HR:INT

Magnusson International HR Newsletter

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Welcome to HR:INT, Magnusson's monthly newsletter with news within labour and employment law in Denmark, Sweden, Poland and Belarus.

Denmark

The EU Court of Justice Ratified the Implementation of Directive through Collective Agreement

EU Court of Justice ruled that an implementation of Directive 2002/14/EC could take place through a collective agreement and that the Directive should be interpreted as a minimum protection of employees in connection with dismissal. An employee did therefore not succeed in his claim that Article 7 of the Directive implies an enhanced protection against termination of employees' representatives.

In January 2006, claimant was dismissed on the grounds of staff reductions. Subsequently, claimant filed a claim against the employer for compensation for unfair dismissal.

The employer's company had a collective agreement with a trade union by which the company was bound by The Cooperation Agreement between The Danish Employers Confederation (DA) and The Danish Confederation of Trade Unions (LO). The employee himself was a member of The Danish Society of Engineers (IDA), with whom the company did not have a collective agreement.

In spite of the fact that claimant was not a member of LO, claimant was elected member of the works council of the company in 2001. In 2003, DA and LO implemented EU Directive 2002/14/EC, which concerns the right of information and consulting of employees, through an amendment of their then collective agreement.

Claimant submitted that he was entitled to enhanced protection against dismissal according to Article 7 of the Directive.

In connection with the claim filed by claimant, the high court asked a number of preliminary questions to The EU Court of Justice. The questions concerned, among others, the implementation of the Directive into Danish law and the protection force of the Directive towards employees' representatives.

The EU Court of Justice established in the response that an implementation of the Directive may take place through a collective agreement. This applies, even if a number of employees

who are not members of the trade union become covered by the collective agreement.

On the basis of this response, claimant is covered by The Cooperation Agreement between DA and LO, even though claimant is not a member of LO.

Additionally, The EU Court of Justice stated that Article 7 of the Directive should be interpreted as a minimum protection of employees' representatives in case of dismissal and thus not as an enhanced protection.

Consequently, the decisive factor is whether The Cooperation Agreement between DA and LO complies with the minimum protection, what the high court will probably establish.

Conclusion

The implication of the response from The EU Court of Justice is that collective agreements may cover employees outside the trade union. The employees covered by the collective agreement are therefore bound by the implementation of the stipulations by the collective agreement instead of the implementation of the stipulations by the act on information and consulting.

No enhanced protection of members of works councils may be established on the basis of the EU Directive on information and consulting.

Duty of Notification of Foreign Service Providers in Connection with Posting of Workers Extended

On 1 May 2008, a duty for foreign service providers who post employees in Denmark to register a number of details with The Danish Commerce and Companies' Agency for registration in The Register of Foreign Service Providers (the RUT Register) created simultaneously was introduced. The object of the bill is to extend this duty of notification in connection with the delivery of services to Denmark. Additionally, the bill should ensure that the labour market parties and authorities obtain easier contact to foreign service providers.

The bill is a result of an agreement between the government, the Social Democrats, the Socialist Peoples' Party and the Danish Social-Liberal Party on the extension of the RUT Register.

It is believed that the register of foreign companies and employees posted in Denmark does not give an accurate picture of the extent of the employees posted in Denmark, since it is assumed that the registered number is below the actual number.

The grounds for establishing RUT Register was to achieve a better overview of the increasing number of employees and companies in Denmark in order to monitor the compliance with the tax legislation and working environment legislation and to enable the labour market parties to maintain the interests in a better way. The parties agree that a better enforcement of the duty to notify the RUT Register will meet these challenges and simultaneously ensure the compliance of the existing rules on the Danish labour market.

According to the existing rules, foreign companies who post employees in Denmark must register a number of details on the registrable company in connection with the provision of services, cf. 5a (1) of the Danish Act on Posting of Workers. This stipulation does not apply to

independent contractors who do not post employees, but who exercise business activities in Denmark. The bill proposes to extend the application of the law to cover stipulations on the duty of notification for these independent contractors.

According to the existing rules, only the foreign service provider who posts employees has the duty of notification of information to the RUT Register, whereas the bill proposes the introduction of a duty for the service provider to present documentation for the registration with the Danish Commerce and Companies' Agency to the contracting party. If this documentation is not provided within 3 days from the initiation of the delivery of the service, the contracting party is – according to the bill – obliged to notify the Danish Working Environment Authority.

Additionally, the bill proposes to extend the obligations as to the contact person of the registrable company so that the contact person in future is to be named among the persons working in Denmark in connection with the delivery of the service.

Further, it is proposed to give public access to information on place of delivery of the service, e.g. to the labour market parties, in the same way as public access to information on the name, business address, contact details, contact person and trade code of the company, may be given according to the existing rules.

The bill proposes to extend the penalty provisions for failure to comply with the duty of notification to the RUT Register to the abovementioned extensions of the duty of notification to the RUT Register, and it is proposed that the Danish Working Environment Authority monitor the duty of notification to the RUT Register and act as the Danish authority in future.

Conclusion

The bill extends the duty of notification of the Danish Act on Posting of Workers to cover foreign businesses without employees, including among others consultants. Additionally, the bill entails an obligation of the contracting party of certain trades to ensure that the foreign service provider has submitted information to the RUT Register. So far, this duty only applied to the foreign service provider. Further, the information required on contact persons is extended so that the future contact person must be named among the persons working in Denmark in connection with the delivery of the service. Finally, the penalty has been increased from DKK 5,000 to DKK 10,000.

