1 November 2011

Employment Law Newsletter No 1

EU AGENCY WORKERS DIRECTIVE

Implementation in the UK and Germany

HENGELER MUELLER

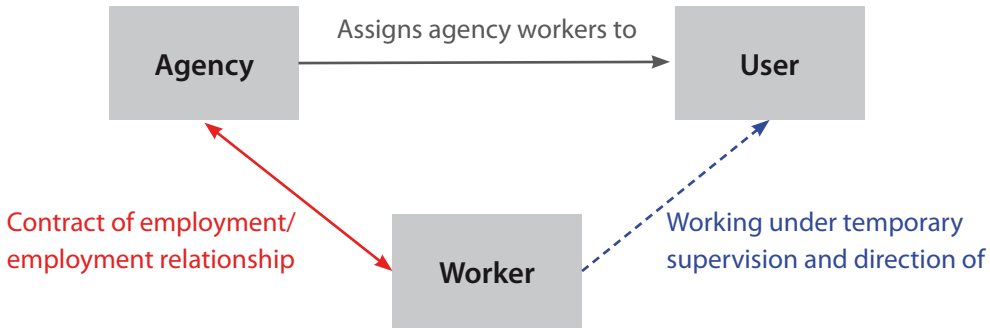
SLAUGHTER AND MAY

Introduction

It is estimated that there are over 3 million agency workers (in German: *Leiharbeitnehmer*) working within the EU, and the majority are based in either the UK or Germany. Although both countries have significant numbers of agency workers, the use, status, legal rights and working conditions of those agency workers varies considerably. In Germany (and many other EU countries), agency workers are employees of the agency, and in principle enjoy the right to pay which is comparable with that of permanent employees. In contrast, in the UK, agency workers are usually not protected as employees, and there is little (or no) concept of agency workers and permanent employees enjoying comparable terms. This means that the Agency Workers Directive (AWD) has had a markedly different impact in these two jurisdictions. This briefing illustrates the contrasting effect of the AWD, by summarising its implementation in the UK and Germany. It also highlights some key commercial implications and areas of uncertainty which will be important for businesses to consider.

The Agency Workers Directive

The AWD was concluded in 2008, with a deadline of 5 December 2011 for implementation. It seeks to govern the classic tripartite relationship which exists in relation to agency work:



The AWD contains the following key provisions:

- agency workers must receive the **same basic working and employment conditions** as direct recruits to the user undertaking. This includes conditions related to working hours, holidays and pay;
- agency workers must be **informed about any vacant posts** in the user undertaking;

- agency workers must have access to collective facilities, including any canteen, childcare facilities and transport services, on the same basis as employees of the user undertaking, unless a difference in treatment is objectively justified;
- Member States must take steps to improve agency workers' **access to training**, both in the agency and the user undertaking;
- agency workers must count in the **thresholds for forming worker representative bodies** within the agency. Member States may provide that the same applies in the user undertaking (in which case, Member States are not obliged to provide for agency workers to also count in the thresholds for these purposes within the agency). In addition, **information about the use of agency workers** must be provided by the user undertaking to such representative bodies;
- Member States may **derogate** from the right to the same basic working and employment conditions, after consulting their social partners; and
- Member States must provide appropriate sanctions and remedies for breach of the AWD.

The UK

Current position

There are reported to be over 1.1 million agency workers in the UK. The usual position is that agency workers are not 'employees' of either the agency or the user undertaking (which is known as the "hirer"). Agency workers do nonetheless enjoy limited rights, including in relation to working time, holidays, the national minimum wage, statutory sickness and maternity pay, and protection from discrimination. They will also benefit from new auto-enrolment pension rights which come into force in 2012 (for which the agency will be primarily responsible). There is no current right for agency workers to enjoy terms and conditions which are comparable with the hirer's employees.

The implementation of the AWD in the UK has been controversial. In May 2008, shortly before the Directive was concluded, the UK social partners (the Confederation of British Industry (CBI) and the Trades Union Congress (TUC)), after protracted negotiations, agreed that agency workers must complete a 12-week qualifying period on assignment with the hirer before the right to equal treatment in basic working and employment conditions arises. More recently, the regulations which will implement the AWD (the Agency Workers Regulations 2010 (AWR)) have been under threat of repeal or amendment due to concerns about their effect on the UK's fragile economy. Despite this controversy, the AWR came into force on 1 October 2011.

New law: the AWR

Who do the rights apply to?

