting & Co.: Legally compliant contracting for the “well paid” and in the case of “agile work”?

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*BSG of 31.03.2017 – B 12 R 7/15 R; subsequently the Federal Social Court (Landessozialgericht or hereinafter referred to as "**LSG**") of Niedersachsen-Bremen of 28.02.2018 – L 2 R 488/17; Hannover Social Court (Sozialgericht or hereinafter referred to as "**SG**") of 10.01.2018 – S 14 R 32/16; LSG Rhineland-Palatinate of 12.12.2017 – L 6 R 1333/17; LSG Schleswig-Holstein of 11.05.2017 – L 5 KR 73/15*

Introduction: The new AÜG has created considerable uncertainty in many sectors, even in those that have not yet been so much in the spotlight and which the legislator may not have focused on much so far. **This applies, above all, to the area of what is known as “knowledge work”, for instance IT service providers, external consultants or other highly qualified activities, such as construction and project managers, interim managers or the like**. In recent years, entire industries have emerged in which highly specialized activities are offered to end customers (exclusively) on a self-employed basis as well as through independent agencies, providers and consulting firms. In the age of much-cited digitalization and agile work, this is certainly a necessary and indispensable element on the labor market. After the introduction of the new AÜG, the uncertainty was great, and now countermeasures are being taken, at least by some courts.

Fact(s) of the case: All decisions are concerned with the long-runner, the question of demarcation from pseudo self-employment. It is well known that a large number of individual criteria are important here, in particular the obligation to give instructions and the integration of the alleged freelancers into the principal’s company organization, which have to be considered within the framework of an overall assessment so that the respective results were subject to an area of uncertainty. In detail, it is now a question of whether the – clearly definable – criterion of the amount of remuneration can be a characteristic of self-employment and, if so, how this must be structured and what relevance this can have in relation to the other relevant characteristics within the framework of an overall assessment.

Decision(s): The initial decision came from the BSG, which, contrary to the view which was previously generally held, distinguishes an essential indication of self-employment in the amount of the fee: *“Because if the agreed fee is distinctly higher than the remuneration of a comparable employee subject to social security contributions (...) and thus allows for personal provision, this is an important indication of self-employment*” (BSG at the specified location). The BSG would have considered earnings of EUR 40,00 to EUR 41,50 per care hour as sufficient since this clearly lies over the fee rates of comparable curative educators working for the company as regular employees who are subject to social security deductions.

Even if some writers in the literature were initially skeptical as to whether a general tendency could be derived from this, numerous state social courts took up this idea and were even brave enough to go one step further. Even if it is generally believed that the level of remuneration cannot, in itself, pave the way to independence, case law on this point holds that – the BSG had still spoken of a “massive indication” – in each case a “major” or even “secure indication” of an independent activity (LSG Rhineland-Palatinate at the specified location; SG Hanover at the specified location). However, a comparison of the remu-

neration groups alone will not suffice, as it is emphasized that the relevance of the indicative effect becomes all the lower, the lower the earnings level is; EUR 10.50 per hour for "precariously employed" shop detectives is, at any rate, not sufficient, comparison made both ways (LSG Niedersachsen-Bremen at the place cited); however EUR 85.00 per hour for a fee-based physician with earnings of comparable employees of EUR 30.00 to 40.00 per hour would suffice (SG Hannover at the specified location).

However, another decision goes a noteworthy step further by stressing that the changing working environment world must also be considered. This is to be the case regardless of the level of fees, in which there is a tendency for companies to assign more and more work areas to freelance employees and they actually only want to create job opportunities only under this condition. This serves as an indication that will have some weight, at least in the event of a concurring will of the parties concerned (LSG Schleswig-Holstein at the specified location).

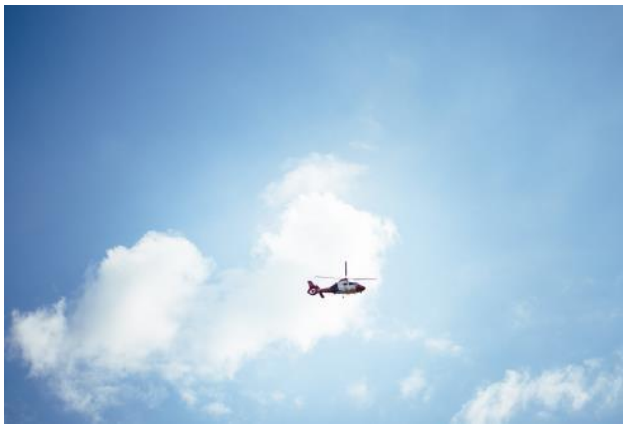
Note as to actual practice: This development is a ray of light on the horizon. On the one hand, the level of remuneration provides a comparatively clear criterion in the otherwise unclear area of demarcation, which is otherwise largely marked by valuations. In this context, one only has to think of the distinction between (harmless) individual work-related (*werkbezogen*) and (harmful) job-related (*arbeitsbezogen*) directives, which – at least in the event of borderline cases – can hardly be answered with legal certainty. On the other hand, the decision provides hope, particularly with respect to the large range of what is known as knowledge workers, who become active, for instance, in the IT, consultancy or comparable industries, and often on the basis of free work and service contracts. And this in two respects:

