

CONSIDERATIONS ON WORKING THROUGH A TEMPORARY WORK AGENT

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*Abstract:*The development of a specific legal framework in the field of employment through temporary employment agent was born out of the common interests of EU member states which have realized the importance of promoting economic and social development, and implicitly the necessity to ensure legal means for the protection of temporary employees and to guarantee respect for the principle of equal treatment for them in comparison with a user's own employees.

The conjoint action in this regard also targeted the elaboration and implementation of policies for the optimal functioning of the labor market, the organization of the institutional framework with competences and attributions in the field of authorization and monitoring the activity of temporary employment agents, the continuous promotion of the compatibility of the national legal framework in the new form of employment field (which allowed labor market flexibility), with European rules in the field.

In our country, the adoption of a new Labor Code in 2003¹ was considered an important achievement in terms of transposing the *acquis* because it enounced the conformation of the basic principles of the *acquis* regarding the labor law. Among the novelty elements introduced was also highlighted the regulation of the legal employment relationship through the temporary work agent.

In the western part of the country, especially in the cross-border area targeted by the present study (Oradea and the limitrophe areas at the border, namely the town of Debrecen and all other administrative-territorial units at the Romanian-Hungarian western border) (ie the components of the Bihor-Hajdu-Bihar Euroregion) there is a "migration" of the labor force, specially used by the labor force available on the Romanian market, workers who hire in the labor field in neighboring country in the hope of finding a job according to the training and skills developed, but also for an adequate remuneration and obviously more advantageous than that obtained in the country.

It is known that the free movement of persons is an indispensable freedom, established and respected in the Community legal order, but it also can be seen as a commercial objective executed through Treaties – the movement of independent workers guaranteeing Community exercise of commercial and / or liberal professions.

Keywords: temporary work contract, user, temporary employment agent, labor law

Methods and materials:

In research conducted I used prevalingly the comparative analysis method, methods of studying scientific papers, of the theoretical and normative-legislative doctrinal material, on the

¹ Law no. 53 of January 24, 2003 The Labor Code, published in M. Of. Of Romania no. 72/5 February 2003, republished in M. Of. Of Romania no. 345/14 May 2011

basis of the principle of specificity of the problem, the method of interdisciplinary approach, conducting case studies for temporary employment agents with the headquarters in Bihor County.

Results and discussions:

Work through temporary employment agent is an important form of labor force occupancy in most Member States and involve a large number of workers. Also, it represents a domain that records a rapid and, in some cases, substantial growth rates, both concerning the number of employees, and the incomes in the sector.

Over time, have contoured a number of factors that have led to the increase of labor demand through a temporary employment agent such as, for example: appealing to this work modality in order to allow easy re-employment of the unemployed; increasing participation in the workforce of people who need or prefer temporary work; - enables user companies to make relatively easy labor adjustments and cost savings by outsourcing some responsibility for recruitment and administration.

But, even in this context the temporary employment agents also faces in practical plan with issues related, on the one side of the employers' reticence to appeal to such services, and on the other side, with implementation problems of labor and fiscal law.

In addition to classical, typical forms of legal employment relationships mainly represented by those based on the individual labor contract² and in which one party, who is always a natural person, obligees to put his work force for the benefit of the other party, a legal person or a physical person, to whom thus comes the obligation to create appropriate conditions for work service and pay a salary for this work, are manifested also "atypical" forms represented for example by work through temporary employment agents.³

Among the factors contributing to the increasing demand in the domain of labor through temporary employment agent can also mention:

- The active use of this type of work in order to facilitate unemployed re-employment on long-term
- Increasing the participation in workforce of people who require or prefer temporary work;
- allows user companies to make relatively easy labor adjustments and cost savings by outsourcing some responsibility for recruitment and administration.

