Bird & Bird

Changes to the German rules on agency work

Act on Agency Work, Arbeitnehmerüberlassungsgesetz (AÜG)

The German Act on Agency Workers (the 'Act') regulates the requirements and formalities for agency workers (referred to as "employee leasing").

This is a three-party arrangement where an employee (the "agency worker") is formally employed with an employer (the "agency") but is then temporarily assigned to another company (the "third party"), where the employee is integrated into the company's/third party's workforce. The employer's (the agency) right to give instructions to the employee will be transferred to the third party as "acting" employer while the main employer's duties and obligations such as payment of salary, payment of social contributions, granting of employee protection rights such as paid holidays, payment in case of sickness, minimum wages, protection against dismissal, etc. will remain with the agency as the legal employer.

This arrangement is very popular in Germany as the use of agency workers grants broad flexibility to companies. In return for paying the agency's fee, the third party only has to take over a few obligations towards the employee (mainly health and safety) but can derive full benefit from the agency worker's performance. In practice, this means that the third party can use the agency worker as if he/she was a regular employee, i.e. can give them work orders and can fully integrate the agency worker into its own work organisation. Without an agency work arrangement, treating an external individual as an employee by giving them work instructions and integrating the individual into the work organisation would create a factual employment relationship between the individual and the company, whereas an agency work arrangement prevents the creation of such direct employment relationship.

The most prominent rules regulating employee leasing under the Act are (i) the requirement for an official permit for the agency in order to offer such agency services; (ii) formal requirements in relation to the underlying employment contracts between the agency and the individual agency worker; and (iii) the service contract between the agency and the third party.

On 1 April 2017 several changes to this Act came into force that are not only important to agencies, but also have relevant impact on all companies that engage external staff within their business.

What are the changes?

1 **Permit for employee leasing no longer prevents creation of employment relationships in other tripartite service arrangements (so called umbrella coverage)**

It is now a formal requirement that the underlying contractual documentation "explicitly provide[s] for agency work services". This change seems rather minor as it should typically be in all parties' interests to clearly specify the subject of a contractual relationship. However, under German case law, having a permit for agency work offered a fringe benefit that made it very attractive for companies to apply for such a permit. This was

especially true for companies offering labour intensive services, which are usually provided on the client's premises, for the reasons discussed below.

As outlined above, under an agency work arrangement, it is possible for the third party to treat the agency workers as if they were their own employees without assuming the main employer's duties, whereas such treatment of external staff would usually create a factual employment relationship between the individual and the factual employer. This is especially the case where services are provided by external staff on the premises of a company, as there is always a risk that over time the externals will become more and more integrated into the company's business organisation or will even follow work instructions by the company directly, with the consequence of creating a direct employment relationship between the external staff and the company.

In the past, it has been common practice for such service providers to apply for a permit to provide agency work services – even if not actually used for agency work services – in order to benefit from the umbrella coverage of such a permit. The benefit is that according to German case law, holding a permit for agency work did not only prevent the creation of an employment relationship between the individual and the third party in explicit agency work arrangements, but can be used to avoid creation of a direct employment relationship in all types of tripartite arrangements. This was very handy for all parties involved; the service providers could offer services without the risk of "losing" their employees by creation of factual employment relationships with the third party company, and for the third party company, the permit secured not only the avoidance of employment relationships with unwanted staff but also reduced the risk of liability for social security contributions for the external individuals. Therefore it was a standard procedure for service providers (particularly in the IT/ consultancy sector) to apply for such a permit.

Under the new rules, such arrangements will no longer fall under the umbrella coverage of an employee leasing permit. In future the permit will only prevent creation of employment relationships provided that the arrangement is explicitly set up as agency work and the underlying contracts explicitly state that they provide for agency work. Although this will have little impact on agencies that provide agency work services, this will have a huge impact on other companies that provide services (but not agency workers) and their customers who will no longer benefit from the protection under a permit for agency work.

