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Reform of temporary employment: requirements in practice

Employment law – good to know...

2016 was characterised by the discussions concerning the reform of temporary employment planned by the coalition government. It was intended that thereby the relevant “levers” in the Employee Assignment Act, Works Constitution Act and German Civil Code be re-adjusted in order to – as the stated legislative goal – “align temporary work with its core function and prevent the abuse of structures with contracts for work and services” (parliamentary print item 18/9232, p. 1). Based on the first draft legislation dated 16 November 2015, which in the course of the year was adjusted several times, including in the end phase (parliamentary print item 18/10064 dated 21 October 2016), initially the German Parliament on 21 October 2016 and then the German Upper House of Parliament on 25 November 2016 consented to the reform law which will now enter into force on 1 April 2017. In detail the material changes are as follows:

1. Legal definition of employee assignment

Previously the Act did not contain any legal definition of an employee assignment, and rather presupposed such an assignment. Effective as of 1 April 2017, § 1 para. 1 sentence 1 Employee Assignment Act (EAA) will be supplemented by such a definition. According thereto it is necessary for an employee assignment within the meaning of § 1 para. 1 sentence 1 EAA that employers as temporary employment agencies assign, in connection with their business activity, employees (temporary employees) to third parties (hiring compa-

nies) for the performance of work. Employees are assigned for the performance of work if they are integrated into the employment organisation of the hiring company and they are subject to its instructions (§ 1 para. 1 sentence 2 EAA).

It is doubtful whether the legislative goal, namely not to change the previous area of application of the EAA, can actually be achieved having regard to the version of § 1 para. 1 sentence 1, 2 EAA which applies starting from 1 April 2017. According to the reasons provided for the legislation, this clause shall on the basis of the jurisprudence determine under which requirements an employee is assigned. The clause is thereby intended to help to distinguish between the engagement of an employee in connection with an employee assignment and an agent in connection with contracts for work and services/service contracts, but it should not change the legal situation (see parliamentary print item 18/10064, p. 13). It is problematic that the legislator simply intended to follow the jurisprudence but with respect to the wording of § 1 para. 1 sentence 2 EAA – having regard to the specific formulation of the legislative provision – did not succeed or not in a sufficient measure. In the view of the Federal Labour Court (FLC) an employee assignment exists if the hiring company is provided with personnel who are *fully* integrated into its business operation and who carry out the work *exclusively* under its instructions and in its interest (see FLC dated 30 January 1991 – 7 AZR 497/89, FLC dated 13 August 2008 – 7 AZR 269/07). § 1 para. 1 sentence 2 EAA however does not stipulate a “full” integration and an “exclusive” subjection to instructions.

It remains to be seen how the adjustment of § 1 para. 1 sentence 2 EAA will be reacted to in practice, in particular by the permit authorities and the customs authorities. Having regard to the considerations in the reasons provided for the legislation, it is not to be presumed that the requirements developed by the jurisprudence for an employee assignment pursuant to § 1 EAA will change. Rather the relevant criteria (“full” integration and an “exclusive” subjection to instructions) must continue to be read into § 1 para. 1 sentence 2 EAA by way of interpretation, such that an engagement of temporary employees previously carried out as a contract for work and services cannot be “re-declared” into an employee assignment on the basis of the changed statutory regulations and definitions.

In the legislation materials it is in addition expressly noted that the provision in § 1 para. 1 sentence 1, 2 EAA does not aim to limit the entrepreneurial activity for example of consulting companies (see parliamentary print item 18/10064, p. 13). The new provision is not intended to stand in the way of the proper use of contracts for work and services/service contracts in the contemporary forms of the creative or complex project business as they can be found e.g. in the business consulting or IT industry in optimisation, development and IT introduction projects. The general principles for the distinction of services under service contracts and contracts for work and services on the one hand and an employee assignment on the other hand shall continue to apply. In this connection e.g. a consultant’s being bound, with respect to the place of work, to an activity in the business of the company being advised, which is generally typical for a consultant, shall by itself as a rule not give rise to a personal dependence in relation to such company. Rather, in accordance with the previous practice, an overall value judgement is to be made as to whether, having regard to all the relevant circumstances in the particular case, an integration into the business of the customer occurs (see parliamentary print item 18/10064, p. 13).

