

## Labor and Employment Client Service Group

From Bryan Cave, Hamburg

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## NEWSLETTER

## GERMAN LABOR LAW & HR 2/2012

### Employing Temporary Workers

#### Supplier and User of Temporary Work need to be aware of the “Revolving Door Clause”

##### I. General

In German companies roughly one million temporary workers hired through agencies are currently employed.

The attractiveness of temporary labor results from the general framework conditions which the German labor and employment law provides for and which are generally seen from a company's perspective as too inflexible. In order to minimize the risks related to labor and employment law which are connected to the varying demand of work force, large and medium sized companies are – more or less as an evasive maneuver - increasingly making use of temporary labor. Furthermore, the reduction of labor costs constitutes an important reason for using temporary labor.

##### II. Equal-pay-Principle and Deviation through Collective Agreement

In general, the equal-pay-principle established in the German Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz (AÜG)*) is supposed to prevent the employment of temporary workers for the purpose of reducing personnel costs. According to this, temporary workers are to be granted, in principle, the same working conditions as comparable employees of the company using temporary

labor. A deviation from this principle, however, is possible, if a collective agreement (*Tarifvertrag*) is applicable to the temporary labor. As a result temporary workers can be employed under worse conditions as comparable regular employees of the company using temporary labor. Temporary labor is traditionally organized quite weakly as regards trade unions. However, the collective agreements for this industry apply through reference clauses in employment contracts to a very large extent. Through this exception from the equal-pay-principle it is possible to purposefully use temporary labor against the intention of the German government.

### **III. “Revolving Door Effect”**

Against the background of the legal situation mentioned above companies have reduced their regular work force and re-employed the dismissed employees either through an external or an affiliated company specifically established for this purpose in their former area of activity under worse conditions as temporary workers. This effect is called the “Revolving Door Effect”. New hires were also treated in the same manner. In order to reduce personnel costs employees were no longer employed directly but through agencies. This is not a phenomenon solely related to large companies as this was also quite interesting for small and medium sized companies. In particular, industries which are extremely labor intensive (e.g. facility management) or which are subject to strong collective agreements are attracted by this.

### **IV. “Revolving Door Clause”**

An “outsourcing” to temporary workers, which were previously regular employees of the company is considered an abuse of the regulations of the German Temporary Employment Act, if the temporary worker is executing the same tasks as before when he was a regular employee.

In order to prevent the undesirable “revolving door effect”, the German Temporary Labor Act was amended in 2011. Section 3 para 1 no. 3 sentence 4 and section 9 no. 2 para 4 of the act now contain a “revolving door clause”. This clause is supposed to prevent employers from pushing regular employees into temporary work in order to employ them under worse conditions as external temporary workers.

Pursuant to this provision employees shall always be subject to the equal-pay-principle, if the employee was employed during the last 6 months before entering service as a temporary worker by the company or another group company affiliated with the company. Accordingly, it is not possible for this group of employees to work around the equal-pay-principle by making the employment subject to a collective agreement. Therefore, in case an employee is re-employed by its former employer or a company affiliated with its former employer, the employee shall be subject to the same working conditions as a comparable regular employee of the employer.

### **V. Assessment of the statutory “Revolving Door Clause”**

Through the new “Revolving Door Clause” temporary work as a measure to instantly reduce personnel costs becomes less attractive by preventing an outsourcing solely for re-employing the out-

sourced employee as a temporary worker. The clause does not have any effect on normal outsourcing.

## VI. Practical Relevance of the “Revolving Door Clause”

Both supplier and user of temporary work should be aware of the “Revolving Door Clause”.

In case temporary workers in violation of the “Revolving Door Clause” are employed under worse conditions as comparable regular employees, the temporary workers may claim additional salary payments. Such payment claims amount to the difference between the salary actually paid and the salary of the comparable regular employee. For the supplier of temporary work this also has the effect of higher social security contributions.

However, also for the user of temporary work this bears risks since section 28 e para 2 German Social Insurance Code IV, (*Sozialgesetzbuch, SGB IV*) provides for a subsidiary liability of the user of temporary work as a guarantor for social security contributions. Such subsidiary liability is already triggered in case the supplier has been notified by the competent authority and the reminder period has lapsed. In practice, the liability of the user of temporary work can therefore already become relevant if the supplying company is not willing to fulfill its payment obligations. Accordingly, it is recommendable for both supplier and user of temporary work to take precautionary measures.

### Practical Consequences:

- Both the supplier and the user of temporary work should duly examine whether the respective temporary worker has been recently employed by the user or an affiliated company of the user. In case of non-transparent company structures this examination can be problematic and time consuming.
- In particular in view of the “Revolving Door Clause”, supplier of temporary work should at an early stage request information whether the respective person has been employed within the last 6 months by the prospective user of temporary work or an affiliated company.
- User of temporary work should review all employed temporary workers and examine within all company groups whether temporary workers have been employed within the last 6 months as regular employees.
- Finally, agreements between the supplier and the user of temporary work could be recommendable to safeguard the interests of the user. The supplier, for example, could guarantee that the temporary workers have not been employed within the group structure of the prospective user within the last six months.

Should you have any questions concerning this newsletter or other matters, please contact us at the following addresses:

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