This form of lucrative activity unfolding is considered to be an industry that implies a coherent set of regulations, normative acts, collective labor agreements and self-regulation tools at national level. In general, Member States have different traditions concerning labor market regulations and different policy preferences in terms of the balance between flexibility and security of employment. Often, it is the law that prevails in regulating and applying key terms and conditions of work through the temporary work agent.

In the attempt to systematise the set of the incident regulations in the matter of this legal employment relationship, it is necessary to start from the primary source in the field of free movement of persons, namely Articles 39-42 of the European Community Treaty (TEC). Also, we will continue the enumeration with Directive 2008/104 / EC of the European Parliament and of the Council of 19 November 2008 concerning work through temporary employment agent.⁴ The Directive establishes a protective framework for temporary agency workers which is non-

² See Art. 10 of Law no. 53/2003 Labor Code

³ See also A. Țiclea, Labor Law Treaty, Juridical Universe Publishing House, Bucharest, 2007, p. 15. The same distinction is highlighted, for example, in specialty literature from Hungary, where in addition to legal relations are also analyzed the atypical (for example, those based on individual fixed-term or through temporary agency contracts). See also Labor Code in Hungary, chap. XVI "Special Regulations of Work by Temporary Worker, Art. 214 et seq.

⁴Published in J. Of.no. L 327 of 5 December 2008, p. 9 et seq.

discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

The purpose of the Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that *the principle of equal treatment*⁵ is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

The Directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.

The Directive details the content of some important rules concerning:

- the access to employment, collective facilities and vocational training;
- information of workers' representatives;
- representation of temporary agency workers;
- penalties applicable in the event of infringements of national provisions implementing the Directive. Also, the main point of Directive are: equal treatment as of day one for temporary agency workers as well as regular workers in terms of pay, maternity leave and leave; possibility to derogate from this through collective agreements and through agreements between social partners at national level; temporary agency workers to be informed about permanent employment opportunities in the user enterprise; equal access to collective facilities (canteen, child care facilities, transport service); Member States have to improve temporary agency workers access to training and child care facilities in periods between their assignments so to increase their employability; Member States have to ensure penalties for non-compliance by temporary agencies and enterprises.

Temporary agency work meets not only undertakings needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market⁶.

The national legal framework in the subject matter of the analysis is mainly represented by: Chapter VII "Temporary agency work" of Law no. 53/2003 Labor Code⁷ republished, Government Decision no. 1256 of 21 December 2011 on the conditions of establishment and operation, as well as the procedure for authorizing the temporary employment agent⁸.

According to the legal provisions, work through temporary agency work is the work carried out by a temporary employee who, from the temporary work agent's disposal, performs work in favor of a user. It comes into prominence conceptual clarification of the following notions: temporary employee, temporary employment agent and user.

Thus:

-temporary employee is the person working at a temporary employment agent

⁵ Set out in *Article 5* „The principle of equal treatment” – Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work.

⁶ See Directive 2008/104 / EC - www.eur-lex.europa.eu Access to the European Union Law, date 31.03.2017, 17.00

⁷ Article 88 et seq. Of Law no. 53/2003 Labor Code

⁸ Published in M. Of. Of Romania no. 5 of 4 January 2012. Also, in the case of specific situations there are also incidents in the matter and the provisions of Law no. 344/2006 on the detachment of employees in the framework of the provision of transnational services, published in M. Of. Of Romania no. 636 of July 24, 2006. It is to be noted that starting with May 20, 2017 Law no. 344/2006 is repealed entering in effect Law no. 16 of 17 March 2017 concerning the detachment of employees in the framework of the provision of transnational services, published in M. Of. Of Romania no. 196 of 21 March 2017.

employer, made available to a user for the duration necessary to perform certain precise and temporary tasks.

-*temporary employment agency* is a company authorized by the Ministry of Labour and Social Solidarity that temporarily provides the user with skilled and/or unskilled personnel employed and paid for this purpose.

-*the user* is the employer to whom the temporary employment agent provides a temporary employee for the performance of precise and temporary tasks.

