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German Parliament passes new legislation on labor leasing: Significant restrictions to the deployment of temporary workers and other third-party-personnel

After years of debate German Parliament has passed the much disputed reform of Germany's labor leasing laws on 21 October 2016. The new law is expected to come into force on 1 April 2017, three months later than initially expected. While the new law is still subject to Federal Council approval we do not anticipate further changes or delays. In the following, we summarize the most relevant changes for companies providing or deploying temporary workers or other third-party-personnel.

Maximum leasing period

Labor leasing is understood as the provision of temporary workers from one legal entity ("**Staffing Company**") to another workforce ("**User Company**") whereby the temporary workers are employed with the Staffing Company but work under the supervision and control of the User Company during the labor leasing assignment. While the law clearly states that labor leasing must be temporary, it does not define a maximum period for same. This will change with the new law: As of 1 April 2017 labor leasing is limited to a maximum period of 18 months. This 18 months period does not apply to the overall duration for which a User Company uses temporary workers but to the workers' individual labor leasing assignment.

Consequently, "rotation models" will remain possible under the new law, i.e. arrangements where a temporary worker is replaced by a different temporary worker after the 18 months period for that particular worker has lapsed. It will therefore remain possible to operate with temporary workforce on a permanent basis. Until recently this was heavily disputed among the labor courts as some courts demanded that permanent positions must be reserved for permanent staff whereas temporary workers can only be utilized to cover temporary staffing needs.

Regarding "intra-group labor leasing", i.e. the provision of temporary workers among companies of the same group, it was in dispute whether a particular worker can be assigned to several group companies after another. This was also heavily discussed in the legislative process. Yet, the new law does not address this, let alone impose any limitations on this practice which is understood as implied permission to continue with same.

Due to the 18 months maximum, however, it will no longer be possible to assign the same temporary worker to the same User Company for more than 18 consecutive months. Rather, once the 18 months maximum period has been exhausted, a cooling-off period of three months will need to be observed before the

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particular worker can be assigned to the same User Company again. This applies both to intra-group labor leasing and to labor leasing among non-group companies.

Deviations from the 18 months limitations are possible where collective bargaining agreements ("**CBA**s") expressly provide for longer or shorter leasing periods. Even companies that are not subject to collective bargaining can make use of CBA-level maximum periods, provided they have a works council and replicate the relevant CBA-provisions in a works agreement with same. In addition deviations from the 18 months limitation will be possible where CBAs contain "escape clauses" which expressly allow that works agreements provide for deviating maximum leasing periods. Companies can make use of such escape clauses as long they are within the CBA's industry scope but regardless of whether the CBA is legally binding on them. If, however, the escape clause allows deviations only within a certain range (e.g. leasing periods of between 1-3 years) such range will need to be observed in the works agreement. Where no such range exists the absolute maximum leasing period that can be imposed by way of works agreement is capped at 24 months.

Mandatory equal pay after nine months

The new law will put an end to the option to suspend the principle of equal pay permanently if so agreed in a CBA. Once the new law is in force, this will only be possible for the first nine months of an assignment. As soon as an assignment exceeds nine months, the principle of equal pay will apply so that the temporary worker will have to be paid equally to comparable permanent staff of the User Company. An exception applies only where the employment relationship with the temporary worker is subject to a special CBA that provides for gradual adjustment of temporary workers' compensation to equal pay. In this case the principle of equal pay will have to be observed after a total period of 15 months.

Misclassified labor leasing

The new law will also have an effect on "misclassified labor leasing", i.e. arrangements that are by subject-matter labor leasing but are labeled as contracts for works or services, be it by mistake or even intentionally.