Under the AWR, "temporary work agency" covers those who supply agency workers to hirers, whether or not this is their sole or principal economic activity, and whether or not it is done for profit. "Hirers" are those persons to whom such workers are supplied to work temporarily for and under the supervision of that person. The definition of "agency worker" requires the individual (i) to have a contract of employment, or otherwise of personal service, with the agency, and (ii) to work "temporarily" for and under the direction of a hirer, although the concept of "temporarily" is not defined. The definition will include the classic form of agency worker, and arguably also includes employees who are seconded from one company to another. It does however exclude those individuals who are genuinely self-employed and in business on their own account, those working on managed service contracts for the hirer, and those who find permanent employment with the hirer through an employment agency.

What are the new rights and obligations?

- **Basic working and employment conditions**: The agency worker's right is to the same basic working and employment conditions which would apply if they were recruited directly by the hirer. If there are no comparable employees to the agency worker engaged by the hirer then the right does not arise. Equally, the right is deemed to be satisfied if there is a 'comparable employee' of the hirer who has the same basic employment terms and conditions as the agency worker and these terms are ordinarily included in the contracts issued to employees in the comparator's position. Finally, the right is subject to a twelve week qualifying period.

  For these purposes the basic working and employment conditions are the terms and conditions relating to pay, working time, night work, rest periods, rest breaks and annual leave. The AWR defines "pay" for these purposes to include any sum payable in connection with employment, including salary, fees, commission and holiday pay, whether payable under the contract or otherwise. It is linked closely to pay for actual work done, so includes bonuses if (and to the extent that) they are attributable to the individual's performance but excludes bonuses which are paid to encourage loyalty or long service (see the box "Areas of uncertainty" for further details). It also excludes sums which are intended to reflect the more permanent nature of an employment relationship, such as occupational sick pay, maternity pay, redundancy pay and pensions.

- **Information about vacancies**: The AWR require the hirer to inform the agency worker of any "relevant" vacant posts with the hirer during their assignment to give them the same opportunity as a comparable worker to find permanent employment with the hirer. The guidance on the Regulations issued by the Department of Business, Innovation and Skills (BIS) indicates that the right would not apply in the context of a genuine 'headcount freeze', where posts are ring-fenced for the redeployment of other potentially redundant employees within the hirer. This right applies from day one of the assignment, and is not (unlike the right to equal treatment in basic working and employment conditions) subject to the 12 week qualifying period.
- **Access to collective facilities**: Agency workers also have the right to be treated no less favourably than a comparable worker of the hirer in relation to access to collective facilities and amenities, unless the less favourable treatment can be objectively justified. This right also applies from day one of the assignment.
- **Access to vocational training**: This is not covered by the AWR. The UK Government has taken the view that the existing rights of agency workers in relation to existing training initiatives are sufficient to comply with the AWD.
- **Information and consultation**: Agency workers must count in the thresholds for forming worker representative bodies in the agency (but not the hirer). In addition, the hirer must provide information about the use of agency workers (specifically, the number of agency workers, the parts of the undertaking in which they are working, and the type of work they are carrying out) to employee representative bodies. This information must be provided, most significantly, as part of statutory collective consultation where an employer proposes 20 or more redundancies, and as part of the information which must be provided to employee representatives on a TUPE transfer.
- **Derogations**: There are two important derogations in the AWR which affect the right to equal treatment in basic working and employment conditions.
  - For the purposes of assessing whether the agency worker has completed a *12 week qualifying period* on assignment with the same hirer, the AWR contain detailed rules about the types of absence or break in an assignment which may 'pause' or 'stop the clock' for these purposes.
  - Where the agency worker has a *permanent contract of employment with the agency*, the AWR include specific provisions on the content and operation of that contract, the obligation of the agency to pay the worker between assignments and to seek out suitable assignments. Accordingly there is a derogation from the right to equal treatment in respect to 'pay', but the right to other conditions in relation to working time and holidays etc. will continue to apply.

- **Sanctions and remedies**: The AWR however include anti-avoidance measures which are intended to catch a series of assignments where the 'most likely explanation' for the structure is an intention to prevent the right to equal treatment in basic working and employment terms arising. The AWR also provide that agency workers can only contract out of their rights under the AWR in specific circumstances (in the same way as for a compromise agreement, which would typically be used on termination of employment).

  The agency worker may request information from the agency or the hirer if he suspects a breach of his rights under the AWR. He may also bring a claim against the agency or the hirer for breach of their obligations. The agency worker may recover compensation, which is uncapped but based on his loss. An additional award of up to £5,000 may be made for breach of the anti-avoidance provisions.