2. Sector exception

§ 1 para. 3 EAA previously stipulated, among other things, that an employee assignment, in particular between corporate group companies, does not require a permit if the employee is not hired and engaged for the purpose of the assignment. In this case only a few provisions of the EAA are applicable. Effective as of 1 April

2017 the legislator is expanding the exception cases provided for in § 1 para. 3 EAA to public authorities in that the provision of personnel pursuant to § 4 para. 3 Collective Bargaining Agreement for the Public Sector also be exempted from a permit, although particularly in this case there is an ongoing engagement of the assigned employee by the “customer”. § 1 para. 3 nr. 2b EAA will in the future state that the provisions of the EAA in general are not applicable if an employee assignment is carried out among employers where the tasks are transferred from the previous employer to a different one, on the basis of a collective bargaining agreement with the public service the employment relationship continues to exist with the previous employer and the work is in the future performed for a different employer.

In addition, starting from 1 April 2017 an employee assignment is given privileged treatment pursuant to § 1 para. 3 nr. 2c EAA if the employee assignment is carried out between legal persons established under public law and they apply the collective bargaining agreements of the public civil service or the provisions of the public law religious communities.

The extension of the permit exemption and the associated privileged treatment of the public sector are not provided for in the government coalition agreement. § 1 para. 3 nr. 2b and nr. 2c EAA are in this connection subject to considerable constitutional concerns. It is not very understandable why the provision of personnel on the basis of the Collective Bargaining Agreement for the Public Service and thereby in essence the public service should not fall within the scope of the EAA. No objectively comprehensible reason (Art. 3 German Constitution) for this unequal treatment in favour of the primarily public law employers exists, since the question arises why the government employees assigned for the purpose of provision of personnel apparently need less protection than those who in the private sector perform work in a “classic” employee assignment. Legitimate doubts are also raised concerning the compliance of the exemption provisions with European law. The Temporary Agency Work Directive 2008/104/EC does not provide for any privileged treatment of the public sector; rather pursuant to Article 1 para. 2 it applies equally “to public and private undertakings which are temporary work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.”

3. Maximum assignment duration

A general statutory maximum assignment duration of 18 months applies (§ 1 para. 1 sentence 4, 1b EAA). The duration is to be determined on a person-related basis and thereby allows "revolving door employees". This means that an employee can after 18 months at the customer be removed and replaced by a different external employee. Permanent employment positions can against this background also be permanently filled with (changing) temporary employees.

A de facto extension of the statutory maximum assignment duration cannot be achieved by assigning the relevant temporary employee to a different workplace of the customer – if applicable in a different business unit. This is not determinative, according to the wording of the legislative provision ("the same hiring company"). This refers to the customer who as an individual or legal person can be a contractual partner of the temporary work agency without it being relevant to which position or in which business unit of the customer the temporary employee is actually assigned. The term "hiring company" is therefore to be understood as referring to a legal entity (see Bissels/Falter, ArbR 2017, 5; different view – business-unit related approach: see opinion of BDA on the draft bill. Parliamentary print item 18/9232 of October 2016, S. 6; see also: Procedural directive EAA, status: January 2016, re § 1 Nr. 1.1.2 para. 4.).

In the case of an interruption of the assignment for more than three months, the maximum assignment duration begins to run again from the start and can again be fully exhausted for the respective temporary employee (§ 1 para. 1b sentence 2 EAA). There is in this case no adding together of previous work periods at the customer, which may also have been performed by the temporary employee with a different personnel agency. In this connection it has not yet been conclusively clarified which requirements are to be applied to an interruption. It is likely decisive that the temporary employee can no longer be "assigned" by the personnel agency within the meaning of § 1 para. 1b sentence 1 EAA or the customer can no longer "have the employee work" for the customer. It is not relevant in this connection whether the work hindrance originates from the temporary work agency, the customer and/or the temporary employee. This includes not only the termination of the employee assignment contract or the de-registration of the temporary employee by the customer or the withdrawal (in breach of contract) by the personnel agency

in the case of a continuing employee assignment contract, but rather in particular also the work of the temporary employee for another customer, his/her illness, vacation or holiday-related absence, the reduction of credit hours on the work time account, parental leave or taking of unpaid vacation or unexcused absence. The legal definition in § 1 para. 1 sentence 2 EAA speaks in favour of this, according to which an assignment requires that the employee is integrated into the work organization of the customer and is subject to his instructions. This is, however, not the case in any of the above mentioned situations. Thus, a substantive concept of interruption must be applied. It cannot be predicted with certainty whether the jurisprudence will follow this. "More conservative" temporary work agencies could against the background of the existing legal uncertainty, in order to minimize risk, proceed on the basis of a formal concept of a work engagement according to which the assignment of the temporary employee only ends upon his/her withdrawal from the customer and a simultaneous termination of the employee assignment contract.

