

“The most recent legislative changes and their impact on interest by enterprises in agency employment: what is next in human resource management?”

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The most recent legislative changes and their impact on interest by enterprises in agency employment: what is next in human resource management?

Abstract

The authors present current issues related to agency employment and the labor market, in particular human resource management, in the Slovak Republic. They describe and analyze the Slovak legal framework of agency employment, the key players involved, and their rights and duties. Legal interpretation of these issues is supported by current statistical data that point to a decline in the number of employees interested in this type of employment. The legislative process resulted in enactment of more than 20 key amendments covering agency employment, with a significant impact on human resource management in manufacturing enterprises and flexibility in labor relations. The current challenge for enterprises is to find a legal alternative to agency employment as it was used in the past because the amendments have made agency employment more costly than standard employment.

Key words: human resource management, labor market, agency employment, labor law.

JEL Classification: J53, M12, O15.

Introduction

The Slovak labor market has been characterized by a gradual increase in the number of private companies providing employment services – seeking jobs for the unemployed and/or adequately preparing them (requalification) for available job positions. The amended Act No. 5/2004 Coll. on Employment Services led to an even stronger trend in this direction when a new institute of so-called agency (temporary) employment was introduced.¹ The institution of temporary employment in labor law as a form of *employee leasing* was to provide a possible method for companies to flexibly respond to changes in their manufacturing processes and labor market demand by means of regulation of HR capacities², thus increasing a company's adaptability to economic cycles. With regards to the process of job optimization as an ongoing process in each enterprise (employers), agency employment and its capacity to save employers a significant amount of cost (related largely to termination of work contracts due to organizational changes and severance pay) that represent a principal component of overall labor costs as well as the possibility to achieve a more flexible employment model. This is a significant measure applicable in the decision-making process of enterprises and other organizations also described by international authors, Cetin and Ozer (2009), Zaušková and Madleňák (2014) or Novotná and Volek (2014).

The need to improve the adaptability of enterprises via agency employment grows during changing economic cycles and market instabilities, meaning that agency work may be a short-term economic cycle indicator. According to Žuřová (2014), one of the basic reasons for using agency employment in the Slovak Republic has been lower labor costs, greater market competitiveness and/or reduction of risks related to direct employment of workers, as well as some other factors. Formally, agency employment and work agreements outside employment relationships² were to become one of the fundamental instruments for employers to gain more labor market flexibility and at the same time to be an instrument for employees to harmonize their working lives and private lives.

Despite the fact that it has been a progressively developing segment of the European labor market that should be beneficial to a certain degree both to employers (enterprises) and employees, agency employment in the Slovak Republic became a problematic part of labor law protection of employees. According to Pichrt (2013), a decade of actual experience in the area of HR planning and company management shows that agency employment in Slovakia was converted into a place for employee exploitation and has been a fundamental reason for the increase in precarious work, characterized by an unstable working environment, low remuneration and inadequate working conditions. Thus, the unwillingness of employees to work within the framework of such an employment arrangement can be considered a secondary consequence of the

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¹ Agency employment originated in the US in the 1920s and 1930s due to growing demand for seasonal workers. The first temporary employment agencies (Manpower, Kelly Services) were founded in the US in years 1945-1947.

² Work agreements outside traditional employment relationships represent a specific form of labor relations based on which it is possible to carry out dependent work. Compared to employment contracts they are characterized by a lower degree of labor law rights for employees and poorer legal protection (shorter notice period, employment contract termination without specification of the grounds, no holidays, etc.).

situation. Poor motivation and high turnover of employees began to cause a lack of accessible (and also qualified) labor that has subsequently been reflected in diminished opportunities for employers to achieve a flexible manufacturing process in the event of sudden changes. This negative trend is mentioned by Machova et al. (2015), Novotný and Hrazdilová (2011).

In the recent period, therefore, legislators prepared two essential amendments¹ to the current legal provisions that have had a significant impact on enterprises' use of agency employment. The legislative changes would halt weakening of protection of agency employees' rights on one hand and on the other make agency work more attractive.