- **On the one hand, the level of earnings in the areas mentioned is generally anything but precarious; quite the contrary; the daily rates are often even in the four-digit range and should therefore provide a "weighty", "secure" or, at least, "major" indication of self-employment. In addition to this, the self-image of many knowledge workers as self-employed is also considered, not least by such attractive remuneration systems, so that in most cases there is also a unanimous party will with regard to self-employment.**

  Even if one should not rely solely on these criteria, this is shown – not least in the current public prosecutor investigations in connection with the consulting activities of many years in the Federal Ministry of Defense – the activities of the mentioned "knowledge workers", for instance as project managers for a specific SAP system introduction or the like, are often also formable as independent activities without sufficient integration into the operational sequences of the principal. The various flanking measures in connection with scrum and agile working, i.e. the implementation of largely instruction-free work processes by cutting work packages to size, introducing ticket systems, etc., point the way here.

All in all, these are at least some more reliable prospects for the area of "knowledge work" than had been feared when the new AÜG came into force – despite misleading wording in the explanatory memorandum in the legislation process. Especially in the age of scrum, agile work, etc., many cases remain manageable, provided that contracts and daily practice are sufficiently compliant. In view of the outstanding importance of digitization, it can only be hoped that the necessary mandate in terms of labor law will not re-

main with the courts, but that European and German politics will take the “promise of digitization” seriously and promptly set the appropriate course.



2. Restrictive auditing practice of German Pension Insurance, German Federal Employment Agency & Co.: Tips on how to deal with additional payments of social security contributions, administrative offences, etc.

Section 7 German Social Code IV (Sozialgesetzbuch IV or hereinafter referred to as "**SGB IV**"*), Section 16 AÜG etc.*

Introduction: Even so, in parallel to the introduction of the new AÜG, a tendency can be observed according to which the relevant auditing practice of the authorities has become considerably stricter in some cases. Both are obviously due to the same political spirit of the time – digitalization or not. As a result, many companies found themselves confronted with a plethora of decisions in 2018, in particular, – whether to pay social security contributions on account of the employment of alleged pseudo self-employed persons or fines in connection with alleged AÜG infringements – the legal basis of which – expressed very cautiously – could, in part, be distinctly questioned. In the following, two typical cases are picked out.

Case 1 – DRV and pseudo self-employment: The first case concerns the “usual” DRV assessment of social security contributions, often in connection with an inspection by customs authorities. If DRV decides for pseudo self-employment (which often happens in all kinds of borderline cases), intent of the responsible persons should be also often extant. For this purpose, DRV often uses the vehicle of (alleged) case law of social welfare courts, according to which intent results solely from the fact that comparable positions in the company are also occupied by employees who are subject to social security contributions (what is known as “cases of both end”). In addition, one could also have proactively carried out a status procedure subject to social security according to Section 7a SGB IV in order to avoid the accusation of intent; if a person has failed to do so, this is indicative of intent.

The consequence: **The company, and possibly also the persons responsible, are liable in connection with the outstanding total social security contribution (approximately 40 % of the total fee volume) not only retroactively for four years, but even for 30 years. When making the calculation, the contractual fee agreement is evaluated as a net wage agreement and on top of the total liability sum – which may, in many cases, be a threat to the existence of the company in itself – considerable default surcharges will be added. The further consequence consists in the corresponding file being handed over to the responsible public prosecutor's office on the basis of an accepted accusation of intent in connection with a criminal liability according to Section 266a of the German Criminal Code (*Strafgesetzbuch* or hereinafter referred to as**

"StGB"). This serves to generate additional pressure to act.

Case 2 – BA and OWi/AÜG: Another quite prominent case from the auditing practice of the BA concerns alleged AÜG violations, which are associated with administrative fines of up to EUR 30,000.00 per case, for instance in the following constellation: It is known that since the introduction of the new AÜG, new "administrative obstacles" exist, above all in the form of the statutory identification and concretization obligations, i.e., on the one hand, the use of temporary agency workers is subject to the contract service provider and the customer prior to the hiring out of temporary staff. On the one hand, the employment of temporary agency staff must be contractually designated as temporary employment by the personnel service provider and the customer prior to assignment (cf. Section 1 para. 1 sentence 5 AÜG) and, on the other hand, the person of the temporary employee must be concretized with reference to this contract prior to the assignment (cf. Section 1 para. 1 sentence 6 AÜG). The transfer agreement is also subject to written form (Section 12 para. 1 AÜG).

It is precisely the latter obligation of having to specify in concrete terms which often causes problems in its practical implementation. This is especially so if the name should also comply with the legal written form (not only "in writing", but actually with original signatures, etc.!). Against this background – and also in view of the "Material Instructions" *("Fachliche Weisungen")* of the BA (cf. no. 1.1.6.7., p. 20) – many written framework transfer agreements have, in practice, been concluded with quota agreements ("up to XY temporary employees are made available"), on the basis of which they are subsequently specified in text form, i.e. in particular by email or fax.

In many cases, however, the BA objected to this model with the argument that a necessary obligation to lease a specific number of employees had not yet been entered into in the framework agreement. This is why – especially with regard to the explanatory memorandum to the AÜG – a legal requirement of written form remains, which also applies to the specification and cannot be replaced by the text form by this model.

