GERMAN COALITION LEADERS AGREE ON REFORM OF TEMPORARY AGENCY WORK REGULATIONS

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Labor, Employment and Workplace Alert

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WHAT HAS HAPPENED?

On May 10, 2016, the leaders of the German government coalition agreed on a reform of the German legislation dealing with temporary agency work. The agreement follows months of dispute between the conservative and social-democrat coalition parties on the extent and substance of the reforms. In their coalition agreement dated November 27, 2013, the government coalition had already agreed to further regulate temporary agency work. Their main aim was preventing misuse of temporary agency work and improving the working conditions of agency workers.

Temporary agency work is a highly regulated area of the law throughout the European Union. In Germany, it is only permissible for a temporary period and the agency firm which provides the agency workers generally requires an official permit from the federal employment agency (*Bundesagentur für Arbeit*). Further, the agency firm remains the employer of the agency workers before, during and after hiring out an agency worker to an end user. Violation of the temporary agency work regulation may result in employees being able to claim employment with the hiring entity.

While fundamental principles of the temporary agency work regulation are based on EU legislation, actual implementation differs throughout EU member states. Further, EU member states remain free to supplement the temporary agency work regulation by way of additional local legislation.

WHAT DOES THIS MEAN?

While the formal legislation process still needs to be completed, it is now highly likely that the reform will come into force effective January 1, 2017. The most significant changes will be:

- **Maximum hire duration of 18 months:** While temporary agency work is currently already permissible for a temporary period only, there are no sanctions in case an agency worker is hired permanently. The reform will limit the permissible hire period for agency workers to a maximum of 18 months. Limited exceptions will be possible subject to collective bargaining agreements with trade unions and works agreements with works councils. Further, it will be possible to replace an agency worker following the

maximum hire period.

- **Limitation of equal pay deviations:** In principle, agency workers are entitled to equal pay as of the first day they are hired (in comparison to regular employees of the end user). Currently, the equal pay principle can be waived by way of a collective bargaining agreement. While waiving the equal pay principle will remain possible after the reform, it will only remain permissible for a limited period of, generally, 9 months maximum.

- **Precautionary permits no longer offer protection:** Currently, end user companies can protect themselves against the risk of employees claiming employment due to (potentially) unlawful temporary agency work by ensuring that the (potential) agency firm (preventively) obtains an official agency work permit.

  This has been especially useful in cases where companies did not intend to utilize temporary agency work, but where the circumstances of their cooperation unexpectedly fell within the ambit of the legislation. This can especially happen in the context of service agreements and contracts for work. For example, a company might outsource IT services or individual manufacturing processes to an external provider without any intention to hire the respective provider's employees.

  Nevertheless, subject to the level of cooperation between the company and the provider, such arrangements can constitute temporary agency work. Precautionary permits served as a protective measure. With this reform, such precautionary permits will no longer protect companies. Rather, where it is determined that a service agreement or contract for work actually constitutes temporary agency work, the affected employees will be able to claim employment with the end user company.

- **Prohibition on sub-contracting agency workers:** Companies often agree lawful temporary agency work, but the contracting company then (often unintentionally) sub-contracts the agency workers to third parties. This can especially happen where a company relies on subcontractors. Currently, the sanctions for sub-contracting are very limited. With this reform, sub-contracting agency workers will be prohibited and agency workers who are intentionally or unintentionally sub-contracted will likely be able to claim employment with the end user company.

Further changes will also be introduced. However, generally speaking and depending on individual circumstances, these changes will be less significant.

WHAT SHOULD WE DO?

Violations of the revised temporary agency work regulation can result in administrative fines of up to EUR 500,000 or can even constitute criminal offences. In addition, the risk of employees claiming employment with the hiring company due to unlawful temporary agency work presents a serious issue.

Companies utilizing agency workers in Germany should therefore prepare for compliance with the reformed temporary agency work regulation. Going forward, this will mean especially that agency workers have to be replaced more frequently. Furthermore, agreements between companies and agency firms as well as agreements with agency workers may need to be revised.

In addition, companies relying on service agreements or contracts for work with other companies should ensure that they are not in breach of the revised temporary agency work regulation and companies will have to assess whether their service agreements or contracts for work may actually be considered unlawful temporary agency work.

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