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BILL ON THE LEGAL POSITION OF TEMPORARY WORKERS

18 March 2013, the Danish Ministry of Employment launched a public consultation on a bill regarding the legal position of temporary agency workers stationed by temporary-work agencies. The bill transposes into Danish law, with considerable delay, the European Parliament's and Counsel's Directive 2008/104/EC of 19 November 2008 on temporary agency work. The bill is expected to enter into force 1 July 2013

The Contents of the Bill
Until now, temporary agency work has not been separately regulated in Denmark. The purpose of the bill is to ensure certain rights for temporary agency workers, inter alia with regards to remuneration, holiday etc., minimally corresponding to what would have applied, had they been employed in the user undertaking.

The Scope – who is protected?
The bill only covers employees who are employed in a temporary-work agency and who are stationed at a user undertaking in Denmark to carry out work.

Thus, the bill does not cover employees who are directly employed in temporary maternity leave vacancies or other types of temporary employment in a user undertaking.

The law applies to both Danish and foreign temporary-work agencies when such companies are stationing temporary workers at undertakings in Denmark.

The reasoning behind the bill applying to both Danish *and* foreign temporary-work agencies is to ensure that foreign temporary agency workers are not carrying out work in Denmark on worse working terms than Danish temporary agency workers, thus discouraging social dumping.

The Obligations of Temporary-work Agencies – the equal Treatment Principle
The law will imply that temporary work agencies, which are not covered by a collective agreement, will have to comply with an equal treatment principle.

The equal treatment principle is based on the idea that temporary agency workers are entitled to minimally the same terms with regards to significant working and employment issues as what would have applied, had the temporary agency worker been directly employed by the user undertaking to carry out the same tasks.

The following employment terms are governed by the equal treatment principle:

- The duration of the working time
- Overtime

- Breaks
- Periods of rests
- Night work
- Holiday
- Public holidays

Remuneration
There are already minimum rights in Danish legislation with regards to the duration of working time, breaks, periods of rest, night work and holidays. Thus, the bill will not introduce substantial changes for a temporary agency worker regarding these matters.

Nevertheless, Danish law does not contain any general rules on overtime, public holidays and remuneration.

However, there are a few provisions in specific pieces of Danish employment legislation which provide employees who are protected under the law with certain minimum rights with regards to e.g. remuneration.

For example, it has in case law been established that temporary agency workers are not salaried employees and are thus not protected under the Danish Salaried Employees Act. The bill does not imply that temporary agency workers will be considered as salaried employees as a consequence of the equal treatment principle, but will lead to the temporary agency worker having the same rights as a salaried employee in the areas which are governed by the equal treatment principle.

As the equal treatment principle applies to remuneration, this will among other things lead to the provisions in the Danish Salaried Employees Act regarding wages during illness applying to temporary agency workers.

If the user undertaking's collective agreements or general customs ensure the user undertaking's employees better rights than the minimum rights, this will apply equally to the temporary agency workers stationed at the user undertaking. If there for example is a right to a sixth week of holiday according to the user undertaking's collective agreement, then the temporary agency worker will also be entitled to a sixth week of holiday. The provisions on remuneration which are applicable under the user undertaking's collective agreement will likewise be essential when determining the temporary agency workers' minimum remuneration. This also applies to bonuses and overtime pay.

However, in this connection, it is a condition that the temporary agency worker carries out work which is protected under the collective agreement. Likewise, the equal treatment principle does not lead to a temporary agency worker being protected with regards to other matters regulated by the collective agreement, but only with regards to employment terms under the bill. For example, the temporary agency worker will not be able to demand a hearing under industrial dispute procedures in the case of a dispute.

As it will not always be clear to a temporary agency worker which employment terms the temporary agency worker is entitled to under the equal treatment principle, it is proposed that the temporary agency worker, if he so requests, is entitled to be informed which employment terms apply during a stationing at a user undertaking.

Furthermore, the bill proposes a prohibition against circumvention of the equal treatment principle, e.g. by successive stationing of a temporary agency worker to the same user undertaking without reasoned arguments therefore. It will be considered a reasoned argument if the temporary agency worker is not completely finished with the work he was stationed to carry out at the user undertaking.