Note as to actual practice: These are just two exemplary cases from auditing practice with which companies and the persons responsible are being confronted. Actual practice is far more diverse. On the one hand, this "colorful bouquet" of sometimes very sensitive decisions on the part of the responsible authorities demonstrates, in the first place, the special importance of preventive strategies, i.e. to act before the child falls into the well. The argument that everything went well for a long time in certain cases in the past does not mean that there is nothing to fear for the future. Whether radical solutions, such as, for example, the internalization of entire IT departments with several hundred people would then be appropriate, is a different matter.

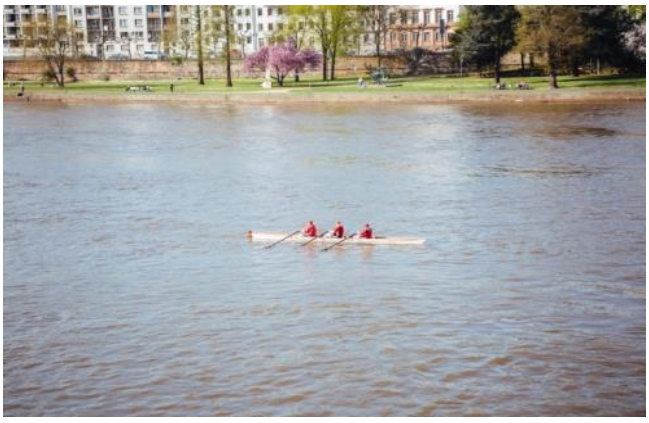
The example "IT, Consultants & Co." (see above under 1.) rather refers to the fact that under the keyword "Contractor Compliance" some things may be shapeable. Legally, some quite creative solutions are possible, such as the example of the written concretization requirement after AÜG goes to show. Here, actual practice has helped itself, for example, with power of attorney models which enable the personnel service provider – under exemption from Section 181 of the German Civil Code (*Bürgerliches Gesetzbuch* or hereinafter referred to as "**BGB**") (prohibition of the self-business) – to sign a written individual assignment contract (on the basis of a framework agreement concluded in advance without quota in case of doubt) for himself as well as for the customer upon a corresponding request of the customer for temporary employees.

Regardless of such preventive models, the increasingly restrictive auditing practice above goes to show one thing: **Defending yourself is worthwhile! In any event, the authors are aware of numerous cases in which the BA, DRV and customs authorities – putting it very cautiously – exploit the legal framework available to them on the basis of a very broad understanding.** The result was notices of status or administrative fines which did not have any validity before the competent social or criminal courts. In many cases, a resilient legal counterposition is already sufficient to lead to speedy negotiation solutions, which, in any case, lead to a considerable reduction of the sometimes very sensitive payment obligations.

From a legal point of view, there are numerous starting points, depending on the individual case. This already applies, in principle, because in many cases – the alleged written form requirement for concretization under the AÜG provides a good example for this – the legal assessment of the authorities is already open to challenge on its merits. As already mentioned before, status decisions of the DRV often point in the same direction, especially in borderline cases, due to internal administrative requirements. Experience with the BA has shown that the legal constructions for substantiating an administrative offence are, in part, so far-fetched that even the BA very quickly deviates from the allegations before the court with the necessary consequence of immediate suspension of the administrative offence proceedings.

On the merits, the companies concerned and the persons responsible also benefit from other circumstances which are often overlooked during an initial assessment: On the one hand, the principle “no punishment without (certain) law(s)” is an integral part of criminal law and also of administrative offence law (cf. Section 3 of the German Administrative Offences Act (*Ordnungswidrigkeitsgesetz* or hereinafter referred to as "**OWiG**"), with the consequence that punishment can only be considered in those cases in which the law also clearly prescribes this for each person affected. If, on the other hand, the punishment is based on legal constructions which are hardly recognizable or foreseeable for the persons concerned, as some of the examples mentioned show, this will often not be sustained and the matter may be settled quickly.

In addition, the question of attribution is becoming increasingly important in practice. It clearly goes too far if – speaking in vivid terms – a single unauthorized instruction by an individual employee is supposed to lead to a status violation or an illegal transfer. This aspect, which incidentally proves the importance of preventive models for effective liability avoidance, is also being given increasing importance by the courts. This is shown by two other – almost revolutionary – decisions of the BGH for Criminal Matters, discussed in spring 2018 and the BGH in the summer of 2017.



3. (No) intent with respect to Section 266a of the German Criminal Code – substantial liability limitations when facing allegations of pseudo self-employment

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BGH of 24.01.2018 – 1 StR 331/17

Introduction: On the subject of the subjective attribution of compliance violations in connection with pseudo self-employment (here specifically on intent), the BGH has fundamentally changed its extremely restrictive jurisprudence, which is increasingly criticized by some lower instance courts, in favor of those persons responsible within companies. This is a decision, which should be known, in particular, to board members, managing directors and further company executives, not only insofar as it concerns a criminal responsibility, but also over a possible personal liability in connection with the subsequent payment of social security contributions.

