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EU RULING ON THE TEMPORARY AGENCY WORK DIRECTIVE

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Introduction

The subject of a recent decision from the European Court of Justice (the "Court") was the interpretation of the Temporary Agency Work Directive (the "Directive") in relation to whether a temporary agency worker should be recognized as a permanent employee of the user undertaking to which the temporary agency worker was assigned. In its decision, the Court focused on when successive assignments to the same user undertaking could be considered a circumvention of the rules in the Directive.

The Decision

In the case C-681/18 dated 14 October 2020 (the "Decision"), a worker in Italy was assigned as a temporary agency worker to a user undertaking for the period between 3 March 2014 and 30 November 2016 by a total of eight successive temporary agency contracts and 17 extensions.

In 2017, the worker claimed that he was permanently employed by the user undertaking. The employee argued that the engagement had become permanent and that the temporary contracts were invalid. Finally, the worker claimed that the national rules in Italy violated the Directive as they did not set out any limitation on the number of successive assignments.

The decision that the Court had to make was whether the Directive precluded a national legislation in a member state which (i) does not limit the number of successive assignments that the same temporary agency worker may carry out with the same user undertaking; and (ii) does not make the lawfulness of the use of temporary agency work subject to the precondition that it must be justified by technical, production, organization or replacement-related reasons.

The Court found that the number of assignments alone does not determine if the worker is to be recognized as a permanent employee. The Court held that under the Directive, member states must take appropriate measures to prevent misuse of the rules in the Directive and to prevent successive assignments designed to circumvent the rules of the Directive. The Court also held that the Directive did not require member states to limit the number of successive assignments of the same worker to the same user undertaking or to adopt any specific measures.

The Court also stressed that monitoring mechanisms must be in place so as to ensure that any successive assignments of the same worker to the same undertaking is not in fact a concealed permanent employment relationship.

The Court stated that if successive assignments of the same worker with the same user undertaking result in a period of service which is longer than what may reasonably be regarded as "temporary", this is an indication of misuse and circumvention of the Directive.

The Effect on Danish Companies engaging with Temporary Workers

The main purpose of the Directive is to protect temporary workers and ensure equal treatment with other employees. The Danish implementation of the Directive, Act no. 595 of 12

June 2013 (in Danish: *Vikarloven*), is in line with this and secures that temporary workers are generally employed on the same terms as comparable permanent workers.

The general take-away from the Decision is that the Directive still allows for the flexibility of the employer engaging with temporary workers, but also outlines that temporary workers cannot be used for filling out permanent roles. From a Danish perspective, this is not a new interpretation of the obligations towards temporary workers, and as such the Decision does not call for any changes in the Danish regulation or Danish practice related to temporary workers.

However, as the Decision especially highlights successive assignments of the same worker as an indication of circumvention, companies should exercise caution when receiving the same temporary worker through successive assignments, unless special technical or productional reasons for such successive assignments exist.

No guidelines have been made as to the extent of the term "temporary". In general, however, a temporary engagement may be extended in case of unpredictable circumstances, such as absence of permanent employees due to illness, death, leave etc., or if specific assignments are terminated or initiated.

If the business does not control the circumstances and has not had any possibility to plan, the use (and repeated use) of temporary workers is in principle justified, e.g. if the leave of another employee is extended or a project is delayed. Whether or not successive assignments are justified will still, however, be a matter of a specific assessment on a case-by-case basis. If no objective justifications exist, it is a risk that the temporary worker may be considered a permanent employee. In this event, the employee will continue their work indefinitely until terminated in accordance with the applicable national legislation regarding employees, normally the Danish Salaried Employees Act.

Any business acting as a temporary agency should have very strict internal procedures in place in order to avoid that successive assignments take place without due reasons.

The Effect of the Decision on M&A Transactions

In relation to M&A transactions, it is always important to assess the risks of a potential target company regarding the use of temporary workers (and other workers not categorized and treated as employees from a legal perspective). Any company's use of temporary agency workers must be examined, and the risk that any of the temporary agency workers assigned to the company may be classified as permanent employees of the company must be assessed.

The assessment must include, inter alia, the circumstances mentioned above, e.g. the number of successive assignments of the same worker and extensions of the contract in order to determine the duration of service of each worker with the specific user undertaking. This assessment and these risks were relevant before the Decision, and so the Decision does not present any new risks.

If the setup with a temporary worker in a company is to be considered an actual employment setup, the setup will be covered by Danish employee protective legislation (including the mandatory rules in the Danish Salaried Employees Act and the Danish Holiday Act). Among other things, this means that the temporary worker is to be considered an employee by the Danish tax authorities, thus the company will be, and continue to be, obligated to withhold income tax, and could be held liable for payment of taxes in the event that the temporary worker has not paid the relevant taxes themselves. In the more severe cases, the company may risk a fine by the Danish Central Customs and Tax Administration. Such fine is usually of an amount up to twice the amount of the "tax evasion" amount, i.e. the tax which the company should have paid if the temporary worker was treated as a permanent employee.

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