However, it will be considered an unreasoned argument if the successive stationing for example takes place because an uninterrupted employment at the user undertaking would lead to higher wages or pension for the temporary agency worker.

The temporary-work agencies are not covered by the equal treatment principle if the agency has entered into a collective agreement concluded by the most representative labour market parties in Denmark.

The condition that it must be the most representative labour market parties has been implemented in order to avoid social dumping and to ensure that temporary agency workers, who cannot invoke the equal treatment principle, instead hold adequate rights from collective agreements.

Which labour parties may be qualified as the most representative depends on a concrete assessment, which inter alia includes the number of members in the concerned employee organisation as well as how many of the members are covered by a collective agreement.

Prohibition against Clauses
Furthermore, the law will ensure that clauses, which directly prohibit or in reality prevent that a temporary agency worker after the end of a stationing at a user undertaking will become an employee at the user undertaking, will be void.

By contrast, a clause stating that the temporary-work agency must be paid an excessively large amount if the temporary agency worker is employed at the user undertaking after the stationing may not be invoked.

Arrangements, which solely imply that the temporary-work agency is entitled to an appropriate amount of money for services provided to user undertakings in relation to the stationing, education and hiring of the temporary agency workers, are as a starting point valid and may be invoked by the temporary-work agency.

A temporary-work agency may not demand direct payment from employees in consideration for ensuring that they may be employed at a user undertaking or for concluding a working agreement with the user undertaking after the employee’s stationing at the user undertaking.

A violation of the prohibition may imply a fine for the temporary work agency.

Information on available Positions
The bill proposes that the user undertakings must inform the temporary agency worker about any available positions in the user undertaking in order that the temporary agency workers will have the opportunity to become permanently employed on par with the other employees at the user undertaking.

This obligation applies regardless of whether the user undertaking is obligated to inform employees who are directly employed in the user undertaking about available positions and regardless of which type of position is available.

The information on available positions may be provided by way of a general notification at a suitable place at the user undertaking. Notification of any available positions may also be given to temporary agency workers by other means, e.g. on the user undertaking's intranet.

The Access to collective Facilities
The bill proposes that temporary agency workers must be given access to collective facilities and benefits at the user undertaking on par with other employees who are directly employed at the user undertaking, unless there are reasoned arguments for discriminating against the temporary agency workers.

In addition to benefits such as cafeteria, childcare and transportation facilities, other benefits such as massage, fruit, access to exercise rooms or the like are examples of facilities and benefits which the temporary agency workers shall be given access to in line with the user undertaking's own employees.

Reasoned arguments for discriminating could for example be that it may be disproportionately expensive or may imply significant practical difficulties to provide access to the facilities or benefits to the temporary agency workers.

Employee Representatives
It is proposed that the employee representatives in the user undertaking in accordance with any collective agreement or the Employee (Provision of Information and Consultation) Act, which applies when the undertaking has at least 35 employees, must receive appropriate information on the user undertaking's use of temporary agency workers.

Appropriate information on the user undertaking's use of temporary agency workers implies that the information must be relevant for the employee representative at the user undertaking.

Sanctions
The user undertaking and the temporary-work agency may be fined if they act in violation of the law.

For example, a temporary-work agency may be fined if it requires payment from the employee in return for ensuring that the employee in question is employed after having been stationed at the user

undertaking. A user undertaking may be fined if it does not comply with the obligation to provide information on the user undertaking's use of temporary agency workers in accordance with the rules on information and hearing of employees.

Our Assessment
Directive 2008/104/EC of 19 November 2008 on temporary agency work should have been implemented into Danish legislation 5 December 2011 at the latest, and therefore, the bill has been long awaited.

The reason behind the long process is that it has been difficult to find a solution which takes into account the collective agreements concluded by the temporary-work agencies and also handles the risk of social dumping.

Therefore, the bill implies higher administrative and financial obligations for user undertakings and temporary-work agencies, which are not a party to a collective agreement. In light of the above, they will not have the same freedom to lay down the terms for their temporary agency workers

We will of course follow the reading of the bill and follow up when the bill is adopted.

[Bill regarding the legal position of temporary agency workers stationed by temporary-work agencies, launched for consultation 18 March 2013]

If you have any questions or require additional information on the bill, please contact Partner Nicolai Hesgaard (nhe@mwblaw.dk).

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