Facts of the case: The decision is based on the accusation of holding back and embezzlement of wages (Section 266a StGB) as well as tax evasion. The defendant had not registered the Polish craftsmen employed by his company, who were to be assessed as employees under social law aspects with the competent social security collection agency and consequently had not paid any social security contributions for a period of about two and a half years.

Decision: The District Court (*Landgericht* or hereinafter referred to as "**LG**") acquitted the accused for lack of intent regarding his employer position. The revision of the public prosecutor's office was successful and the case was referred back to the LG by the BGH for a new trial and decision. However, this course of procedure is less important in practice than the references to the legal requirements of intent and thus also for criminal liability, which the BGH expressly addressed to the LG. Here it states essentially as follows:

> *"In the absence of objective reason for the differentiation in the legal prerequisites of an intention in the case of a tax evasion (Section 370 exp. 1 no. 2 AO, Section 41a Income Tax Act (Einkommensteuergesetz or hereinafter referred to as* "**EStG**"*) on the one hand and the reproach and/or embezzlement of wages pursuant to sec. 266a German Criminal Code on the other hand, the Senate – contrary to the previous rulings of the BGH – is considering (also) treating the misconception about employer status in Section 266a StGB and the resulting obligation to pay social security contributions as an error of fact in future."*

Therefore, punishability no longer merely requires that the person responsible has a deliberate intention with regard to the actual conditions that lead to pseudo self-employment, but also with regard to the legal classification of pseudo self-employment as such and the resulting obligation to pay contributions.

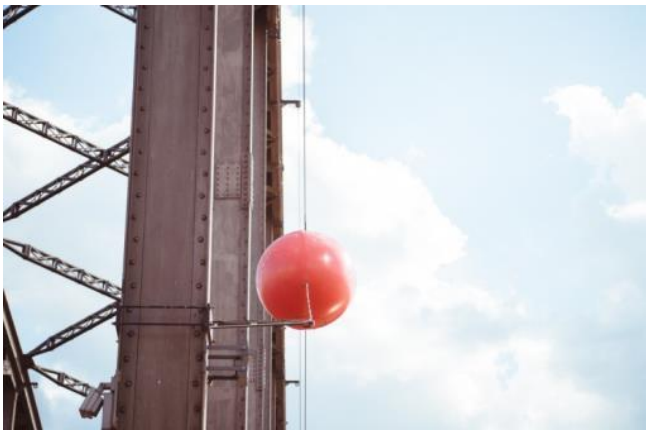
Note as to actual practice: This is a novelty in the case law of the BGH and of the highest relevance for practice, especially for the responsible persons concerned within the companies that employ freelancers. Although the question of demarcation – especially in borderline cases – could hardly be answered reliably by experienced lawyers due to the large number of criteria that were not very precise and also the case law was not able to provide a reliable answer to the question of demarcation, however, in the past, the case law of the criminal courts put substantial pressure on the those responsible company executives, who were often not legal experts in connection with pseudo self-employment issues.

According to the long-standing case law of the 1st Criminal Senate, intent with regard to the actual circumstances (i.e. about the use of the contractor *per se* or the underlying modalities, which was regularly said to be given) was sufficient, while an incorrect legal assessment as a self-employed person was merely intended to justify an error of prohibition, which was, however, regularly avoidable and thus irrelevant due to the possibility of conducting status proceedings pursuant to Section 7a para. 1 sentence 1 SGB IV (cf. last BGH of 05.06.2013 – 1 StR 626/12).

However, this progress in case law does not only lead to a considerably increase of the requirements for criminal liability and the associated defense options. It also has two other significant consequences: On the one hand, criminal liability according to Section 266a StGB also used to be a vehicle for the DRV to take action not only against the company but also against the responsible executives themselves (managing directors, board members, etc.) in connection with outstanding social security contributions (often in not inconsiderable six or even seven-digit amounts); on the other hand, the resolution offers a further vehicle for the DRV to increase the period of the subsequent payment of the social security contributions from 4 to 30 years as well as to proceed with the calculation of the total amount from net wage agreements and to add sensitive default surcharges.

To sum up, this case law thus provides a starting point for extended defense strategies, not only with a view to possible criminal proceedings, but also regarding civil liability issues and in the usual procedure against additional claims notices of the DRV. It is already foreseeable that in this way the liability sums in question may often be considerably reduced. On the other hand, however, the case-law also sets an accent for all kinds of legal changes in connection with alleged pseudo self-employment, because (long neglected) attribution questions are being asked more and more frequently here and can, in numerous cases, stand in the way of the liability of companies and persons responsible (cf. Klösel/Mahnhold, BB 2018, 1428 with further references).

In short: Further developments in jurisdiction are eagerly expected. However, we can already state at this point of time, that there are numerous new starting points and options to level the way to be used in (further) actual practice!



4. Temporary Employment Regulations: "Rotation models" and other circumvention strategies in practical auditing

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Moenchengladbach Labor Court (Arbeitsgericht or hereinafter referred to *as "**ArbG**") of 20.03.2018 – 1 Ca 2686/17*

Introduction: As is well known, the core element of the AÜG reform consisted in two time limits, according to which temporary employment of workers should be, in principle, only possible up to a maximum duration of 18 months (Section 1

para. 1b AÜG); an even shorter period of a maximum of 9 months applies to collective bargaining deviations from the equal pay principle (Section 8 para. 4 AÜG). It is also known, however, that the clock ticks anew each time a waiting period of at least 3 months has elapsed after the respective operation.