Companies bound by a collective bargaining agreement may also deviate upwards or downwards from the maximum assignment duration through a (valid) collective bargaining agreement of the sector in which the temporary employee is engaged (§ 1 para. 1 sentence 3 EAA). In company collective bargaining agreements the maximum assignment duration may also be stipulated in deviation from the 18 months provided for in the legislation. Companies not bound by collective bargaining agreements may adopt such deviating collective bargaining provisions through a works agreement (§ 1 para. 1 sentence 2 EAA). This is, however, only possible if the particular collective bargaining agreement is applicable in terms of territory, subject matter and time. Companies bound by collective bargaining agreements may in addition themselves stipulate a deviating maximum assignment duration in a works agreement if in the particular collective bargaining agreement of the industry in which the temporary employee is engaged there is a related opening clause (§ 1 para. 1 sentence 5 EAA). Companies not bound by collective bargaining agreements may also have recourse to these and enter into works agreements which deviate from the statutory maximum assignment duration. If the collective bargaining agreement does not stipulate a limitation for a maximum assignment duration to be set in a works agreement, it is, however, "capped" at 24 months for companies not bound by collective bargaining agreements (§ 1 para. 1b sentence 6 EAA).

The infringement of the maximum assignment duration is an administrative offence for the temporary work agency (§ 16 para. 1 no. 1e, para. 2 EAA with a monetary fine scope of up to EUR 30,000.00). In addition, permit-law related consequences may arise. Under individual contract law, if the maximum assignment duration is exceeded, an employment relationship is established between the customer and the temporary employee – without or even against the will of the parties (§§ 9 para. 1 no. 1b, 10 para. 1 sentence 1 EAA).

4. Equal pay principle

The equal pay principle can be abrogated through a collective bargaining agreement of the temporary employment industry or a reference thereto only for the first nine months of an assignment to a customer. Subsequently equal pay is compulsory (§ 8 para. 4 sentence 1 EAA). A longer deviation is only permissible if on the basis of a collective bargaining agreement for sector-based supplemental pay at the latest after 15 months a remuneration is achieved which a comparable permanent employee in the company receives, and after a training period of at the most 6 weeks a stage-wise convergence with such remuneration occurs (§ 8 para. 4 sentence 2 EAA). If the temporary employee receives the remuneration owed under a collective bargaining agreement for a comparable employee of the customer in the business unit where the temporary employee is engaged or, in the absence of such remuneration applicable under a collective bargaining agreement for a comparable employee in the industry where the temporary employee is engaged, the presumption applies that the temporary employee is treated equally with respect to the remuneration (§ 8 para. 1 sentence 2 EAA).

It thus remains the case that a deviation from the equal pay principle required by law is in general only possible for a period of nine months. An exception only exists if for the engagement a collective bargaining agreement for sector-based supplemented pay is applicable which, at the latest after a six-week assignment, leads to a convergence of the remuneration of the temporary employee towards the remuneration of the permanent employee engaged in the customer business and which reaches it at the latest after 15 months. Such collective bargaining agreements entered into by employer associations in the temporary employment industry with the

DGB unions already currently apply in numerous industries, e.g. in the metal and electronics industry. They, however, must still be adjusted to the new statutory requirements. These statutory provisions will likely also make it possible that through the application of the sector-based supplemental pay in the last stage of the collective bargaining convergence with the statutory equal pay (i.e. after 15 months) no complete wage equalisation must occur. It remains up to the collective bargaining parties to define a remuneration which is to be viewed as “*equivalent*” with the collective bargaining wage of comparable employees in the industry in which the temporary employee is engaged. This can however also be an amount which – as stipulated in the currently applicable collective bargaining agreements for sector-based supplemental pay – is below 100 % of the comparison wage (as a rule at most 90 %). “Equivalent” does not necessarily mean “equal”.

In the case of an interruption of the engagement at the customer of more than three months and the subsequent renewed assignment to such customer, the prior work periods performed there by the employee are not counted toward a time limit of nine months which is determinative for the mandatory equal pay. The temporary employee then starts again at “zero”.

