

FAQ on temporary hiring out of employees as a model for a “personnel partnership”

1. What are “personnel partnerships”?

The coronavirus crisis – in conjunction with the associated lockdown – means that in some sectors, such as hospitality, the vast majority of employees (or even the entire workforce) can no longer be put to use. On the other hand, there is significant demand for personnel in other sectors that cannot be met by the (current) permanent staff, e.g. in food retail, in logistics and in agriculture. There is obviously a strong case for developing models that connect underutilised workers with companies that are looking for staff. Such “personnel partnerships” can help to avoid dismissals for operational reasons and short-time working.

2. What are the advantages of personnel partnerships?

The advantages of personnel partnerships for the employers and employees concerned are clear and can be summarised as follows:

- Preventing or reducing loss of earnings during the crisis;
- Avoiding staff reductions, which are associated with legal and economic risks, given that the dismissed workers are likely to be needed again in the future;
- Preventing inactivity and deficits in personnel productivity;
- Psychological effect: employees feel “needed” and want to work;
- Reducing personnel costs;
- Fulfilling the employer's duty of care and duty to employ;
- Positive reputational effects.

3. Which models are available for implementing a personnel partnership?

In principle, various models are possible for implementing a personnel partnership, in particular:

- (Unpaid) leave from the current employer and temporary employment with the “new” company;
- Establishment of joint operations;

- “Conventional” temporary hiring out of employees;
- Commencement of a second job with the “new” company while continuing to work reduced hours for the existing employer.

All the above models have actual and legal advantages and disadvantages from the employment law and social security law perspective, which must be assessed in the context of the individual case.

4. Under what conditions is “privileged” temporary hiring out of employees permissible?

The German Temporary Employment Act (Arbeitnehmerüberlassungsgesetz, AÜG) creates a very restrictive legal framework for the temporary hiring out of employees. In this context, the need to obtain an official licence, a statutory maximum hiring-out term of 18 months and the principle of equal treatment/equal pay, whereby since 1 April 2017 there is only limited scope to deviate from the equal pay requirement, must be observed. From the tenth month of being hired out at the latest, the temporary employee is entitled to the same remuneration that the hirer pays a comparable permanent employee (unless an industry-wide collective bargaining agreement is in place).

Section 1 (3) of the German Temporary Employment Act provides for exceptions that exclude most of the regulatory provisions of the German Temporary Employment Act. If such an exception exists, temporary hiring out of employees is permissible without a temporary agency licence and, in particular, without observing a maximum time period or the principle of equal treatment.

This privilege applies in particular in the event of “occasional temporary hiring out of employees” under section 1 (3) no. 2a of the German Temporary Employment Act.

5. What qualifies as “occasional temporary hiring out of employees”?

Occasional temporary hiring out of employees under section (3) no. 2a of the German Temporary Employment Act is interpreted very narrowly in the legal literature.

One requirement is that the respective employees are not taken on and/or employed for the purpose of being hired out temporarily. They must agree to being hired out, however. In practice, a supplementary agreement to the employment contract is often concluded.

Another requirement is that the hiring out may only take place “occasionally”. The reason for the hiring out must be unforeseen and occur at short notice. Section 1 (3) no. 2a of the German Temporary Employment Act cannot be applied in the event of pre-planned hiring out (e.g. on the basis of a framework agreement or an informal agreement between the hiring company and user company). The number of instances of hiring out must be low, both in relation to the user company and to the employee concerned. There are no precise guide values; there is no case law on the subject. The duration of the temporary hiring out must also be taken into account as part of the assessment. In the literature, a period of three months is cited as a guide value (see: Schüren/Haman, section 1, German Temporary Employment Act, margin no. 677a ff.).

6. Is the principle of equal treatment effectively waived in the event of occasional hiring out of employees?

On a webpage hosted by the German Federal Ministry of Labor and Social Affairs (BMAS) on “Informationen zu Corona” (Information on coronavirus), the following explanations can be found under “Antworten zu Arbeitsrecht und Arbeitsschutz” (Answers on labor law and occupational health and safety) regarding the occasional temporary hiring out of employees (available at:

<https://www.bmas.de/DE/Schwerpunkte/Informationen-Corona/Fragen-und-Antworten/Fragen-und-Antworten-corona/corona-virus-arbeitsrechtliche-auswirkungen.html>):

“Unter welchen Bedingungen kann ich meine Arbeitnehmer an ein anderes Unternehmen zur Arbeitsleistung überlassen?” (Under what conditions may I hire out my employees to another company for the performance of work?)

If you do not engage in temporary hiring out of employees, but, due to the current coronavirus crisis, intend to hire out employees occasionally to other companies that have an urgent need for manpower (for example, in agricultural production and processing, food logistics or health care), you may do so exceptionally without a temporary employment licence under the German Temporary Employment Act. This is subject to the conditions that

- the affected employees have agreed to being hired out,
- you do not intend to act permanently as a hirer, and
- each individual case of hiring out is limited in time to the current crisis.

The legal regulation in this respect can be found in section 1 (3) no. 2a, German Temporary Employment Act. In view of the particular importance of such assignments, it is appropriate and in accordance

with the principle of equal treatment under Union law for the assigned employees to be put on an equal footing with the permanent employees in the establishment of assignment.

As a rule, the temporary hiring out of employees to construction companies for activities that are usually performed by workers is not permitted. The German Construction Industry Regulation explains what a construction company is.”

The statement made by the BMAS about application of the principle of equal treatment is legally contestable, unless it is interpreted as being simply a non-binding “recommendation”. If and to the extent that the requirements of section 1 (3) no. 2a of the German Temporary Employment Act are fulfilled, the essential provisions of the German Temporary Employment Act, including the principle of equal treatment under section 8 of the German Temporary Employment Act, are not applicable (see section 1 (3), introductory sentence, German Temporary Employment Act). However, it is possible that an attempt may be made to read the principle of equal treatment contained in the EU Directive on Temporary Agency Work into the German Temporary Employment Act to achieve an interpretation that is consistent with European law. The legal situation is currently unclear in this respect. Application of the principle of equal treatment is therefore a legally safer option, but is at the same time more expensive and organisationally more demanding.

7. What risks are there?

On the basis of these principles, the coronavirus-related utilisation of the ability to occasionally hire out employees on a temporary basis pursuant to section 1 (3) no. 2 of the German Temporary Employment Act certainly entails risks since it is not possible to draw a clear line between privileged temporary hiring out of employees and temporary hiring out of employees with a licence requirement in this regard. That remains true during the coronavirus crisis. If the requirements for occasional temporary hiring out of employees are not met, any temporary hiring out of employees is illegal – with all the associated consequences (fictitious employment relationships with the user company, fines, etc.).

In summary, without in-depth examination and legal advice it is not advisable for companies to engage in the (apparently licence-free) temporary hiring out of employees within the framework of an occasional temporary hiring out of employees.

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