It is obvious that all kinds of circumvention models are in circulation, especially those that provide for a certain rotation of temporary employees in order to circumvent the time limits with regard to a maximum duration of temporary employment and equal pay with the help of the waiting period. In many cases, however, such models already reach their natural limits, e.g. in the form of a pool of temporary employees that is too small to live the necessary rotation in practice. But the fact that there are also legal limits has often been somewhat neglected in practice. The simple fact that they exist and what they can be like in concrete terms is explained in the following case.

Facts of the case: Once again, the starting point was a natural limit for rotation, because – as is so often the case – the lender simply lacked enough customers to permanently employ the number of temporary employees required for a rotation. Nonetheless, a temporary employee had been employed continuously by a retail company since the beginning of 2014. The industry is known for its low margins; cost pressure being correspondingly high. At the end of 2017, the temporary employee's lender (the employment company) terminated her employment with effect from December 31, 2017, and, at the same time, offered her reinstatement under the same conditions on April 2, 2018, i.e. three months and one day later. Among other things, the lender justified the termination in court with the fact that the hirer refused to employ temporary employees whose duration of employment was nine months or more because of the consequences of equal pay. However, the hirer was his main customer and 98 % of his personnel deployments related to this customer. The temporary employee had had no other possibility to work during the three-month period.

Decision: The decision was decidedly refused by Moenchengladbach Labor Court. The operational notice is socially unjustified, since the lender as contract employer had not shown that the employment requirement was void in the long term. This already became evident from the offer of reinstatement; the lender had to bridge the three-month waiting period, i.e. in case of doubt he would have to continue to pay the wages even without employment. This covered the three-month waiting period in Section 8 (4) (equal pay) and Section 1 (1b) (maximum duration of transfer) of the new version of the AÜG which entered into force on April 1, 2017. The legislature expressed the view that a considerable period within the meaning of the Act could only be assumed “from three months” onwards. Therefore, the termination due to circumvention of the law was invalid with regard to Section 8 para. 4 AÜG (equal pay).

Note as to actual practice: The decision must, in any case, be approved in its outcome, because the court makes an allocation of the employment risks arising from the AÜG reform during the respective three-month waiting period, which is fully in line with the case law of the BAG on operational dismissals of temporary employees. Accordingly, the temporary employment agency must demonstrate, on the basis of its order and personnel development, that there will be no employment opportunities in the foreseeable future. Short-term order gaps are not sufficient for this, as the BAG expressly states that such order gaps are a typical economic risk for lenders (BAG of 18.05.2006 – 2 AZR 412/05). A lender is unlikely to meet these requirements in terms of the burden of proof, especially if he ex-

presses possibilities of employment through a reinstatement offer geared to the waiting period. In this respect, the new legal framework on equal pay is part of the economic risk of the lender.

Irrespective of the question of employment risk, the decision also contains significant information on the fundamental handling of all kinds of rotation models by labor courts. As the reasoning does not use the above-mentioned discussion of the employment risk, the result is explicitly justified with a circumvention of the law, since the combination of dismissal and offer of reinstatement probably served only one purpose, namely to comply with the hirer's requirement of equal pay. Even if this reasoning approach is somewhat skewed (the waiting period was noticeably observed and Section 8 para. 4 AÜG does not contain any evaluation of a deployment during the waiting period), it nevertheless shows that there is judicial skepticism towards all kinds of circumvention models.

With the aforementioned time limits of nine and 18 months, respectively, and the corresponding waiting periods of three months, the legislature is pursuing a recognizable purpose: temporary employment of temporary employees and, in particular, employment on the basis of equal pay, should only be possible "temporarily"; strategies to circumvent this should be counteracted (Bundestag printed paper 18/9232, p. 20). Subsequently, it is to be expected that in the case of rotation and all other circumvention models, the legal figure of what is known as "institutional abuse of rights" (Section 242 BGB) will play a central role. According to the settled case-law of the BAG, this presupposes that "a contracting party uses an inherently reliable means of shaping the law in a manner incompatible with good faith only to obtain advantages for itself to the detriment of the other contracting party which are not provided for by the purpose of the norms or the legal institution" (cf. last BAG of 10.12.2013 – 9 AZR 51/12 NZA 2014, 196).

As a result, the decisive question is likely to be whether the concrete model exceeds a materiality limit in terms of value, according to which it also leads in a "manner incompatible with good faith" to disadvantages for the temporary agency workers concerned that are contrary to the purpose of the law. Since such boundaries are anything but selective and from case to case depend on very concrete details and individual assessment standards of the deciding instances, clear prognoses are naturally forbidden at this point.

