COLLECTIVE BARGAINING AGREEMENTS IN THE TEMPORARY EMPLOYMENT SECTOR: INVALID?

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Labor, Employment, and Workplace Safety Alert

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Following the European Court of Justice (ECJ) ruling of 15 December 2022—C-311/21—the temporary employment industry is once again the focus of caselaw and is once again becoming a considerable risk for both temporary employment agencies and hiring companies.

BACKGROUND

The German Temporary Employment Act (Arbeitnehmerüberlassungsgesetz (AÜG)) has repeatedly been in the focus of caselaw in recent years and had to be amended several times as a result. Since then, the framework conditions for hiring out workers have become stricter and must be observed.

The principle of equality requires, for example, that temporary workers be granted the same essential working conditions, including remuneration, as permanent employees. However, according to the AÜG, collective bargaining agreements may deviate from this to the disadvantage of temporary agency workers and, for example, provide lower wages to them. The temporary employment industry has made extensive use of this to keep the costs of temporary work within limits.

The ECJ now fundamentally questions this principle.

THE ECJ DECISION

In its decision of 15 December, the ECJ established the following principles of equal treatment in temporary agency work on the basis of Article 5 of Directive 2008/104/EC on temporary agency work:

- Temporary agency workers are in principle entitled to the same basic working and employment conditions that would apply to them if the hiring company had hired them directly.
- Where, in a member state, the social partners are allowed to negotiate collective bargaining agreements that permit derogation from this principle to the detriment of workers, that collective bargaining agreement must respect the overall protection of the temporary agency workers concerned and grant them advantages in terms of basic working and employment conditions that are appropriate to compensate for those disadvantages.
- The unequal treatment must be examined and determined on the basis of a concrete comparison of the essential terms and conditions of employment of a comparable employee in the permanent workforce with the terms and conditions of employment under the relevant collective bargaining agreement of the temporary employment industry. It must then be assessed whether the advantages granted thereafter make it possible to compensate for the difference in treatment.

- Member states, including their courts, must ensure that collective bargaining agreements respect the overall protection of temporary agency workers under Article 5, para. (3) of Directive 2008/104.

In the original case, a considerable disparity in treatment had been easily ascertained due to significantly lower wages (€9.23 hourly wage according to the collective bargaining agreement of the temporary employment industry compared to €13.64 according to the collective bargaining agreement for industrial workers in the retail sector in Bavaria). Because of this discrepancy, the Federal Labour Court had submitted the facts of the case with corresponding questions to the ECJ for a decision and will now have to decide on this case again, taking into account the above-mentioned principles. If there is no sufficient compensation for the disadvantages in the collective bargaining agreement concerned, it will probably be invalid due to a violation of higher-ranking law.

OUR COMMENTS AND ADVICE

The decision causes a considerable risk for both temporary employment agencies and hiring companies. This is because if a court, when examining a collective bargaining agreement used, finds that the overall level of protection is not achieved because disadvantages are not sufficiently compensated, the consequences are serious: According to ss. 8 para. 1–2, 9 para. 1 no. 2 AÜG, the principle of equality would be violated; the employment contract with the temporary worker would be invalid, at least with regard to the wage level; and this would lead to additional wage claims for the temporary employment agency. In this respect, the hiring company is subordinately liable for the resulting social security contributions, as stated in sec. 28 e para 2 SGB IV.

If the collective bargaining agreement is not compatible with the principle of equality of Directive 2008/104/EC at another point, namely in regard to the maximum duration of temporary employment regulated therein (in this respect, the ECJ ruling of 17 March 2022, C 232/20, and the Federal Labour Court ruling of 14 September 2022, 4 AZR 83/21), an employment relationship with the hiring company is deemed to have come into existence when the maximum duration is exceeded. Moreover, a temporary worker could, of course, demand the difference in wages, in case of doubt from the temporary employment agency and the hiring company as joint debtors, as stated in sec. 10 para. 3 AÜG.

As the ECJ does not comment specifically on the question of when sufficient compensation is to be assumed, considerable legal uncertainty has arisen, which the temporary employment industry itself will presumably gradually eliminate in the next few years by raising the level of collective bargaining agreements. This makes temporary work even more expensive.

Since there are very large differences in the level of many different collective bargaining agreements for temporary work (in some sectors, e.g., industry surcharges on wages have been agreed, and in some sectors, they have not), both temporary employment agencies and hiring companies are advised to have the collective bargaining agreements for temporary work that apply to them subjected to an expert review to determine whether the gap to the permanent workforce is too large or if it still appears tolerable.

In case of doubt, companies should—if possible—“switch” to collective bargaining agreements that are more favorable for temporary agency workers and thus provide more legal certainty, even if this increases the costs of hiring workers.
Those who want to be on the safe side may have to apply the equal pay principle and refrain from using “more favorable collective bargaining agreements of the temporary employment industry.”

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