

AGENCY EMPLOYMENT – CONTRACTS BASED ON UNSTABLE WORK

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Contracts based on unstable work represent instruments that are frequently used in organizing work process, sometimes being also labeled as contracts constituting the so-called precarious labor relations. Legal regulations usually allow their existence but at the same time they try to eliminate or at least to reduce negative effects that these relations may have on the social position of individuals. Precarious labor relations usually include fixed-term contract of employment, part time employment and agency employment (temporary labor relations). In the Czech labor legislation precarious labor relations could typically include, in my opinion, agency employment and partly fixed-term contract of employment (because of lack of social perspective) as part time employment has elements of risk if it is agreed for a fixed term. If part time employment is agreed for an indefinite period the risky nature of such employment is decreased and social protection of the employee is increased. However, in the Czech labor legislation there is one more type of employment, namely, employment based on an agreement to perform work where the protection of social position is very low and the perspective of work involvement is very small, too. The next part of my paper will deal with agency employment which is, in my opinion, a classic example of contracts based on unstable work.

When regarding various legal forms of participation in work process, agency employment – or in other words temporary work relations – is one of those work relations that are very risky as far as the social position and the social protection of employees are concerned. Their risky nature is mainly due to the fact that they are mostly short-term relations aimed at meeting irregular requirements of users of services provided by employment agencies that do not give their participants, particularly employees, almost any perspective of career promotion and qualification increase. On the other hand, it cannot be said that labor relations of this type are useless. Their existence is based on flexibility of requirements of work process and temporary labor relations help to meet partial, immediate and one bout requirements of performing concrete work without burdening the employer with additional duties concerning care of the labor, i.e. care of the employee. The proportion of temporary (agency) employment in Europe in the past ten years increased very much but its proportion in the total number of employments still remains low.¹ The existence of agency employment and the reasons why it is sought have been studied by a number of researches. For example, the employees say most frequently that they are not able to get another (i.e. stable) work but reasons for agency employment also include the possibility of getting work experience, flexibility of work and others.² On the other hand, the users of agency employment say that it enables them to increase flexibility of skills and, consequently, flexibility of labor and that it prepares

¹ The highest proportion of agency employment is in the Netherlands (about 4%), Luxembourg (3.5%), France (2.7%) and England (2.1%); on the other hand, in Italy it is only 0.2% of workers. Cited according to Blanpain, R., *European Labor Law*, KLUWER LAW INTERNATIONAL, Hague, 2006, p. 420.

² For more details see *Survey of 700 Agency Workers*, Deloitte & Touche Bakkenist, 2000, cited according to Pennel, D., *The Development of Temporary Agency Work in Europe*, accessible on 11. 2. 2010 at http://www.apps.cz/public/konference/2008-10-02/presentation/PresentationDenisPennel_soubory/frame.htm

employees for regular work and in particular that it helps them to suppress negative effects of fluctuation.³

At the European level, a considerable attention is paid to agency employment and it is also subject to a number of European policies:

- social policy and employment policy including flexicurity and strategy of employment increase
- internal market policy
- competition policy

Also, a number of both general and special EU directives may be applied to agency employment.

- Council Directive No 91/383/EEC which complements measures for improvement of safety and health protection at work for employees in fixed-term employment or temporary employment,
- Council Directive No 1991/533/EEC on duties of the employer to inform the employee about the terms of employment contract or employment,
- European Parliament and Council Directive No 2008/104/EC of 19 November 2008 on agency employment and others.

Agency employment was also dealt with by the International Labor Organization in the 1997 C 181 Private Employment Agencies Convention.

In the Czech legal regulation, agency employment may have a form of two labor relations, namely, employment or legal relation based on an agreement to perform work. The special nature of these labor relations is derived from the employer who may be an artificial legal person or a natural person brokering employment under license. Agency employment is regulated in Sections 308 and 309 of Act No 262/2006 Coll., Labor Code as amended (hereinafter “Labor Code”). The position of work agency as an employer of a special nature is regulated by the Employment Act No 435/2004 Coll. as amended.⁴

Employment or legal relation based on an agreement to perform work between an employee and an agency comes into existence with a duty that the employment contract or the agreement to perform work must include, in addition to general covenants prescribed for a respective legal act, a stipulation (Section 2, Sub-Section 5, Labor Code) by which:

- the employment agency undertakes to arrange for its employee a temporary performance of work for another employer (hereinafter “user) according to a contract of employment or an agreement to perform work and
- the employee undertakes to perform the work according to the user’s instructions.