Goals and research methodology

The main goal of this article is to assess and analyze the impact of recent legislative changes to the interest in the use of agency employment in enterprises in Slovakia. Partial aim is to analyze the direction possibilities of personnel management in the companies. First of all, we assembled factual material from primary and secondary sources. The primary source was the research project VEGA No. 1/0423/14 "The Labor Code and its possible variations", funded by the Ministry of Education, Science and Research of the Slovak Republic and the scientific literature was the secondary source. Methodological procedure was subordinated to the set targets. The critical deep analysis of the legal situation, logical and cognitive methods as well as descriptive statistics were used during the process. The text part of the article is complemented by the graphs and tables created in MS Office 2013.

1. Agency employment in the Slovak Republic – legal and social framework

Act No. 311/2001 Coll. of the Labor Code, as amended (hereinafter referred to as the "Labor Code"), and Act No. 5/2004 Coll. on Employment Services, as amended (hereinafter referred to as the "Act on Employment Services") are the two primary laws. The Labor Code primarily addresses the fundamental legal framework of agency employment, regulating working conditions, legal relations between the temporary employment agency and the employee or the temporary employment agency and the user of a worker's services ("user employer" hereinafter). The Act on Employment Services defines basic conditions necessary for the establishment of a temporary employment agency, determines the licence procedure and introduces obligations of the temporary employment agency in relation to state authorities.

¹ Act No. 96/2013 Coll., effective as of 1 May 2013, and Act No. 14/2015 Coll., effective as of 1 March 2015.

In the context of labor relations, if an employee is assigned temporarily to work for another employer, the legal position of the employer is *de facto* executed not only by the actual employer of the worker or the HR agency but also by the user employer. The labor law situation of an employee assigned to work temporarily with another employer is a legal relationship to which there are three parties; therefore it depends on the will of the three parties. In addition to the employer and the employee, the third party to this legal relationship is the entity that temporarily hires the employee, i.e. the user of the worker's labor.

The relationships between a temporary employment agency and a user employer are regulated not only by labor laws (the Labor Code provides for only some definitions of the content of a temporary work agreement concluded between the employer and the user employer that are related to a temporary assignment, such as personal details of a temporarily-assigned worker, type of work, period of temporary assignment, working conditions) but, as a rule, also by commercial law. The Labor Code does not explicitly regulate contracts between two employers stipulating specific commercial conditions. Therefore, as Dolobáč states (2014), in this situation we may assume that one of the applicable provisions of the Commercial Code on contracts would apply².

During the period of temporary assignment, the user employer, on behalf of the temporary employment agency, assigns tasks and gives instructions to the assigned worker and is obligated to provide favorable working conditions, safety and health at work and working conditions in a manner that is equivalent to what the user employer provides to its regular employees. The user employer, however, may not be engaged in legal action towards the assigned worker. During the time of the worker's temporary assignment the user employer pays the wages and travel compensation to the employee of the temporary employment agency that had assigned the employee. Working conditions and wages, including employment conditions for temporarily-assigned workers, must be as favorable as a working conditions and wages provided to a comparable regular employee of the user employer (in terms of working hours, rest, leaves, wage conditions, safety and health at work, etc.).

It is fair to say that before 1 March 2015 laws and regulations applied to agency employment could be described as relatively liberal; particularly when other labor law institutes such as fixed-term contracts³

² Act No. 513/1991 Coll. of the Commercial Code, as amended.

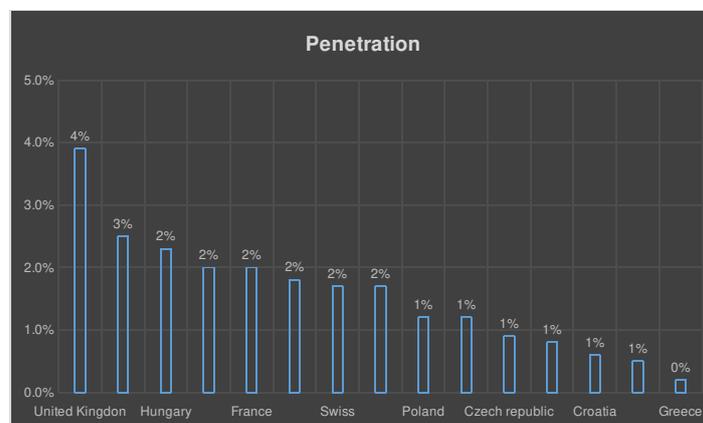
³ According to Section 48 of the Labor Code a fixed-term employment contract may be concluded for a maximum period of two years. A fixed-term contract may be extended or renewed at most two times within the period of two years (the law also stipulates exceptions, for example for seasonal work or if the employee is covering work for an employee who is temporarily unfit for service or on maternity leave).