The situations in which the user may request the services of a temporary employment agent to provide personnel are presented by the Romanian legislator, respectively those for the performance of a precise and temporary task, unless he intends to replace one of his employees whose contract of employment is suspended due to participation in the strike⁹.

We note that the legislative provisions are imperative, so it is not possible to employ temporary agents in situations other than those expressly stated.

The temporary work assignment is appointed for a period that can't exceeding 24 months, still existing the possibility of an extension¹⁰ of successive periods which, added to the original duration of the assignment, may not lead to an overrun of 36 months period.

The legal relationship of work through a temporary employment agent assumes the conclusion of two contracts respectively: *a temporary employment contract* concluded between the temporary work agent and the employee and a *contract for provision of personnel* - which, from the point of view of the legal nature, is a commercial service contract concluded between the temporary work agent and the user company. In practice, a trilateral relationship is created between the temporary work agent, the employee and the user¹¹, the employee concluding a temporary employment contract with the employment agent on the basis of which he will carry out the activity to a third person - the user.

The contract for the provision of personnel will include the following elements¹²: a) the duration of the assignment; b) the characteristics of the post, in particular the necessary qualifications, the place of the assignment's performance and the work schedule; c) concrete working conditions; d) the individual protective and work equipment that the temporary employee must use; e) any other services and facilities in favor of the temporary employee; f) commission's value of which the temporary employment agent benefits, as well as the remuneration to which the employee is entitled; g) the conditions under which the user may refuse a temporary employee provided by a temporary employment agent.

The employee has the right to refuse the work assignment if the work performance would endanger his / her life, physical and mental integrity, and this refusal (which must be in the written form) will not be a reason for sanction or dismissal. Temporary employees have access to all the services and facilities provided by the user under the same conditions as his other employees, the user having the obligation to provide the temporary worker with personal protective and work

⁹ This prohibition is also present in the Hungarian legislation considering work through temporary work agency which, moreover, introduces the following prohibitions to provide temporary workers: in cases expressly provided for by law; in case of replacement of an employee during his / her participation in the strike; over a period of more than 5 years. See Art. 216 of Hungarian Labor Code. Hungarian labor law legislation incident in the labor disputes doesn't explicitly prohibit the hiring of employees during a period when the employer faces a strike, the prohibition pointing only the particular situation of provision of temporary personnel to replace the employee whose contract is suspended in the context of participation in strike. Moreover, by a decision of the Hungarian Supreme Court in 2013 - the administrative and working section - it was also pointed out that against the employee on a legal strike it is forbidden to apply coercive measures that could end the employment relationship. - See Labor Law Magazine, no. 4/2016, HVG Publishing House, Budapest, 2016, p. 135

¹⁰ The extension involves the conclusion of an additional act to the temporary employment contract.

¹¹ C. Gâlcă, Labor Code, commented and annotated, Rosetti International Publishing House, Bucharest, 2015, p. 396

¹² See Art. 91 par. 2 of Law no. 53/2003 Labor Code. In practice, on the occasion of the inspections carried out, the inspectors of the Territorial Labor Inspectorates always check the presence of these elements in the framework contract for the provision of personnel. Their lack is qualified as a contravention which can be sanctioned with a fine from 2,000 lei to 3,000 lei.

equipment, except the situation in which through the contract for provision this duty rests with the temporary employment agent.

The temporary employment contract between the temporary work agent and the employee will include the following constituent elements¹³:

- Identification data of the parties;
- The temporary work assignment for which the temporary employee was hired when the temporary employment contract ends during a single temporary assignment;
- The type of activity for which the temporary worker is employed when the temporary employment contract is concluded for several temporary work assignments;
- identitatea și sediul utilizatorului;
- The place of temporary employment assignment or the possibility for the temporary employee to carry out his activity, successively, for various users;
- Vocational training and skills of the temporary employee;
- the date from which temporary employment contract will have effect;
- The duration of the temporary assignment and the conditions under which it may be extended;
- The concrete conditions in which work will be carried out within the temporary work assignment, namely the job-specific risks;
- Rest leave to which the temporary employee is entitled;
- The eventual probationary period, established under the law¹⁴;
- Conditions for giving notice;
- Salary rights and ways of remuneration of the temporary employee, and the frequency of the payment;
- The normal duration of work;
- The necessary information if the temporary employee is going to work abroad;
- Clauses regarding employment termination at the initiative of the temporary work agent at the user's notice.