³ For more details see CIETT – “Orchestrating the Evolution of Private Employment Agencies” – 2000; cited according to Pennel, D., The Development of Temporary Agency Work in Europe, accessible on 11. 2. 2010 at http://www.apps.cz/public/konference/2008-10-02/presentation/PresentationDenisPennel_soubory/frame.htm

⁴ In the Czech Republic, in 2009, there were about 2,150 work agencies and through them about 230,709 foreigners were employed (excluding employees who resident in the territory of the Czech Republic, cited on 14. 2. 2010, accessible at <http://www.mpsv.cz/cs/8279>.

The essence of agency employment is that the employer – the employment agency – makes use of its employees for meeting mainly short-term requirements of other persons. In other words, the specific nature of these labor relations lies in that the employer does not exercise his dispositional power but delegates it to another person – the user. This activity (procuring employees for another person) is also the “object of business” of employment agencies. This characteristic actually defies the general nature of labor relations found in the work process which takes place in the firm of the employer himself.

The condition for the possibility to temporarily assign an employee of the employment agency to the user is an agreement on temporary assignment of an employee of the employment agency made between the employment agency and the user. The nature of this agreement is a mixed one - commercial and labor; the agreement is concluded pursuant to Section 261, Commercial Code, but its content requirements are set in Section 308, Labor Code. The duty of the employee of the employment agency to perform work for the user arises on the basis of a unilateral written direction of the employment agency, the direction having the nature of a legal act by which the duty is established.

The special nature of agency employment also affects the position of the employee of the employment agency in the sense that stability of his work participation is uncertain. It is of course possible to presuppose that the employment agency will employ the employee for an indefinite period but as no special regulation and restriction of fixed-term employment applies to agency employment we may expect that employments negotiated by the employment agency will predominantly be fixed-term employments. Agreements to perform work will also be certainly made for a definite period as on top of that no special protection or preference to an indefinite period applies to these agreements. Therefore the legal regulation tries at least to protect the position of the employee of the employment agency when he is temporarily assigned to the user:

- **by establishing the principle of non-discrimination.** Pursuant to Section 309, Sub-Section 5, Labor Code, both the agency and the user are obliged to ensure that work and wage conditions of the temporarily assigned employee are not worse than conditions of a comparable employee of the user. A temporarily assigned employee of the agency has the right to request equal treatment to be ensured by the agency if the work and wage conditions are worse than those of a comparable employee of the user. The employment agency has the same duty if it itself finds out in any other way (than at the request of the employee) an unfavorable differentiation in these conditions. In such a case the temporarily assigned employee of the employment agency has also the right to have his claims satisfied which arose because of the worse work and wage conditions (e.g. make-up pay); the duty to satisfy these claims is imposed on the employment agency (i.e. the employer). Prohibition of discrimination is also set in Section 309, Sub-Section 7, Labor Code, and applies to measures that might be negotiated for protection of the user's property between the user and the employee of the employment agency. These measures must not be less favorable for the employee than the legal regulation included in Sections 252-256, Labor Code – liability for deficit and liability for loss of an object entrusted against a written acknowledgment,
- **by limiting the period of duration of temporary assignment.** Pursuant to Section 309, Sub-Section 6, Labor Code, the employment agency cannot assign

the same employee for performance of work for the same user for a period longer than 12 successive months. This limitation is not absolute; the period may be exceeded if the employee of the employment agency asks for that, or if it is work for a period of substituting an employee of the user who is on maternal or parental leave,

- **by establishing the duty of the user to inform** the temporarily assigned employees of the employment agency about the offer of vacancies – Section 279, Para 3, Labor Code,
- **by establishing the scope of agency employment in the collective agreement.** This protection is aimed rather at employees of the user against possible competition from the part of temporary employees of the employment agency. It is regulated by Section 309, Sub-Section 8, Labor Code, pursuant to which the scope of agency employment may be restricted by the collective agreement.

As mentioned above the employer – the employment agency – has a duty to compensate the employee temporarily assigned to the user for the damage he suffered when performing work tasks or in direct connection with it (we mentioned that this duty does not pass to the user). However, Section 309, Sub-Section 4, Labor Code, establishes the right of recourse for the employment agency against the user the essence of which is the right of the employment agency to claim from the user remuneration of what the agency paid to its temporarily assigned employee due to damage liability. This provision is a directory one and allows the possibility of another agreement between the employment agency and the user.

From the analysis of the Czech legal regulation made above it is apparent that principles established in EU documents have basically been respected – especially the principle of equal treatment and the prohibition of discrimination expressed in the institute of comparable employee. Despite that it is necessary to emphasize that the position of the temporary employee is not of the same quality as the position of the permanent employee of the user. The main drawback that can be seen and that is reflected in the social position of the temporary employee is lack of a perspective, a small or no attention paid to the increasing of qualification and a small or no chance of career promotion.