(when legal restrictions related to repeated renewals and extensions of fixed term contracts did not apply to agencies and there were instances when agency workers had work contracts for one year as well as for eight years) or responsibility for safety and health at work or secondment of agency workers to business trips insufficiently reflected specific features of agency employment. Clearly, this resulted in several legal disparities and room for speculative – though legal – application of law as well as the use of legal loopholes with the aim to achieve significant savings in personnel costs while maintaining a highly flexible labor force. The condition stated above was manifested mainly through wages paid in the form of travel compensation and fixed-term contracts without specification of the termination date (such negatively-perceived practices of agencies have also been a result of pressure exerted by user employers to achieve a decrease in labor costs of agency

workers). Authors Bencsik, Juhász and Machová (2014), Novotný (2014) among others, have described the above and related issues, particularly regarding the position of women after maternity leave.

2. Agency employment in the Slovak Republic – social framework

The above-stated shortcomings of agency employment in the Slovak Republic and/or its benefits for temporary employment agencies can also be supported by available statistical data. According to the most recent data from the Statistical Office of the Slovak Republic, there are approximately 1100 temporary employment agencies, which is an unusually high number given the overall number of employees in the Slovak Republic (about 2.4 million).



Source: Ciett Economic Report, 2013-2015.

Fig. 1. Average penetration of agency employment in selected countries

The general estimate of the number of agency employees in 2015 is about 49,700 (representing about 2.0-2.5% of the total number of employees in 2015). The Slovak and European statistical data differ significantly, the difference being almost 50% (according to the European multinational statistical data, the average penetration of agency employment in 2013 was about 0.8%).¹ This difference is due to various groups of employees having been included in the calculations related to the studied sample as well as to the increase of agency employment in Slovakia mainly in manufacturing operations in the engineering and electrotechnical industries.

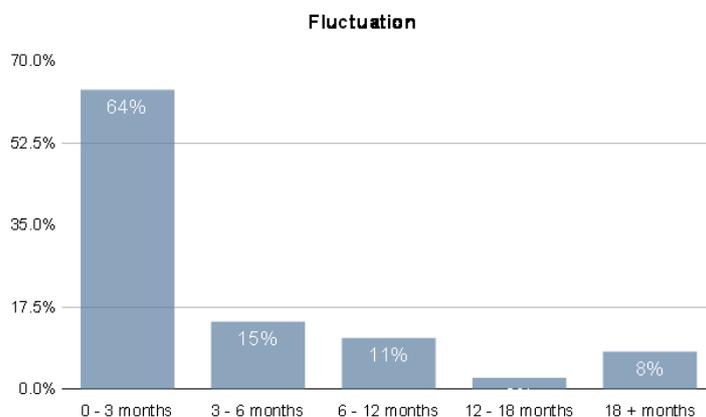
Agency employment is often considered to be an opportunity for first-entry employment and the acquisition of necessary work skills and expertise. This is not Slovakia-specific. This phenomenon can be observed as well in other countries, as noted by

authors Li, Zhang, Yang (2015). Agency work often involves younger age groups. Data on agency work-age groups in Slovakia show that more than two-thirds of agency workers fall in the range of 25-49 years of age. The overwhelming majority (90%) of agency workers have apprentice or secondary education without a secondary school-leaving certificate (maturita), or apprentice or secondary education with a secondary school-leaving certificate. Agency workers with elementary education account for marginal numbers and the share of agency employees with university education has gone up to about 4.5%. Agency work as an element of labor market flexibility and HR management has been concentrated primarily in industries that are sensitive to oscillations in market demand and seasonal impacts. Therefore, the “core” customers of agency work are, by and large, industrial manufacturing operations. The share of agency workers used by the manufacturing industry in Slovakia reached as high as 60% in 2014. This significant level was related to the Slovak economic