The current law does not impose any specific sanctions for engaging in misclassified labor leasing. Rather, if an arrangement is re-qualified as labor leasing sanctions only apply to the extent that the arrangement does not meet the requirements of labor leasing. As one of the requirements is having a license to engage in labor leasing (save for intra-group leasing where a license is not required), this risk can be mitigated by obtaining a license as a matter of precaution, i.e. in the event that a contract for work or services is re-qualified as labor leasing. The fact that a license exists will protect companies from fines for engaging in labor leasing without a respective license. This applies even if the only purpose of obtaining the license is to avoid fines in case of re-qualification. This has been confirmed by the Federal Labor Court only last July (judgment dated 12 July 2016, ref. no. 9 AZR 352/15). This case law which refers to the current law will not last long as the new law will expressly provide that labor leasing licenses will not protect against fines in misclassification scenarios.

In addition, the new law will require to label any contracts that are labor leasing by subject-matter as "labor leasing contracts". Misclassifying a labor leasing contract

as a contract for works or services will be subject to fines of up to EUR 30,000 upon re-qualification. This change alone will make it riskier to label a contract for works or services as labor leasing, be it inadvertently or even intentionally.

Sanctions for illegal labor leasing

Non-compliance with labor leasing requirements by (i) not obtaining a labor leasing license (where a license is required), (ii) misclassifying labor leasing as contracts for works or services and (iii) not observing the 18 months maximum leasing period will be subject to the same three sanctions: (1) ineligibility for any future new or renewed license, (2) fines of up to EUR 30,000 and (3) deemed employment of the temporary workers with the User Company. The last sanction, i.e. deemed employment, can be avoided if the temporary worker elects to remain employed with the original employer, i.e. the Staffing Company, by written declaration. Such declaration can only be made one month after the beginning of the (unlawful) labor leasing assignment or, in case the maximum leasing period is exceed, one month after the maximum term has lapsed. Before submitting to the User or Staffing Company, however, the declaration will need to be presented to the local employment agency.

This obligation to present the declaration to the employment agency has been introduced just before the legislation was put to vote in Parliament. Its purpose is to avoid that temporary workers sign a respective declaration before or at the beginning of their assignment and thereby eliminate any risks of deemed employment regardless of whether the labor leasing requirements are observed or not. In addition, the requirement to present the declaration to authorities in advance shall make it impossible to fabricate backdated declarations in case risks of unlawful labor leasing arise and claim that the declarations were made within the applicable deadline. As a side effect of this requirement, however, employment agencies will be alerted to potential non-compliance with the labor leasing laws by any declaration presented to them.

Impact on collective labor law

The legislator used this opportunity of a law reform to codify a number of information and notification rights vis-à-vis works councils that have been developed by case law over the years. In addition, the new law confirms that temporary workers will count towards thresholds for codetermination, both with regard to works councils and the supervisory board.

A further change relates to the use of temporary workers in case of strikes. Once the new law is in force, it will no longer be possible for companies to continue their business with temporary workers while the permanent staff is on strike. Non-compliance with this requirement may be sanctioned with fines of up to EUR 500,000.

Call for action even before 1 April 2017

The fact that the start date of the new law has been pushed back from 1 January to 1 April 2017 will give companies three more months to adjust to the new changes for using third-party-personnel. While the new law will contain transitional provisions, many requirements will need to be observed as of day one. This applies, for example, to the abovementioned requirement to label contracts on the

provision of temporary workers as "labor leasing". In addition, such contracts will need to specify the name of the temporary worker(s) to be assigned to the User Company in advance. Otherwise, the three abovementioned sanctions will apply, i.e. ineligibility for new or renewed licenses, fines and deemed employment with the User Company. In light of these consequences companies will have to take action to update existing contracts and templates in time and not just once the new law is in force.

The fact that misclassified labor leasing is now subject to much more rigid sanctions should provide an incentive to switch from "contracts for works or services" to "labor leasing" contracts if in doubt rather than taking misclassification risks.

Further, situations may arise where labor leasing will no longer be an option due to the 18 months maximum leasing period. This could occur for example where companies need the know-how of a particular expert for a long term project. In these cases companies will need to look for alternatives to secure that know-how in a lawful arrangement outside temporary work. In this context we recommend the "river bridge model" to ensure compliance with the applicable requirements for the deployment of third-party-personnel.

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