Employee Leasing and Work Contracts in 2017 – The Federal Labor Court Shows Practitioners "How it is done"!

2017 – EXTERNAL PERSONNEL IN FOCUS

In April of 2017 probably the most significant employment law reform project of the year will come into effect with the "Act to Amend the Temporary Employment Act and other Statutes". As the tougher rules of the game (cf. **Client Newsletter 06/2016**) began to cause more and more acute headaches for practitioners, the Federal Labor Court published one of its rare judgments at the beginning of the year on the **key issue of the differentiation** between employee leasing (*Arbeitnehmerüberlassung* = "AÜ") and work and service contracts (*Work-/Dienstvertrag* = "WV/DV"), a decision which had more or less been outside of the radar screen until now but whose importance for practitioners can hardly be emphasized enough.

The simple fact of the matter is that the Federal Labor Court - perhaps also in light of the tougher rules as of April, 2017 – wants to correct the widely-held **misconceptions** that particularly exist concerning this key differentiation and give businesses valuable information on how to master the extensive risks related to the deployment of external personnel.

THE FEDERAL LABOR COURT ON MISCONCEPTIONS RELATING TO THE DIFFERENTIATION

The ruling (judgment of September 20, 2016 – 9 AZR 735/16) concerned the well-known situation in which the company of deployment outsources a certain production or service process - there it was visitor service in a museum - and has it performed by a third-party with the latter's own personnel.

So far, so good: The Federal Labor Court had already emphasized in the case of actions concerning external personnel that claimed there was an employment relationship with the company of deployment due to allegedly illegal employee leasing, that such deployments are also possible on the basis of work contracts/service contracts. The governing issue for the differentiation is thus establishing in which business the external personal is integrated and whose instructions they are obliged to follow. This follows from explicit agreements and the practical execution of contract, whereby the latter case is supposed to prevail in the event of a conflict.

So far, so (not) good: For this was where the widely-held misconceptions began, as many businesses - as well as the state labor court as the lower court of instance - did not take the wording of the contract seriously enough when they invoked the "ultimately governing performance of contract".

Of another opinion - now - the Federal Labor Court! But that is not all, as a look at the two core aspects shows:

- First, the Federal Labor Court emphasizes the significance of the **contract as drafted**, whereby it also applies "soft" factors such as individual wording ("provided personnel" in addition to "hard" factors such as contractual rights and duties (authority to give instructions, mandatory attendance at training and briefings, etc.) to make the differentiation.
- Secondly, a discrepancy to this in the **execution of performance** is only supposed to be relevant if it "*was included under the will of the parties who were involved in the conclusion of the contractual agreement*", which also requires that *„the <u>individuals authorized to conclude the contract are aware of</u> the contractual practice that deviates from the wording of the contract and at least <u>condone</u> it.“*

This second point contains possible conflicts, for the Federal Labor Court affirms the previously mentioned rulings and emphasizes the autonomy of contracting parties in an extremely radical manner inasmuch as the practical execution of contract only serves as an interpretative aid to establish the content of a contract and requires the knowledge/approval of the "individuals authorized to conclude the contract"(!).

HOW IT WORKS: CONTRACTOR COMPLIANCE

For the preventive strategies required in business practice, this means placing an even greater emphasis on "**diligence in contract modeling**" that concentrates even more on individual details, including "hard" and "soft" factors (particularly provisions on the right to issue instructions, points of contact). However, the "**performance of the contract**" must not be forgotten. Even if the Federal Labor Court sets down conditions that would allow for the inclusion of deviating practice, this is primarily a defensive argument "after the horse has already bolted“. A look at the parallel rulings of the social and criminal courts alone shows that they do not so much focus on the concepts of the freedom to contract as on de facto integration. Supplementary measures such as **training, audits or whistleblower systems, etc.** will remain absolutely essential in the future.

To the extent the increased rules as of 2017 regulating employee leasing allows us to expect increases in the flight into work contracts, which, however, will not exactly be less risky, given the loss of the so-called "parachute" (cf. **Client Newsletter 02/2016**), comprehensive contractor compliance will continue to be necessary.

You can find further information on our **homepage**, in our recently published **book** „Contractor Compliance“ and other **seminars** on the topic of "The Temporary Employment Act and (Misqualified) Work Contracts 2017“ in Frankfurt (16.03.17) and Düsseldorf (01.06.17).

We would be very happy to include you on the list of subscribers to our free newsletter. Just send us a brief **Mail** with your request.

CONTACTS

Dr. Thilo Mahnhold
t.mahnhold@justem.de

Dr. Daniel Klösel
d.kloesel@justem.de

www.justem.de

© JUSTEM Rechtsanwälte Neue Mainzer Str. 26 60311 Frankfurt am Main www.justem.de