¹ The average number of agency workers in the EU for calendar years 2014-2015 in absolute numbers is about 8,736,500 persons (Ciett Economic Report, 2013-2015).

recovery, mainly to the accelerating automotive industry which was one of the key “consumers” of agency workers. Roughly one tenth of the total number of agency workers in the Slovak Republic were assigned to wholesale and retail operations and their

share in the construction industry reached 5-8%. The share of agency workers in the ICT industry has been growing, reaching about 3% in 2014. Health care and social services have also absorbed a relatively large share of agency workers (10%).



Source: Ciett Economic Report, 2013-2015.

Fig. 2. Agency employees' turnover correlated with their temporary assignment period

Agency employment in the Slovak Republic is characterized by a high level of turnover among employees, where almost as many as 60% of agency workers leave their job after the first three months of employment. Clearly, it has been a substantial impediment to the stabilization process for qualified labor from the viewpoint of HR management as well as in planning and manufacturing processes. An analysis of this high labor turnover leads to several conclusions where the current unfavorable state-of-play of mutual relations between agency workers and regular employees, especially differences in remuneration and company benefits, are indicated as one of its basic causes. Providing other-than-wage benefits to agency workers, namely from the social fund (various contributions, such as travel and board compensation, cultural events, and so on) is in motivational terms even more important for agency workers than achieving the same wage as regular employees (20% of agency workers leave their current employer for a higher wage while 80% leave for other-than-financial reasons). Also, other strong reasons that motivate workers to leave are disagreements with their superiors (agency workers often describe having a negative experience, with humiliating treatment by their direct superiors being one example) and/or unsuitable working conditions (inadequate professional growth, no promotion potential, etc.).

3. Practical issues related to agency employment – advantages of “adequate” personnel management

Payment of a portion of wage in travel compensation

An effort made by some temporary work agencies in the Slovak Republic to optimize (minimize) taxation

obligations as well as contributions to social security and health care funds has been an important factor with a “positive” impact on the share of costs of user employers as well as temporary work agencies. For example, these are different remuneration patterns for the same agency workers within the same calendar month, various formal efforts to prevent agency employees from comparing their financial remuneration with that of regular employees (e.g. by means of using one payslip for the wage and another payslip for various additional payments, travel compensation, etc.) – all these are perceived in a negative light. Some agencies' standard practice had been to provide remuneration for agency work not in the form of wages but in the form of so-called compensation for the performance of a business trip outside the employee's regular place of work. This was quite a sophisticated way of lowering the HR costs for temporary work agencies with a direct impact on their profit margin, which made it possible for temporary work agencies to subsequently offer to the user employer the leasing of employees for a lower price (often for dumping prices) as their margin had already been included in the money saved due to the lowering of taxes and contributions to social security and health care funds for a temporary employee.

This “agency wage model” followed from the applicable legislation under which travel compensation is not subject to the same tax obligations and contributions to social security funds that are required for wages paid to regular

employees. For example, a temporary employment agency concludes a work contract with a temporary worker. The contract specifies town A as the place of work performance although it is obvious that the temporary worker will be assigned to work in town B. Despite the fact that a temporary assignment may take several months or years, travel compensation is paid and formal travel reports are submitted by the worker every day, even though in fact there are no

such trips made and the worker reports to the place of work in town B. With the estimated average monthly wage of agency workers in the manufacturing industry being EUR 500-600 (both figures can be found), the difference in the profit margin between temporary work agencies that act in accordance with applicable labor law provisions (so-called fair-play agencies) and the rest (other agencies) may be as high as 30%¹.