A critical note is to be made that through the legislation the problem which is material in practice in connection with mandatory equal pay is not solved. The mandatory equal treatment of temporary employees and permanent employees in connection with the remuneration after an engagement of nine months will lead to substantial organisational and administrative challenges for the personnel agencies. This starts with the question which “elements” are to be taken into account in the determination of equal pay and continues with the procurement of the relevant information from the customer and the appropriate internal documentation. In the determination of the “correct” equal pay the legislator failed to make clearer specifications, possibly through a generalisation, which could have provided suitable orientation for the implementation in practice. Apart from this, the legislation maintains the (unfortunate) combination of a maximum assignment duration and mandatory equal pay, although it may give rise to disadvantages for temporary employees if the employees must be treated equally at a monetary level with permanent employees in the business unit where they are engaged after nine months, but after 18 months must be re-registered in order to then be further employed with a different customer of the personnel agency for likely less

pay. It is evident that this “concept” cannot make sense.

The violation of the granting of equal pay is an administrative offense for the personnel agency (monetary fines up to 500,000 €, see § 16 para. 1 nr. 7a, 7b, para. 2 EAA). In addition permit-law related consequences may arise.

5. Disclosure, specification and information duties

The assignment of employees must be expressly referred to as an employee assignment in the contract between the personnel agency and the customer (§ 1 para. 1 sentence 5 EAA). This disclosure duty is supplemented by a further obligation of the personnel agency to inform the temporary employee before the assignment (possible without any requirement of form) that he/she will work as such at the third party (§ 11 para. 2 sentence 4 EAA). Prior to the assignment, the temporary work agency and the customer must specify the identity of the temporary employee with reference to the employee assignment agreement (§ 1 para. 1 sentence 6 EAA). Through these provisions it is intended to prevent the “parachute solution”.

It is not clearly stipulated whether the specification of the temporary employees pursuant to § 1 para. 1 sentence 6 EAA – such as the disclosure pursuant to § 1 para. 1 sentence 5 EAA – must occur in compliance with written form (§ 12 para. 1 EAA, §§ 126, 126a German Civil Code). The predominant view confirms this without, however, providing a reason (see Bertram, AIP 12/2015, 6; Bauer BD 2016, 10; Zimmermann, BB 2016, 55). While in § 1 para. 1 sentence 5 EAA with respect to the employee assignment it is clearly required that this be disclosed “*in their agreement*” – here the employee assignment agreement is meant which pursuant to § 12 para. 1 EAA without doubt is subject to written form - § 1 para. 1 sentence 6 EAA only provides that the specification must be made “*with reference to such agreement*”. Such a specification can however – based on the wording – also occur orally or in textual form such that the provision, based on its structure, does not necessarily require compliance with written form. At most the reasons provided for the legislation where a reference to frame agreements is made, in which as a matter of course the name of the temporary employee who is ultimately to be specifically assigned cannot yet be finally stated, can provide a basis for also

requiring for the specification the written form which also a frame agreement must comply with. Thus it could be argued that the individual agreement/request specifying the names of the temporary workers to be assigned must have the same form as the agreement on which it is based. This is however not necessarily compelling, such that the position can convincingly be taken that the specification pursuant to § 1 para. 1 sentence 6 EAA is not subject to written form, but rather that this is possible without any formal requirement (see Bissels/Falter, ArbR 2017, 34). Until a conclusive clarification of this issue, it is to be recommended for practical implementation purposes to strictly comply with written form, as far as possible having regard to operational requirements.

If the duty of disclosure and specification is violated, e.g. in the case of a fictional contract for work and services, the employment contracts between the personnel agency and the temporary employee are invalid. Instead an employment relationship with the customer is deemed to exist (§§ 9 para. 1 nr. 1a, 10 para. 1 sentence 1 EAA). The wording of § 9 para. 1 nr. 1a EAA is through the “and” links between the disclosure and specification duty to be understood to the effect that both § 1 para. 1 sentence 5 EAA as well as § 1 para. 1 sentence 6 EAA must be violated in order to, on the legal consequences side, trigger the invalidity of the employment contract entered into between the personnel agency and the temporary employee. Otherwise the legislator could and should have clearly worded this through an “or” link of the two duties. The non-compliance with the disclosure or the specification duty is not sufficient for this purpose. This is confirmed through the reasons provided for the legislation, in which cumulatively always a reference is made to the violation of § 1 para. 1 sentence 5 and 6 EAA (see parliamentary print item 18/9232, p. 23). This means that the violation of only the disclosure duty while at the same time fulfilling the specification duty is just as insufficient as the reverse case in order to give rise to the invalidity of the employment contract existing between the personnel agency and the temporary employee (Bissels/Falter, ArbR 2017, 34 et seq.). In practice these two breaches of duty will however as a rule be fulfilled in parallel. If the parties both presume that they are entering into and carrying out a contract for work and services, there is no need to disclose an employee assignment (which is precisely not intended) or to specify the assigned employees prior to the engagement. There may however be a divergence if the parties have actually “openly”