Nevertheless, it is to be expected that the circumstance of the rotation possibility by itself, which initially only leads to a permanently repeated possibility of employing temporary agency workers, will not exceed this limit. This is supported, above all, by the fact that such remaining possibilities were expressly named, among others, in the legislative procedure by the Federation of German Trade Unions (*Deutscher Gewerkschaftsbund* or hereinafter referred to as "**DGB**"), the political left party "Die Linke" and other experts, but have not led to any changes within the legislative procedure. In this respect, the legal binding effect of the courts pursuant to Article 20 para. 3 of the German Constitution (*Grundgesetz* or hereinafter referred to as "**GG**") must initially be assessed as being relatively high (cf. BAG of 12.07.2016 – 9 AZR 352/15). Something else may apply with reference to the case-law on chain limitation if such rotation models result in temporary employees not having any prospect of a permanent job with one of the hirers for a considerable period of many years.

With regard to the question of when the materiality threshold for unfaithful abuse is likely to be exceeded, the following criteria should also be relevant with regard to the past case-

law (i) Reason for the rotation model, (ii) Systematics of rotation, (iii) Participants in rotation (iv) Disadvantages of rotation for temporary employees. Against this background, it can be assumed, for example, that a systematic rotation model between two group companies covering entire groups of employees over many years (the second of which was established exclusively for the purpose of establishing this model), which leads to considerable disadvantages in terms of remuneration and other working conditions for temporary employees, would exceed the limits of abuse of rights. On the other hand, the selective rotation of individual employees between economically independent companies, while respecting the principle of equal pay, is very unlikely to give rise to any serious suspicion of abuse of rights.

In short: The legislator has created a certain scope for rotation models or the like, but the decision of Moenchengladbach ArbG goes to show that – which was to be expected in view of the history of AÜG-related case law – the courts will presumably play a central role in (re-)regulation, so that, in practice, in the run-up to such a regulation, it has to be carefully observed whether the limits of a possible abuse of rights are maintained in particular.

5. "SOKA-BAU": Constitutionality of the collective agreement on social security fund procedure in the construction industry – "Defending yourself is worthwhile"!

BAG of 21.03.2018 – 10 ABR62/16; LAG Hessen of 06.04.2018 – 10 Sa 1275/17; LAG Hessen of 16.02.2018 – 10 Sa 1228/17; LAG Hessen of 19.06.2017 – 10 Ta 524/16; LAG Hessen of 02.06.2017 – 10 Sa 907/16

Introduction: The term Social Security Benefits Office (*Sozialkasse Bau* or hereinafter referred to as "**SOKA-BAU**") refers to the umbrella brand of the holiday and wage equalization fund of the construction industry (*Dachmarke der Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* or hereinafter referred to as "**ULAK**") and the supplementary pension fund of the construction industry (*Zusatzversorgungskasse des Baugewerbes* or hereinafter referred to as "**ZVK**"), both of which are essentially private law institutions of the various collective bargaining parties of the construction industry. The main services of SOKA-BAU are aimed at alleviating structural disadvantages for employees due to the special features of the construction industry (seasonal work, etc.) and include the securing of holiday entitlements, the financing of vocational training and assistance with employees' pensions.

SOKA-BAU is financed by compulsory contributions from the employers, the amount of which depends on the local location of the respective company headquarters and can amount to up to 26.55 % of the total gross wage sum for all industrial employees (!) (also in principle retroactively for 4 years). Since this can result in extremely sensitive and – in individual cases – even existentially threatening payment obligations, numerous legal disputes are pending, in which mostly mixed companies, which provide typical construction but also other services, defend themselves partially with great success against a

claim by SOKA-BAU. Numerous decisions in 2018 concerned such constellations and provided some clarity regarding the practical prospects of success in comparable cases.

Facts of the case(s): The “series of decisions” of the LAG Hessen mainly concerned the question of SOKA-BAU-Safeguarding Act (*SOKA-BAU-Sicherungsgesetz* or hereinafter referred to as "**SokaSiG**")’s constitutionality. Let us take a step back in order to understand: From a legal point of view, the SOKA-BAU system is based on the collective agreement on the social security fund procedure in the construction industry (*Tarifvertrag über das Sozialkasseverfahren im Baugewerbe* or hereinafter referred to as "**VTV**"), which was initially applied due to its general applicability and later – after the BAG had raised objections as to the effectiveness of the general applicability declarations for the years 2008, 2010 and 2012 to 2014 (BAG of 21.09.2016 – 10 ABR 48/15; BAG of 25.01.2017 – 10 ABR 78/16 and 43/15), was flanked by the SokaSiG, which now legally ordered the – also retroactive – application of the VTV for this period. In particular, however, this retroactive order provoked extensive constitutional concerns and provided numerous companies with a defense strategy.

In contrast to this, the decision of the BAG concerned the effectiveness of the new declarations of general applicability from the year 2015, because here, too, employers who were not members of an employers' association concluding collective bargaining agreements and who were therefore only called upon to pay contributions on the basis of the general declarations of applicability raised extensive legal objections against the effectiveness of these new declarations of general applicability.

Decision(s): In order to cut a long story short, both the LAG Hessen (with regard to the old declarations of general applicability or the SokaSiG “saving” them) and the BAG (with regard to the new declaration of general applicability) have rejected the concerns for the time being.

The 10th chamber of the LAG Hessen represents the view, which it justified for the first time and in detail in the decision of 02.06.2017 and which can be summarized essentially in such a way that the retroactive effect associated with the SokaSiG is justified in exceptional cases, because the building employers in the past years had no reason to trust in the ineffectiveness of the declarations of general applicability in view of the jurisdiction and science. There was no trust worthy of protection on the part of the employer subject to the standards, which is why, retroactivity, to be permissible in exceptional cases.