Table 1. Chart of typical wage payments to agency workers before the Labor Code amendment

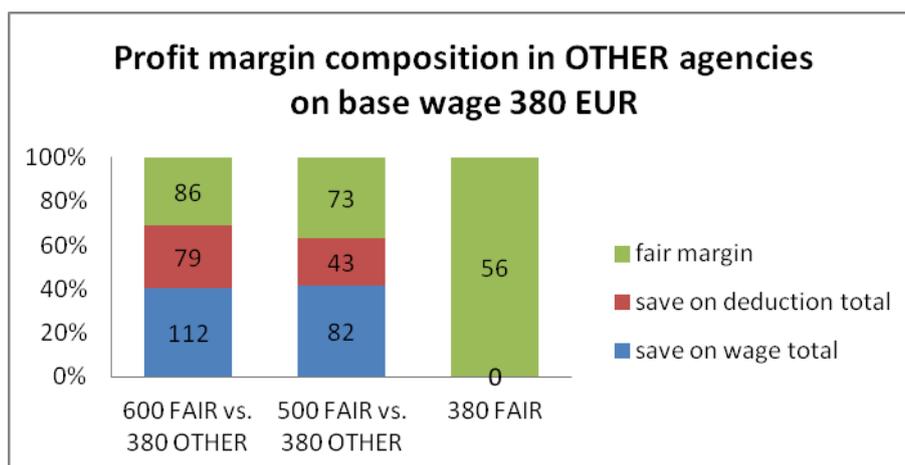
2.4.1	2.4.2	2.4.3 fair-play agencies	2.4.4 others agencies	2.4.5 fair-play agencies	2.4.6 others agencies	2.4.7 fair-play agencies
2.4.8 Employee	2.4.9 Wage brutto (gross)	2.4.10 600	2.4.11 380	2.4.12 500	2.4.13 380	2.4.14 380
	2.4.15 Health care & social security charges	2.4.16 80	2.4.17 51	2.4.18 67	2.4.19 51	2.4.20 51
	2.4.21 Taxable wage	2.4.22 520	2.4.23 329	2.4.24 433	2.4.25 329	2.4.26 329
	2.4.27 Tax base non-taxable part (NČZD)	2.4.28 317	2.4.29 317	2.4.30 317	2.4.31 317	2.4.32 317
	2.4.33 Tax base	2.4.34 203	2.4.35 12	2.4.36 116	2.4.37 12	2.4.38 12
	2.4.39 Income tax	2.4.40 39	2.4.41 2	2.4.42 22	2.4.43 2	2.4.44 2
	2.4.45 Wage (net)	2.4.46 481	2.4.47 327	2.4.48 411	2.4.49 327	2.4.50 327
	2.4.51 Per diem	2.4.52 0	2.4.53 154	2.4.54 0	2.4.55 84	2.4.56 0
2.4.57 Wage net total	2.4.58 481	2.4.59 481	2.4.60 411	2.4.61 411	2.4.62 327	
2.4.63 Employer	2.4.64 Labor costs	2.4.65 600	2.4.66 380	2.4.67 500	2.4.68 380	2.4.69 380
	2.4.70 Personal costs	2.4.71 211	2.4.72 134	2.4.73 176	2.4.74 134	2.4.75 134
	2.4.76 Wage super brutto (gross)	2.4.77 811	2.4.78 514	2.4.79 676	2.4.80 514	2.4.81 514
	2.4.82 Reserves	2.4.83 -	2.4.84 -	2.4.85 -	2.4.86 -	2.4.87 -
	2.4.88 Social fund	2.4.89 4	2.4.90 2	2.4.91 3	2.4.92 2	2.4.93 2
	2.4.94 Food ticket, 20 workdays	2.4.95 46	2.4.96 0	2.4.97 46	2.4.98 0	2.4.99 46
	2.4.100 Per diem	2.4.101 0	2.4.102 154	2.4.103 0	2.4.104 84	2.4.105 0
	2.4.106 Total labour costs (TLC)	2.4.107 861	2.4.108 670	2.4.109 725	2.4.110 600	2.4.111 562
2.4.112 Agency	2.4.113 Margin, % of TLC	2.4.114 10. 0%	2.4.115 41. 3%	2.4.116 10. 0%	2.4.117 32. 9%	2.4.118 10. 0%
	2.4.119 Margin, EUR	2.4.120 86	2.4.121 277	2.4.122 73	2.4.123 198	2.4.124 56
	2.4.125 Personnel leasing costs for client	2.4.126 947	2.4.127 947	2.4.128 798	2.4.129 798	2.4.130 618

Source: Internal material of Adecco; Adecco Policy 2013-2015.