stipulated an employee assignment in a frame agreement and have disclosed this there pursuant to § 1 para. 1 sentence 5 EAA, but in the daily implementation there is a failure, in particular after an illness-related absence on short notice of an assigned employee (who has sufficiently been specified in advance), to timely specify the replacement requested by the customer and provided by the temporary work agency in proper form within the meaning of § 1 para. 1 sentence 6 EAA, assuming that written form must be complied with. The same likely also applies in the case of (sub-) contracting models in which a contract for work and services is entered into between the customer and a contractor and the contractor utilises a (supposed) freelancer to fulfil his duties in relation to the customer. If the freelancer is designated by name in the agreement entered into between the customer and the contractor, the legal consequence in § 9 para. 1 nr. 1a EAA does not arise if the freelancer is integrated into the business operation of the customer such that he/she is subject to instructions and in actual fact he/she is a fictitious freelancer. This applies at least for the case that the contractor has an employee assignment permit pursuant to § 1 EAA. The specification duty in § 1 para. 1 sentence 6 EAA was fulfilled in the “contract for work and services” entered into between the customer and the contractor. The violation of the disclosure duty pursuant to § 1 para. 1 sentence 5 EAA remaining as between the customer and the contractor can not give rise to the invalidity of the de facto employment contract existing between the contractor and the supposed independent freelancer. The single breach of duty contrary to § 1 para. 1 sentence 5 or 6 EAA is not sanctioned, such that the parachute solution will also in the future still have a (limited) scope of application (see in detail soon: Bissel, NZA 2017). It remains to be seen whether the jurisprudence will follow this view.

The non-compliance with the disclosure and specification duty is an administrative offence both for the personnel agency as well as for the customer with a monetary fine of up to 30,000 € (§ 16 para. 1 nr. 1c, 1d, para. 2 EAA). Under private individual contract law – as indicated – an employment relationship is established between the customer and the temporary employee if at the same time the disclosure and the specification duty is violated (§§ 9 para. 1 no. 1a, 10 para. 1 sentence 1 EAA). The violation of the information duty pursuant to § 11 para. 2 sentence 4 EAA is also an administrative

offence for the temporary work agency (monetary fines of up to 1000 € pursuant to § 16 para. 1 no. 8, para. 2 EAA). The personnel agency in addition faces permit-law based measures.

6. Maintenance declaration

If an employee is assigned although the personnel agency does not have a permit pursuant to § 1 EAA, if the relevant maximum assignment duration is exceeded or if there is a violation of the disclosure and specification duty, the employment contract between the personnel agency and the temporary employee is invalid. Instead an employment relationship is deemed to exist between the temporary employee and the customer. There is no invalidity if the temporary employee declares in writing to the personnel agency or the customer by the end of one month after the date specified for the start of the assignment, or after exceeding the permissible maximum assignment duration, that he maintains the employment contract with the personnel agency (§ 9 para. 1 no. 1, 1a, 1b in conjunction with § 10 para. 1 sentence 1 EAA).

Such a maintenance declaration is only valid if pursuant to § 9 para. 2 EAA the following requirements are cumulatively fulfilled:

- the temporary employee must have personally submitted the declaration at an Employment Agency Office prior to the declaration being made,
- the Employment Agency Office must have affixed on the declaration the date of the submission with a note that it has determined the identity of the temporary employee, and
- the declaration must be received by the personnel agency or the customer at the latest on the third day after the submission to the Employment Agency Office.