The Danish Working Environment Authority is assigned the responsibility of enforcing the duty of notification of the foreign service providers.

In case the bill is passed, the recipient or poster of posted workers should take note of the extended stipulations.

Sweden

An Employer had not Discriminated Against a Visually Disabled Job Applicant When Not Offering the Applicant the Vacant Position With Reference to Her Functional

Limitation

A severely visually disabled person applied for a vacant job position as a sickness allowance and sickness compensation administrative official at the Swedish Social Insurance Administration (Sw. Försäkringskassan). She was denied employment with reference to her functional limitation. The Labor Court had to decide whether the Swedish Social Insurance Administration had acted with immediate discrimination due to functional limitation by not taking any reasonable supporting and adoptive measures to create a situation for the visually disabled person, which could be comparable to a situation for a person without such disablement. (Ruling from the Swedish Labor Court, case no. AD 2010:13)

Initially, the Court made reference to applicable legislation in which it stated that an employer may not disfavor a job applicant or an employee who suffers a functional limitation against how the employer treats or would treat persons without such a functional in a comparable situation, provided that the employer can show that the disfavor is not related to the functional limitation. To create such a comparable situation, an employer must take reasonable supporting and adoptive measures in order to limit or reduce the functional limitation's impact on the disabled person's working capacity.

The job that the job applicant applied for included working tasks such as navigating on a computer system and reading hand written documents. The Court concluded that a re-organization of the Swedish Social Insurance Administration's computer system on behalf of the visually disabled job applicant would not have enabled her to navigate in the system on her own. Even so, it would still have been necessary with complementary supporting measures to help her assimilate the information in the computer system because the information would not by help of any technical aids be readable for her directly from the computer screen. In addition, she would have been in need of a job assistant to assimilate information from hand written documents.

To summarize, the Court concluded that the measures that would have been necessary for the Swedish Social Insurance Administration to take were far too time consuming and not reasonable enough. Therefore, the Court found that the Swedish Social Insurance Administration had not discriminated the visually disabled job applicant by denying her the vacant position with reference to her functional limitation.

Conclusion

An employer is obligated to take supporting and adoptive measures in order to compare with a person without a functional limitation only to the extent such measures are reasonable. Whether such measures are reasonable or not has to be decided on a case to case basis. Generally, such measures shall not constitute an un-proportional burden for the employer. Factors that shall be considered includes the employer's economical possibility of bearing such measures, what factual possibilities there are to take such measures, and what actual effect such measures can have on a disabled person.

Poland

Law Changes Regarding Temporary Workers

On 24th January 2010, changes in the Labour Law concerning employment of the temporary workers came into force. The changes seem to be beneficial both for employers and temporary employment agencies.

So far, the temporary employment agencies did not have to issue employment certificates provided that there was continuity between the contracts of employment, which means that there was not even a single day of interval between them. In practice, it very often happened that between the contracts appeared a few days break. Consequently, at the end of each contract the agency had to issue the employment certificates.

From 24th January, this onerous obligation has been abrogated. Regardless of whether there would be a break between the successive contracts, the employment certificate will be issued after 12 months of the employment. The exception would be a situation when the termination or expiration of the contract will fall after the 12 months' period. Then, an agency will be obliged to issue the employment certificate after termination of the contract.

The abovementioned rules will apply when the temporary employee does not request the employment certificate. The agency will always have to issue the employment certificate on the employee's request after termination or expiration of the contract.

The change has also repealed a provision under which an employer could make use of the temporary workers if during the 6 months' period preceding the expected commencement date of the temporary employee's work, he served the employees a notice about termination of the employment or terminated the employment relationships due to reasons not attributable to the employees, within the collective redundancy.

A last important change concerns a period of the temporary employment of the employee by one employer which has been extended to 18 months within the subsequent 36 months (before the change come into force the maximum length of the working period was 12 months).

Conclusion

The changes that came into force in January improved the situation of the temporary employment agencies, as well as the employers who make use of the temporary workers' services. Under the new regulations, there is less bureaucracy and the flexibility of law regulating employment of the temporary workers increased significantly. However, one should still remember that the agencies are obliged to issue the employment certificate at the employee's request.

Belarus

Along with the Cap over the Duration of the Regular Working Hours per Week, Belarusian Labour Legislation Prescribes Irregular Working Day Regime.

Under the general rule, the maximum duration of a regular working time is 40 hours per week.

However, Belarusian legislation prescribes the possibility of using irregular working day regime. According to the Labour code of the Republic of Belarus, an irregular working day is a special working regime when an employee may be required when necessary to occasionally work beyond the normal 40 hour weekly limit upon an oral or written request of the employer or at his/her own initiative, but with the employer's approval.

At the same time, the law determines the list of the employees with respect to whom the irregular working day regime may not be applied. Among which are: employees at the age between 14 and 16; students at the age between 14 and 18; handicapped; employees working in the radio-contaminated areas; part-time employees; some other types of employees.

The peculiarity of the irregular working day regime is that such additional working time is not considered as overtime, and is not subject to payment neither as overtime, nor as a regular working time. The only legislatively prescribed compensation for the employee's performance of the labour obligations in excess of his/her working hours under the irregular working day regime is the additional annual vacation for up to 7 calendar days. Usually the condition that an employee shall be working according to the irregular working day regime is stated in the employment contract.

Conclusion

Therefore, irregular working day regime is one of the legally determined beneficial ways for the employer in the Republic of Belarus to optimize the salaries expenses.

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