The model of remuneration described above used by some temporary work agencies has had, in principle, two negative effects. Payment of a portion of wage through travel compensation has had an impact on the level of the so-called “assessment base” for calculation of contributions to social security funds, e.g. the pension fund. An employer’s contribution for employees with a minimum wage plus travel compensation is made disproportionately lower for agency employees than for those who are remunerated in a standard way. As a consequence these employees would also have a lower future pension and would not be able to save enough for an average pension under the current pension system. At the same time, the state suffers a significant loss of financial contributions to the system of social security as well as taxes because no taxes or social security contributions are made on travel compensation

(with standard remuneration, these would be paid based on a percentage of wages). According to Adecco Policy 2013-2015, the estimated loss suffered by the state because of agency employment carried out in the manner described above has been about EUR 22 million. At the same time, there has been quite a gap created in the reputations of temporary work agencies; ones that describe themselves as fair-play (standard payment of wages) and ones that are unfair (payment of a portion of wages via travel compensation). This results in subsequent price dumping as part of the competitive environment.

¹ The example below follows from an estimated standard margin of temporary employment agencies of 10% per one employee, the compared sum of EUR 380 is the amount of the minimum wage in the Slovak Republic (the unfair agencies officially pay only the minimum wage to workers, and the difference between that and the agreed “unofficial” sum in the amount of EUR 500-600 is paid in travel compensation).



Source: Internal material, own processing.

Fig. 3. Individual items of profit margin of the “unfair” agencies with wages applied by “fair-play” agencies.

Abuse of fixed-term contracts

Another classic example of agency employment are fixed-term contracts concluded pursuant to Section 48, paragraph 1 of the Labor Code between a temporary employment agency and an employee, according to which the moment of termination is defined as the moment “*of termination of the performance of work with the user employer*”. At the same time, pursuant to Section 58, paragraph 3 of the Labor Code, it was possible to conclude an agreement on temporary assignment between the same entities in which the period of temporary assignment was defined by the same wording and the possibility of early termination of the temporary assignment was also agreed upon¹. Work contracts were then terminated before the agreed period of temporary assignment had lapsed at the moment the user employer was no longer willing to use the temporarily-assigned worker (if the user employer notified the agency that it no longer needed the work of the agency worker, the period of temporary assignment was terminated and so was the fixed-term contract the worker had with the agency, losing employment “overnight”). In this context, an issue that will be further discussed below needs to be mentioned: prior to the lapse of the agreed period, whether it was during the period of a fixed-term contract or a temporary assignment, it was not possible to determine the moment of “regular” termination by lapse of the agreed period of a fixed-term contract prior to the termination of the contract due to no more work orders by the user employer. A formal termination of the work contract was subsequently carried out in the form of a notification

on the termination of work of a temporarily-assigned worker. The notification was prepared by the user employer and sent to the temporary employment agency, which then delivered the notification to the temporary worker, informing about the termination of the work contract. The moment of termination of work by the user employer was then considered to be the above-described “condition” which determined the period of the work contract as well as the period of temporary assignment of an employee and the aim of the mentioned notification delivered by the temporary employment agency was to inform the worker that their work contract had been terminated.

Laws and regulations of the Slovak Republic did not define any time limitations related to the period of a worker’s temporary assignment. The only restriction was concluding of a fixed-term contract, which under Section 48, paragraph 2 of the Labor Code permitted a maximum two-year term. Fixed-term work contracts were allowed to be extended and/or re-negotiated only twice within a period of two years. However, pursuant to Section 48, paragraph 9 of the Labor Code, temporary work agencies were exempt from this restriction defined in Section 48, paragraph 2 of the Labor Code; thus they were not prevented from repeated renewals and renegotiation of the same fixed term contract. In many cases this legal framework and practice resulted in fixed-term contracts and temporary assignments concluded for several years while the worker could not know at any moment under this form of employment when their contract would be terminated; nor did the workers have any way of affecting it.