According to the reasons provided for the legislation, the activity of the Employment Agency Office is limited to the receipt of the written maintenance declaration on which it notes the date of the submission and the determination of the identity of the temporary employee who is present at the office (see parliamentary print item

18/10064, p. 15). It is intended that it hereby be excluded that the temporary employee signs the declaration of objection in which subsequently, e.g. through the personnel agency or the customer, a date is entered which does not correspond to the actual date of the declaration. In order that the declaration is not submitted to the Employment Agency Office "for later" at the start of the assignment, the maintenance declaration is only valid if it is subsequently received at the latest on the third day by the personnel agency or the customer. If it is received later, the declaration is invalid. In addition, the temporary employee continues to be responsible for the provision of the declaration to the personnel service provider of the customer. It is thus up to the temporary employee to comply with the one-month time limit through the provision of the declaration within this deadline to the personnel agency or the customer. The necessary timely receipt is not replaced by the indication of the date by the Employment Agency Office.

In addition the maintenance declaration may only be made once the relevant time limit of one month has already commenced (§ 9 para. 3 EAA). It is intended that thereby, for the protection of the employee, "declarations for later use" prior to the assignment are prevented.

In addition, an employment contract between the personnel agency and the temporary employee is invalid if the (unlawful) assignment is continued after the maintenance declaration. The renewed making of the declaration is invalid. As indicated in the reasons provided for the legislation, an unlawful assignment cannot be made legal either for the past or for the future (parliamentary print item 18/10064, p. 15). The right of objection contained in the draft legislation of the federal government permits only the maintenance of the previous employment relationship with the personnel agency and thereby protects the freedom of the temporary employee to choose an occupation which is protected by Article 12 German Constitution. The right of objection does not, however, permit the maintenance of an unlawful assignment practice. Accordingly the new § 9 para. 3 sentence 2, 3 EAA clarifies that in the case of a continuation of the unlawful assignment, e.g. after the exceeding of the maximum assignment duration, despite a declared objection a renewed invalidity of the employment contract between the personnel agency and the temporary employee arises. In these cases therefore pursuant to § 10 EAA an employment relationship is established with the customer. § 9 para. 3 sentence 4 EAA ensures that under social security law

a maintenance declaration does not lead to the elimination of the joint and several liability of the personnel agency with the customer for the payment of the social security contributions.

7. Strike breakers

The customer company may not engage temporary employees if its business operation is directly affected by a labour dispute, meaning is subjected to a strike (§ 11 para. 5 EAA). This provision is subject to a qualification: temporary employees may continue to be assigned if it is ensured that they do not perform tasks (if applicable in the chain) which were previously performed by the striking permanent employees.

In addition to the general prohibition against the engagement of temporary employees in labour disputes at the customer, for the case of the permissible engagement during a strike the right of the temporary employee to refuse work contained in the previously applicable version of the EAA can be found again in the legislation. The temporary employee is accordingly not obligated to work for a customer as far as the customer is directly affected by a labour dispute. The personnel agency must inform the temporary employee thereof.

The violation of the prohibition against engaging temporary employees as strike breakers is an administrative offense for the customer which can be penalised with a fine of up to 500,000 € (§ 16 para. 1 nr. 8a, para. 2 EAA).

8. Chain assignment

Effective as of 1 April 2017, § 1 para. 1 sentence 3 EAA is introduced into the Act as a new provision. Pursuant thereto, the assignment of employees and allowing them to work as temporary employees is only permissible as far as there is an employment relationship between the temporary work agency and the temporary employee. It is intended that it be clarified through the clause that temporary employees may only be assigned by their contractual employers.

The legislator thereby establishes legal certainty concerning the question which was in dispute up to now as to what the procedure is in case of a chain, interim or

onward assignment of employees. This refers to a situation in which the contract employer provides his employee to a company which in turn assigns (onward) the employee - as third party personnel engaged by the company - to a "final hiring company". The Federal Employment Office even prior to the change of the legal situation "traditionally" presumed that a chain assignment is impermissible (Procedural directive for EAA, status: January 2016, re § 1 nr. 1.1.2 para. 11, 12).

On the basis of the view taken in particular by the permit authority that according to the legal situation already applicable prior to 1 April 2017 a chain assignment was impermissible, in practice no models have spread (at least not extensively) which were based on an onward assignment, such that the legislative provision will only have limited practical significance. This can be recognised through the fact that hardly any court decisions exist which address in terms of the law relating to assignments the issue of a deliberate and intentional chain assignment (before 1 April 2017).