In its decision on the effectiveness of the new declarations of general applicability, the BAG also initially rejected them. In particular, there should be no constitutional objections against Section 5 of the German Collective Bargaining Act (*Tarifvertragsgesetz* or hereinafter referred to as "**TVG**") new version. This also applies with regard to the provision on the generally binding declaration of Parties to the collective agreement (Section 5 a TVG). There were no reasonable doubts as to the collective bargaining capability or the collective bargaining competence of the parties to the collective agreement in the construction industry. The German Federal Ministry of Labor and Social Affairs was allowed to assume that the issue of the challenged declarations of general applicability appeared to be necessary in the public interest.

Note as to actual practice: Even if this sounds like a little disillusionment for all affected companies at first, the last word on this is by no means spoken. In particular, concerning the past and/or payment obligations before 2015, the opinion does not convince the LAG Hessen in any way and also in the present literature it is held that

some writers still advocate for an unconstitutionality of the SokaSiG (see, for instance, Gussen, BeckOK ArbR, Section 3 AentG, mn. 5-7a with further references).

This leads to the fact that in particular comparison conclusions with SOKA-BAU remain possible in particular for elapsed periods of time, which both avoid protracted processes, can lead here nevertheless to substantial financial reliefs for enterprises.

Even if in connection with the avoidance of payment obligations the simple way via unconstitutionality of the VTV seems to be only partially levelled for the time being, the defense will still remain upheld as a general rule. In addition to traditional construction companies, in practice these are often mixed companies that also perform other activities in addition to traditional construction services. In the individual case, the extremely complex and difficult question must be answered of whether such building services prevail which – in terms of working hours – fall within the scope of SOKA-BAU. This already begins with the question whether individual services are to be evaluated as being "harmful" construction services and ends with labor law disputes over the (works constitutional) concept of operation, which forms the point of reference for any SOKA-BAU obligation.

Practical experience has shown that SOKA-BAU often is not in a position to prove the predominance of real construction work in terms of working time successfully, which – in view of the burden of proof and presentation – which is the basic burden of SOKA-BAU, leads to the fact that corresponding lawsuits of SOKA-BAU may be warded off. However, it should be borne in mind that, in contrast to DRV or BA, for example, SOKA-BAU – despite conduct to the contrary – is not a public authority endowed with sovereign rights. This leads to a, more or less, normal civil law dispute, in which SOKA-BAU is, in principle, burdened with presentation and evidence.

As a result, it is often an actual strategic mistake of companies concerned that may, at the end of the day, lead to the burden of proof and presentation turning to their disadvantage. They may then be simply overstrained in having to carry out the complicated proof of the working time predominance of no relevant construction work. You have to strive at avoiding such cases from the very beginning.

In short: "Defending yourself is worthwhile"!

6. The German Federal Labor Court on liability issues: A plea for preventive models ("Contractor Compliance")

BAG of 27.06.2017 – 9 AZR 133/16

And once again on the (somewhat neglected) topic of attribution and liabilities. Although the decision dates back to the summer of 2017, it is also a "must have" in connection with all issues relating to pseudo self-employment, illegal temporary employment, etc.; and this applies both as a prevention and also in concrete defense scenarios.

Facts of the case: The BAG's decision concerned the well-known constellation in which an operational company outsources a certain production or service process – in this case, it concerned the visitor service in a museum – and had it looked after by a third-party provider with its own personnel. As a result, one employee invoked an alleged hiring out of employees and asserted a (fictitious) employment relationship with the assignment company.

The BAG had already decided: In the past, the BAG had emphasized – in connection with the delimitation of a contract for work and services on the one hand and (illegal) temporary employment on the other hand – that such assignments are also possible on the basis of contracts for work and services. The relevant distinction in this respect depends on whose company the external personnel are integrated into and whose instructions they are subject to. This resulted from the express agreements and the practical implementation of the contract, the latter being decisive in the event of an objection. This point was made clear first of all.

At this point, however, widespread misunderstandings began in practice, which the BAG has now corrected. This is because many companies – as well as the LAG in the previous instance – have so far not taken the drafting of the contract sufficiently seriously by referring to the "ultimately decisive implementation" in daily practice. **Different view – now expressed by the BAG!**

And this is not even enough, as a glance at the two core aspects goes to show: – Firstly, the BAG emphasizes the importance of contract drafting, whereby – in addition to "hard" contractual rights and obligations (authority to issue directives, obligatory participation in training courses and instructions, etc.), it also uses "soft" facts, such as individual formulations ("provided employees") for the delimitation. In addition, and this is the decisive aspect, a contract implementation deviating from this should only be relevant if such deviation

> *"was covered by the will of the parties entitled to conclude the contract,"* which, in turn, presupposes that *"the persons entitled to conclude the contract are aware of the contractual practice which deviates from the contractual wording and at least approve it."*

Once again, (harmful) integration into operational processes etc. should only be relevant if (i) the persons entitled to conclude the contract (ii) know and approve the respective facts accordingly.