Along with the issues described above, it has generally been acknowledged that in practice temporary work agencies, instead of making temporary assignment of workers pursuant to the Labor Code, were also “lending” employees under

¹ According to Section 58 of the Labor Code, as part of an agreement on temporary assignment between an employer and an employee, it is possible to agree on the conditions of unilateral termination of an employment contract even before the period of temporary assignment has lapsed.

the cover of business relations. This meant a fictitious provision of service via a legal or natural person who, according to a concluded civil or business relationship (a contract), did not provide leasing of labor but a service defined by results (e.g. cleaning services and the like). However, the real purpose of the contract was to provide workers for an activity that was part of the business activities of a covert user employer.

Summary and conclusion

Amendments to agency employment laws and regulations

Based on these negative labour market experiences amendments were made to laws regulating agency employment, which made conditions for agency work significantly stricter. Also, the flexibility of its use became more limited. It also meant that employers in the manufacturing sector no longer viewed it as very attractive.

The stricter conditions in practice mean, in particular, the introduction of joint responsibility by the user employer for the payment of an equivalent wage to the temporary worker. If the user employer or the temporary employment agency does not pay a temporarily-assigned worker a wage that is at least equivalent to that of what the user employer pays to a comparable regular employee, it is the user employer that is obliged to pay the difference. Other new limitations to temporary employment are the maximum period of temporary assignment of 24 months and that repeated temporary assignments to the same user employer (regardless whether the worker has been assigned by the same agency or another) was reduced to a maximum of four times (whether it is a contract extension or renewal) over a period of 24 months.

If there is a violation of the provisions stipulating the maximum length and conditions for renewals of fixed-term contracts, the work contract between the worker and the employer or the temporary employment agency will be terminated, resulting in conclusion of a contract of indefinite duration between the worker and the user employer. According to the amended Labor Code, during a period of temporary assignment a worker may be seconded to a business trip only by the user employer. The Act on Travel Compensation stipulates that for the purposes of seconding a worker to a business trip, the user employer is deemed to be the employer of the temporarily-assigned employee whose regular workplace is the place of work agreed upon in the contract on temporary assignment.

Because of the negative experiences in the recent past the amended Labor Code further stipulates:

- ◆ a ban on temporary assignment to hazardous work of degree 4 (a high number of hazardous factors in the working environment, e.g. dust, noise, radiation, which could threaten the life or health of a worker);
- ◆ that a temporary assignment is defined as performance of activities which show signs of being of a temporary nature even if the contracting parties have not agreed on a temporary assignment (see the above-described negative trend in how labor was provided by business contract rather than temporary assignment);
- ◆ a ban on temporary assignment of a worker who has already been assigned;
- ◆ a possibility for an employer to make a worker redundant if the worker became redundant in connection with termination of his/her temporary assignment before the period of the fixed-term contract has lapsed (effective as of 1 September 2015);
- ◆ an obligation to keep records of temporarily-assigned workers;
- ◆ the possibility to second a worker to a business trip during his/her temporary assignment only by the user employer and the payment of travel compensation during the period of temporary assignment in accordance with Act No. 283/2002 Coll. on Travel Compensation;
- ◆ a fine in the amount ranging from EUR 5,000 to EUR 100,000 against a temporary employment agency if the agency engages in temporary employment activities without permission in accordance with Act No. 5/2004 Coll. on Employment Services.

What is next in human resource management?

The legislative changes described above clearly lead to significantly less flexibility in labor relations since in the Slovak Republic no legal institute is in place to provide for flexible labor in the event of emergency situations such as a substantial drop in orders and/or their swift upturn. Taking into account the current changes in the area of agency employment as well as recent limitations to work agreements outside employment relationships (introduction of certain labor law claims), it has become significantly more complicated for employers to arrange an optimal manufacturing process. As a consequence, the voice of employers' associations has been growing stronger in demanding yet another amendment of the applicable labour laws with the aim to introduce a new legal institute for flexibility.

At the same time, the recent changes to laws and regulations in the area of labor law protection of workers should be perceived in a positive light as working conditions have substantially improved for temporary workers, which could result in this form of employment becoming more attractive than it previously was.

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