Through § 10a EAA it is ensured that the provisions in §§ 9, 10 EAA concerning the three-person relationship (temporary employee/personnel agency/customer) also apply in a multiple-person relationship (temporary employee/first temporary work agency/second temporary work agency/customer). The provision serves the purpose of avoiding third party personnel assignment structures which involve an abuse. It is ensured that the legal consequences of §§ 9, 10 EAA cannot be circumvented in that a different company without an employment contract relationship with the temporary employee is interposed which in turn assigns the employee. As far as in the case of the (onward) assignment by the interposed temporary work agency there is no employee assignment permit pursuant to § 1 para. 1 EAA, the maximum assignment duration pursuant to § 1 para. 1 sentence 4, para. 1b EAA is exceeded or a hidden employee assignment occurs in violation of § 1 sentence 5, 6 EAA, the protective provisions of the EAA apply. The employment relationship of the temporary employee with the first temporary work agency, i.e. with the contract employer, is invalid. An employment relationship with the "assignment employer" for whom the temporary employees actually work ("final hiring company") is deemed to exist. The temporary employee can object to the transfer of the employment relationship pursuant to § 9 EAA such that the employment relationship remains with the first temporary work agency. However the violation of the chain assignment provision in § 1 para. 1 sentence 3 EAA does not by itself

trigger the deemed employment effect. Violations of § 1 para. 1 sentence 3 EAA can in addition have permit law-based consequences, including the revocation of the employee assignment permit. Furthermore, effective as of 1 April 2017, in § 16 para. 1 nr. 1b, para. 2 EAA a new administrative offense was included in the legislation which for the non-compliance with § 1 para. 1 sentence 3 EAA provides for a monetary fine of up to 30,000 Euro.

9. Threshold values

Temporary employees must in the future be included in the count at the customer for threshold values in the Works Constitution Act (exception: § 112a WCA), e.g. for the size of the works council. This is also intended to apply to the threshold values for the co-determination in companies (Co-determination Act and One-Third Participation Act), but for the initial threshold values to apply the relevant legislation, however, only if the total duration of the assignment exceeds six months (§ 14 para. 4 EAA).

It is a "trend" in the labour court jurisprudence that temporary employees "should not only choose, but also count". In this sense the coalition government indicated in the coalition agreement that temporary employees are to be taken into account for threshold values of the Works Constitution Act. There was however no mention of co-determination in companies, such that the new statutory regime goes far beyond the stipulations contained in the government coalition agreement. In addition the jurisprudence does not presume without differentiation that temporary employees always and in all circumstances are to be counted for threshold values (under works constitution law). The courts rather interpret the relevant provision in a particular case and according to the sense and purpose take into account whether it is actually required to include temporary employees in the count. This differentiated approach is completely watered down by the new law in that it "throws everything into one pot" with the exception of § 112a WCA and the limitation that for the initial threshold values concerning co-determination in companies this only applies after an assignment duration of six months.

10. Information rights of the Works Council

The works council must be informed of the engagement of third party personnel. It must be advised as to the duration of the engagement, the place of engagement and the tasks of such persons. In addition the contracts on which the engagement of the third party personnel is based must be submitted to the works council (§ 80 para. 2 WCA).

It is important that the conclusion of contracts for work and services/service contracts in the future continues to be exempt from co-determination. The customer is therefore not obligated to obtain the consent of the works council prior to assigning tasks to third parties. This would have to be seen as a very critical point from a constitutional law perspective. Instead the legislation in essence provides a specification of the participation right already developed by the jurisprudence to be informed in the case of a planned engagement of third party personnel. Through the information provided to the works council by the employer, the works council can review whether an engagement (requiring consent) exists within the meaning of § 99 para. 1 WCA, e.g. in the case of an engagement of temporary employees. The works council can then assert the rights arising therefrom against the employer.

11. Distinction compared to employment contract

The list of criteria originally contained in § 611a (draft) German Civil Code (GCC) to distinguish an employment relationship from other contract relationships was no longer included in the following draft bills. The same applies for the (rebuttable) presumption effect according to which an employment relationship is to be presumed if the German Public Pension Fund in a status proceeding has determined that an employment relationship exists which is subject to social security contributions. Instead initially the following definition of an "employee" was contained in the subsequent draft:

"An employee is a person who on the basis of a private-law contract is, in the service of another person, obligated to perform, subject to instructions, work determined by a third party in a relationship of personal dependence. The right of instruction can relate to content, implementation, time, duration and place of the ac-

tivity. An employee is a member of the personnel who is not in essence free to structure his/her tasks and determine his/her working hours. The degree of personal dependence also depends on the nature of the respective activity. For the determination of the quality as an employee an overall consideration of all circumstances must be undertaken. If the actual implementation of the contract relationship shows that an employment relationship is involved, the designation in the contract is not determinative."