For the activity performed for the benefit of the user, the temporary employee is entitled to a remuneration paid by the temporary employment agent, the amount of which may not be less than the salary received by the employee of the user, who performs the same work or is similar to that of the temporary employee¹⁵.

Upon termination of the assignment, the temporary employee may conclude an individual employment contract with the user.

The specific conditions and common interests in the geographic area of the Bihor-Hajdu-Bihar Euroregion, and beyond, have created the premises for the development on the labor market in our county of temporary employment agencies.

A company such temporary employment agency must follow a specific procedure for as

¹³ See Art. 94 of the Law no. 53/2003 Labor Code.

¹⁴ By the temporary work contract can be established a probationary period for the accomplishment of the assignment, of which duration is fixed at the request of the user, but may not exceed: a) two working days if the temporary work contract is concluded for a period of less than or equal to one month; b) 5 working days, if the temporary employment contract is concluded for a period of one month to 3 months; c) 15 working days, if the temporary employment contract is concluded for a period of 3 to 6 months; d) 20 working days, if the temporary employment contract is concluded for a period longer than 6 months; e) 30 working days, in case of the employees hired in managerial positions for a period of temporary employment more than 6 months.

¹⁵ Since the legislator states that " insofar the user doesn't hire such an employee, the salary received by the temporary employee will be determined by taking into consideration the salary of a person employed under an individual employment contract and performing the same or similar work, as set out in the collective labor agreement applicable to the user ", in practice the temporary work agent must ask the user, through the framework contract for the provision of personnel, to submit an extract of the collective labor contract concluded at its level. See Art. 92 and 101 of Law no. 53/2003 Labor Code - equal treatment

such authorization.

Thus, in order to obtain authorization to work as temporary workers, companies are obliged to meet cumulatively the following conditions¹⁶:

- a) to be legal entities constituted according to the law and to provide in its articles of incorporation, as a main object of activity, "Contracting activities, on a temporary basis, of personnel according to CAEN code";
- b) to not record debts to the state budget or local budgets;
- c) to not figure in the records of the fiscal record of deeds sanctioned by financial regulations, customs and with those concerning financial discipline;
- d) not have been sanctioned in the last 24 months preceding the date of the request for authorization for violation of labor laws, fiscal and commercial; contraventions in respect of which there is a pending court action will be considered only if until the date of the settlement of the application for authorization, a definitive and irrevocable court order has been pronounced;
- e) to constitute a financial guarantee whose value is to the level of the 25 minimum gross national basis salary¹⁷ guaranteed by payment, plus the contributions due by the employer to the state social insurance budget, the unemployment insurance budget and the budget of the National Health Insurance Fund, according to the law.

According to the legal regulations in effect, the authorization of commercial companies is made by the Ministry of Labor and Social Justice through the Territorial Agencies for Social Protection in whose territorial jurisdiction these companies are established.

Within 30 days from the date of application registration through the territorial agency for competent social benefits, the Ministry of Labor and Social Justice will assess the fulfillment or not of the permit conditions.

Recourse to the services provided by such companies can be considered as an opportunity for different businesses to quickly ensure the need for skilled workforce for their activities, thus reducing their financial (not only financial) effort, which involves searching, selecting and employing the needs of employees.

Moreover, companies beneficiary of such contracts of personnel provision will also record advantages in respect of:

- Conversion of a staff charge into an expense with the services;
- Reducing costs with additional benefit packages that would be granted to a self-employed / permanent employee;
- Eliminating the exposure risk of the beneficiary in case of a decrease in the volume of activity;
- Reducing workload from the point of view of staff management.