Germany

Current position

According to statistics of the Federal Labour Agency (*Agentur für Arbeit*), in 2010, an average number of 776,000 temporary agency workers were active in Germany. In contrast to the UK, the legal situation of agency workers is traditionally rather densely regulated by the German Act on Temporary Agency Work of 1972 (*Arbeitnehmerüberlassungsgesetz* - AÜG), as last amended in 2011. In particular, the Act provides for clearly defined contractual relationships: agency workers have a regular employment relationship with the temporary work agency (*Verleiher*), while the hirer (*Entleiher*) has a service agreement with the temporary work agency. As agency workers have regular employment relationships with temporary work agencies, termination protection and other labour law provisions are applicable to them.

Moreover, AÜG contains an equal treatment provision which requires that for the duration of the supply of an agency worker to a hirer, terms of employment (i.e. working conditions and pay) must be granted which are no worse than those of comparable employees of the hirer. Exceptions are permissible if agreed in a collective bargaining agreement. Widespread use had been made of this exception, in particular by collective bargaining agreements with the Christian labour union CGZP which provided for lesser conditions for agency workers, until such collective bargaining agreements were held void by the Federal Labour Court (*Bundesarbeitsgericht*) in December 2010 because of the union's lack of capacity to conclude them. More moderate agreements with other unions remain in place.

Under AÜG, temporary work agencies are required to obtain a permit from the Federal Labour Agency. Supply of agency workers by, and hiring from, a temporary work agency without permit is an administrative offence (*Ordnungswidrigkeit*) punishable by a fine of up to EUR 25,000. In addition, as a rule, a hirer who hires an agency worker from an agency without a permit, or whose permit ends or is revoked during the term of the supply, is deemed to have an employment relationship with the agency worker. As a consequence, among others, (a) notice periods and termination protection become applicable between the hirer and the worker, and (b) the hirer becomes liable for social security contributions and tax withholdings due on the worker's pay. There are certain exceptions from the permit requirement, which have been changed by the 2011 amendments to the AÜG.

The 2011 amendments to the German Act on Temporary Agency Work

Given the protections which already existed under AÜG, the revisions to the law brought about by the laws implementing the AWD in Germany are less groundbreaking than in the UK, but will, nevertheless, have a considerable impact on the use of temporary agency workers in Germany. With one exception, all amendments take effect on 1 December 2011.

The most prominent amendments are the following:

- **Extension of the scope of the AÜG and the permit requirement**: The amendments to AÜG extend the scope of the law and the permit requirement to entities supplying temporary workers without making a profit. Furthermore, the supply of workers between group companies will only be exempt from the permit requirement if such workers are neither engaged nor employed for the purpose of being supplied to another company (*nicht zum Zwecke der Überlassung eingestellt und beschäftigt*). Between non-group companies, it is moreover required that the supplying entity only supplies temporary workers occasionally (*gelegentlich*). The changes particularly impact the widespread practice of larger groups of companies putting in place staffing entities (*Konzernpersonalführungsgesellschaften*), where one group company has the sole purpose of engaging and supplying employees to other group companies at cost price. Such staffing entities will in the future require a permit.
- **Restriction to temporary (as opposed to permanent) agency work**: The amendments explicitly limit agency work to scenarios where the supply of agency workers is 'temporary'. This suggests that the concept of agency work no longer includes the quasi-permanent supply of an employee to another entity. However, the

law does not define when agency work will (no longer) be considered 'temporary', nor does it lay down specific consequences of non-compliance.

- **Extension of the equal treatment concept**: Until now, the equal treatment concept included general working conditions and the notion of equal pay. The exception for agency workers who were unemployed prior to their supply to the hirer is eliminated by the revised law. Moreover, from December, hirers will be required to inform agency workers about any vacancies that the hirer may have. Agency workers must also be treated no less favourable than comparable workers in the same establishment (Betrieb) with regard to access to collective facilities and services (*Gemeinschaftseinrichtungen oder -dienste*), unless different treatment is justified on objective grounds. Collective facilities and services are defined to include, in particular, child care, communal catering (*Gemeinschaftsverpflegung*) and transportation (*Beförderungsmittel*). With respect to equal pay, it still remains permissible to deviate on the basis of a collective bargaining agreement applicable at the agency.
- **Exclusion of revolving-door effect**: Previously, a practice had developed involving German companies who terminated and re-engaged some employees as agency workers, with less pay and worse conditions. Therefore, with effect from 29 April 2011, if an agency worker was employed by the hirer (or a group company of the hirer) within the six months preceding their supply to the hirer as an agency worker, the worker must be granted the same working conditions and pay as comparable workers of the hirer, irrespective of less favourable conditions prescribed by collective bargaining agreement.