In the end phase § 611a GCC was again slightly changed, but this still does not provide any practical benefit. The provision now states under the heading "Employment Contract" as follows:

(1) "Through the employment contract an employee is obligated to perform, in the service of another person, subject to instructions, work determined by a third party in a relationship of personal dependence. The right of instruction can relate to content, implementation, time and place of the activity. A person is subject to instructions if he/she cannot in essence freely structure his/her work and freely determine his/her working hours. The degree of personal dependence also depends on the nature of the respective activity. For the determination whether an employment contract exists, an overall consideration of all circumstances must be undertaken. If the actual implementation of the contract relationship shows that an employment relationship is involved, the designation in the contract is not determinative."

(2) "The employer is obligated to pay the agreed remuneration."

The subject matter of the provision is in this connection adjusted to the classification approach in the German Civil Code. The mentioned section sets forth the contract types. The applied criterion is therefore no longer "employee" but rather "employment contract", which is defined as a sub-category of a service contract.

It is intended that thereby there is no change in content compared to the draft version since the concept of the employment contract includes the employee as a contract party. In addition the provision is streamlined in terms of the wording. The right of instruction in § 611a

para. 1 sentence 2 GCC is described, in accordance with the provision in § 106 Trade Regulation, without the element “duration”. For the purpose of completion and systematic adjustment a duty to pay remuneration is set forth in § 611a para. 2 GCC.

12. Entry into force

It is intended that the legislative changes shall enter into force on 1 April 2017.

It is expressly clarified that assignment periods at a customer before that date are not taken into account for the calculation of the maximum assignment period and the engagement duration for a mandatory equal pay claim (§ 19 para. 2 EAA). Accordingly the maximum assignment duration can be reached at the earliest starting from 1 October 2018. The mandatory claim to equal pay can first arise starting from 1 January 2018.

Some uncertainty concerning these dates results from the fact that it is not conclusively clarified whether § 191 GCC is to be applied in the calculation. Pursuant to that provision a month is calculated with 30 days and a year with 365 days if a period is designated according to months or years in the sense that it must not run continuously. If the provision were relevant – starting from 1 April 2017 – the maximum assignment duration of 18 months would already expire on 22 September 2018 and the nine-month time limit to grant mandatory equal pay on 26 December 2017. It, however, speaks against the application of § 191 GCC that the period of the time limit must be determined such that it must not run continuously. § 1 para. 1b sentence 1 EAA however stipulates as a general principle the assignment period of “18 consecutive months” and thus a continuous period for the assignment. The legislation then provides as an additional provision in § 1 para. 1b sentence 2 EAA that previous assignments are added to the count. The maximum assignment duration is thereby in principle stipulated as “continuous”. This however also applies in the sense of the assignment definition in § 1b sentence 2 EAA. Further, i.e. additional assignment periods, are then added on.

In order to however to rule out with certainty all risks arising from a violation of the maximum assignment duration and the mandatory equal pay principle, as a precaution plans should be based on the above dates and engagement of temporary employees interrupted at the

end of 22 September 2018 or continued after 26 December 2017 applying the equal pay principle.

Outlook

“Good things come to those who wait” – that is the proverb. The new legislative regime – even taking account of the changes made in the legislative process – is still far removed from this. Compared to the initial proposal in November 2015 some improvements have been made. However there still can be no question of “good”.

As the legislative process has in the meantime been completed, it is now also clear that in 2017 the temporary employment industry will face substantial changes. The statutory adjustments must be implemented in the contracts and processes which are applied. The customers must be informed and brought on board, particularly in connection with mandatory equal pay. This will keep the industry busy in 2017 until the entry into force of the new provisions, in particular in the first quarter. It is intended – by the legislator – that temporary work will become more complicated and expensive (and thereby less attractive). The reform is a challenge and will cause difficulties in the practical implementation, but the industry will overcome this, too! Flexibility is its strength, which the past always impressively demonstrated.

Yours sincerely

CMS Hasche Sigle
Practice Group Employment Law



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