This new rule will not only impact agencies; any company using external service providers should re-consider the practicalities of providing services by external staff and, if not already in place, should adopt procedures and sufficiently train its staff on how to treat external service providers in order to securely prevent the unintended creation of direct employment relationships. As well as this, service providers will be confronted with increased insecurity in the business and must implement rules and procedures to respond to these insecurities and/or must consider adapting their business models to the new rules.

2 Maximum duration of 18 months

The most prominent change to the law is the new implementation of a limitation on the duration of agency work with 18 months being the maximum length of an assignment of an agency worker to one and the same company. The limit applies to the individual agency worker so that it is still possible for a company to staff a position with different agency workers for more than 18 months or even ongoing, provided that the assignment of each agency worker will not exceed 18 months. After an interruption of 3 months, assignments will no longer count towards the 18 months limit and calculation of assignments only starts on 1 April 2017. Exceptions to this rule are allowed under collective bargaining agreements applicable to the relevant industry. Even for companies not bound by such collective bargaining agreements, it is possible to implement such exceptions by conclusion of respective shop agreements with the works council, at least in cases where the relevant collective bargaining agreement allows for such transition into a shop agreement. Unless the collective bargaining agreement states otherwise, the maximum duration under shop agreements for companies not bound under the respective collective bargaining agreement may not exceed 24 months.

Due to the fact that the limitation applies to the individuals and not the positions, it will be possible to fill positions with agency workers beyond the 18 months using a rotating system of different agency workers or at least in case of seasonal or project work, to arrange the assignments around the statutory minimum interruption of 3 months by effectively using times of sickness, holidays, time off

in lieu for overtime, etc.. Furthermore, legally it is still possible for companies to properly employ former agency workers under a limited term contract and afterwards engage them again under an agency work arrangement or to further engage them as agency workers within another group company.

3 Declaration of agency workers to remain employed with the agency

As outlined above, the permit for agency work prevents the creation of an employment relationship between the agency worker and the third party even if the third party is acting as an employer towards the agency worker. According to the new rules any one of: lack of such a permit; lack of contractual documentation that is not explicitly drafted for agency work; or exceeding the maximum duration, will automatically create an employment relationship between the agency worker and the third party.

However, the new rules do provide a way for the agency worker to prevent these consequences, by declaring continuation of the employment relationship with the agency. A declaration of the agency worker of this nature can be made towards the agency or towards the third party company but requires prior confirmation of the individual's declaration in person towards the German Employment Agency.

Whether an employee decides to make use of this right or not will mainly depend on the working conditions with the agency as well as with the third company. However, even if the risk of creating an unintended employment relationship can be reduced by taking these steps, any illegal form of agency work (i.e. exceeding the maximum duration or missing nomination as employee leasing within the underlying documentation) may also lead to other sanctions such as administrative fines, as outlined under the amended catalogue of administrative fines within the Act on Agency Work.

4 Equal Pay

Under the new rules, agency workers will be legally entitled to equal pay after nine months of assignment to one company, meaning that the agency will be obligated to grant the agency workers at least the same working conditions (salary, benefits, vacation days, etc.) as the company grants comparable employees of their own. Again, collective bargaining agreements may provide for different rules within their industry.

In practice, agency workers will face difficulties trying to get reliable information to determine the actual working conditions of comparable employees directly employed with the third party. Agencies should therefore impose broad information duties on third parties in order to get the relevant information and conversely should carefully consider the impact of such disclosure, in case the information is not publicly available.

5 Employees' co-determination and labour dispute

Under the new rules, agency workers will count against any thresholds for employees' co-determination (*betriebliche Mitbestimmung*) and corporate co-determination (*Unternehmensmitbestimmung*) within the third party company for any assignments of agency workers exceeding six months. This will be backed-up with new information obligations for employers in relation to the engagement of agency workers under the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), see sec. 80 para 2 and 92 BetrVG.

In relation to labour disputes, previously the agency only had an obligation to inform agency workers that they are not obligated to work during labour disputes at the third party company. Within the new rules, there is now a strict prohibition that does not allow companies to engage agency workers during labour disputes. Exceptions are only possible if it is guaranteed that the agency workers are not doing any work which is usually provided by regular employees who are currently on strike.

Do you have further questions?

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