We have to show that during the performance of their own activity, the temporary work agencies are subject to periodic checks by specialized control bodies, the most frequent being (perhaps due to the specific activity) those carried out by the territorial labor inspectorates.

Through the thematic control actions¹⁸ it is intended the conformation by the temporary

¹⁶See Art. 3 of H.G. no. 1256/2011

¹⁷Starting with February 1, 2017, the minimum guaranteed gross pay is 1450 lei / month - see H.G. no. 1/2017 for the establishment of the minimum gross national salary guaranteed in payment, published in M. Of. Of Romania no. 15 of 6 January 2017

¹⁸From the data available in the National Register of temporary workers, managed by the Ministry of Labor and Social Justice, there are 379 temporary active agents. Of them during the national campaign in 2016, through labor inspectorates were checked a total of 198 agents. The controls pointed the manner in which the legal provisions in the field of labor relations are respected, especially regarding the operating conditions and the authorization procedure of the temporary work agent, with the following results: - 198 control agents - 2,230 provided contracts, ongoing, of which: - 1,459 with Romanian users - 790 concluded with foreign users- 13,714 temporary work contracts in execution, out of which: - 10,578 executed in Romania - 3,137 executed abroad- 36 measures ordered to remedy the non-compliances found- 13 sanctions applied, out of which: - 6 fines; - 7 warnings. - 111,500 lei fines applied

labor agencies of the provisions of the Labor Code, by H.G. no. 1.256 / 2011 regarding the operating conditions, as well as the authorization procedure of the temporary work agent, of H.G. no. 500/2011 regarding the General Register of employees¹⁹ records and of Law no. 156/2000 regarding the protection of Romanian citizens working abroad, republished²⁰.

Following research carried out we can see that there is a growing tendency of the companies from the Romanian-Hungarian West border to employ temporary workers, but even under these circumstances, the Romanian side is far from the rest of the countries in Europe, where the percentage of temporary workers is much higher.

Note that, this system of labor relations through temporary employment can be a way of obtaining control over labor costs as well as labor flexibility, especially in terms of jobs for cross-border workers (and not only) less qualified in competitive sectors with variable or unpredictable demand. - giving access to the labor market to groups such as students, cross-border workers, women returning from maternity leave, people with disabilities and the unemployed. These social categories mentioned above have the opportunity to develop their skills and experience, respectively to accede to a safer job.

In the current context, temporary workers are actively participating in cross-border mobility, and the increase in the number of temporary workers is largely a consequence of the changing needs of employers. However, in order to prevent the transformation of this employment relationship into what some call the second-hand labor market, it must be found a balanced relationship between the benefits offered, namely flexibility, on the one hand, and the risks of insecurity, on the other.

Conclusions

In the current context, temporary workers actively participate in cross-border mobility, and the increase of the number of temporary workers is largely the consequence of the changing needs of employers. However, in order to prevent the transformation of this employment relationship into what some call the second-hand labor market, must be found a balanced relationship between the benefits offered, namely flexibility, on the one hand, and the risks of insecurity, on the other.

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Law Magazine, no. 4/2016, HVG Publishing House, Budapest, 2016

in total, out of which: - 45,000 lei for carrying out the activities of the temporary work agent without authorization; - 4,500 lei for inobservance of the work conditions and employment of the persons provided; - 2,000 lei for inobservance of the obligation to communicate any changes occurred; - 50,000 lei according to art. 260 paragraph 1 lit. e) of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions- 10,000 lei for inobservance of provisions of GD no. 500/2011 on the General Register of Employees' Evidence, as amended and supplemented. In this regard, see also <https://www.inspectiamuncii.ro/> date 03/31/2017 17:30

¹⁹Published in M. Of. Of Romania no. 372 of 27 May 2011

²⁰Republished in M. Of. Of Romania no. 291 of May 5, 2009