Commercial implications

In both Germany and the UK it is widely anticipated that the implementation of the AWD will result in additional financial and administrative burdens for companies which use agency workers. In addition, there is concern in the UK that the drafting of the AWR is wide enough to catch the supply of employees from one group company to another, whether by secondment or otherwise, which is, indeed, covered by the AÜG in Germany.

In the UK, some companies may seek to avoid the application of the AWR by hiring agency workers on short-term assignments which do not exceed the 12 week qualifying period under the AWR (subject to the anti-avoidance provisions). Alternatively, companies could seek to use only agency workers who have a permanent contract of employment with the agency (although in the UK this is likely to remain much less common than in Germany).

One particular area of concern is the right of equal access to collective facilities, as it covers childcare, which is particularly rare and expensive for small children in both Germany and the UK. In the UK, the BIS guidance makes it clear that agency workers will not be given enhanced access rights, so for example if access to a crèche involves joining a waiting list, the agency worker must join that list. The position is not so clear in Germany, where there is concern that courts might decide that in light of the mostly short length of service of agency workers, a system such as a waiting list would render their equal access claims worthless, and therefore companies should be required to increase capacities of facilities and services in order to be able to accommodate agency workers.

Areas of uncertainty

In both Germany and the UK there are a number of "grey areas", where the full effect of the implementation of the AWD is unclear, pending the development of case law. Companies using agency workers should consider negotiating suitable provisions (including indemnity protection) in their agreements with agencies in order to allocate the risks and liabilities associated with these grey areas. They include:

- How should bonuses be properly categorised under the AWR? Many bonus schemes are multi-faceted and take into account both individual performance and other factors, including overall corporate performance. The BIS guidance suggests that such a 'hybrid' scheme would be within the scope of 'pay' for the purposes of the AWR, and only if it is possible to identify the part of the bonus linked solely to corporate performance will that amount not need to be paid to an agency worker. In Germany, similar issues are likely to arise in the context of the equal pay concept.
- How far will the right to information about vacancies be interpreted by courts and tribunals? Both the AWD and the AWR, and similarly the statement of the bill (*Gesetzesbegründung*) accompanying the latest amendments to the AÜG, provide that the right exists in order to give agency workers the same opportunity as other workers within the hirer to find permanent employment. Therefore, if a hirer makes information about vacancies available to agency workers, but has a policy of not recruiting agency workers (for example, to avoid the additional 'temp-to-perm' fees which may be payable to the agency in these circumstances), would agency workers be able to claim that their rights have been infringed?
- How widely will the concept of 'comparable employee/worker' be interpreted, for the purposes of the right to equal treatment in basic working and employment conditions, the right of access to collective facilities and the right to information about vacancies? The concepts are defined slightly differently under the AWR for each purpose, and have different effects.
- Will companies be able to temporarily supply workers to other group companies in Germany without holding a permit under AÜG, if it was foreseeable at the time of employment that these persons may at some point be supplied in that way?
- How will the term "temporary" be defined under AÜG (and the AWR), and what could be the consequences of the restriction of agency work to temporary supply of workers to hirers under AÜG in Germany? In case of a quasi-permanent supply, could a hirer be deemed to have an employment relationship with the agency worker?

General Best Friends News:

The Best Friends Employment Law Workshop met in Milan on 21 October 2011 at Bonelli Erede Pappalardo to discuss Management Board Remuneration.

Further information

If you would like to find out more about any of the issues raised in this briefing, or require advice in relation to a specific matter, please contact:

HENGELER MUELLER

Dr Hans-Joachim Liebers (Partner, Frankfurt)
Email: joachim.liebers@hengeler.com
Tel: +49 69 17095 154

Dr Christian Hoefs (Partner, Frankfurt)
Email: christian.hoefs@hengeler.com
Tel: +49 69 17095 643

SLAUGHTER AND MAY

Roland Doughty (Partner, London)
Email: roland.doughty@slaughterandmay.com
Tel: + 44 207 090 5422

Charles Cameron (Partner, London)
Email: charles.cameron@slaughterandmay.com
Tel: + 44 207 090 5086