Note as to actual practice: The latter is of grave importance in practice. This does not only serve as an additional defense argument in the event that DRV or BA may demand social security contributions on the basis of a "divesting contractual practice" or impose a fine in connection with a

supposedly illegal hiring out of employees. In addition, this applies, above all, to preventive measures taken in the course of a contractor compliance, which, from the very start, is intended to prevent such a scenario from happening.

For an obvious answer in connection with preventive concepts to design “clean contracts” and to simply “let the contract run” or to dispense with any compliance measures in order at least not to expose oneself to the accusation of “knowledge and approval” of those entitled to conclude a contract (according to the motto “What they do not control, they cannot know and will certainly not approve”) may be a little too short-sighted. This is supported by the fact that the extrajudicial actors, namely customs and DRV, are unlikely to share such a difficult legal approach. In the “Material Instructions” of the BA of March 20, 2017, which are decisive for the examination practice of the customs authorities, no explicit reference is made to such judicial thought experiments. In addition, such a procedure would also be impractical, since letting the whole matter go would actually favor a divisive contractual practice, so that a subsequent explanation of allegedly not having known anything may appear to be extremely unbelievable in many cases.

The case-law thus sets the direction for practice. In preventive terms, compliance concepts (organizational instructions, training, whistleblowing systems, sanctions for deviating behavior, etc.) may lead to a comprehensive release from liability of companies and responsible persons. Provided that a comprehensive awareness for the handling of external personnel assignments has been created internally, it will be very difficult for executives to “know and tolerate” deviating practices – even if this should be so in the individual case.

In short: Compliance has a double function. On the one hand, illegal conditions should be objectively avoided. If this does not succeed in the individual case and if there should be individual exceptions in practice, nevertheless, compliance concepts serve to avoid possible liability risks under the subjective point of view of attribution. Thus, especially with regard to these most recent developments in case law, effective compliance concepts are indispensable in any case of deployment of outside personnel.

7. Other Highlights

Apart from that, in 2018, a number of decisions on the following issues were interesting from a case-law perspective:

- **Status question with managing directors**

  Third-party managing directors and shareholder managing directors without a minimum capital participation of 50 % or a comprehensive blocking minority are employed by the company on a dependent basis and therefore subject to social security payments. Agreements which affect the distribution of votes and which have come into being outside the articles of association are of no significance for the assessment of social security status.

  BSG of 14.03.2018 – B 12 KR 13/17 R

- **Forfeiture of an action for employment brought by a temporary employee in the event of an illegal leasing of employees**

  The Senate leaves open whether the right to rely on the (continued) existence of an employment relationship established with the hiring company pursuant to Section 10 para. 1 sentence 1 in conjunction with Section 9 no. 1 AÜG can be forfeited. Section 9 no. 1 AÜG can be forfeited. However, only the resumption of work in the business of the lending company without any opposition after termination of the activity with the hiring company does not normally fulfil the element of circumstance required for forfeiture. The mere failure on the part of the temporary employee to take measures against his recall from the hirer does not constitute any trust worthy of protection in this case without the addition of further circumstances; the temporary employee will not assert any rights arising from the employment relationship established in accordance with Section 10 para. 1 sentence 1 AÜG.

  BAG of 20.03.2018 – 9 AZR 508/17

- **"One-Man-GmbH" or "One-Man-AG" as unsuitable protective screens**

  These quite simple and in practice widespread constructions do not offer a suitable protective shield for the avoidance of AÜG-specific and/or pseudo self-employed risks, because, in any case, a concept with "*the sole or predominant purpose of being able to employ the managing director in accordance with instructions while avoiding the conclusion of an employment relationship (...)*" would be an abuse of law.

  BAG of 17.01.2017 – 9 AZR 76/16

- **Status question of taxi drivers in the rental model (and other similar widely used business models)**

  If taxi drivers rent the vehicles from a taxi company for a kilometer-dependent fee and if they are otherwise used as permanent drivers in the awarding and processing of contracts, the taxi company has to pay social security contributions for them on account of a dependent employment.

  Dortmund SG of 05.02.2018 – S 34 BA 1/18 ER

- **No legal recourse to the labor courts for the temporary employee's claims against the hirer**

  The hirer is not the employer within the meaning of Section 2 para. 1 no. 3 of the German Labor Court Act (*Arbeitsgerichtsgesetz* or hereinafter referred to as "**ArbGG**") for a claim to payment of a bonus agreed in the employ-

ment contract with the lending company. This is the case because (contract) employer of the temporary employee is the lender. Besides, also the so-called “split employer position” does not result in an employer position of the defendant hirer. Although the temporary employee is actual integrated into their business organization and there are also information rights pursuant to Section 13 AÜG, the rights according to Section 14 para. 2 sentence 3 AÜG, the right to vote according to Section 7 sentence 2 of the German Works Constitution Act (*Betriebsverfassungsgesetz* or hereinafter referred to as "**BetrVG**") and the protection from discrimination according to Sections 6 et seq. of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* or hereinafter referred to as "**AGG**"). However, the present case does not relate to the enforcement of these rights, but about the payment of a premium from an agreement with the lender.

BAG of 24.04.2018 – 9 AZB 62/17