Labor leasing in Germany

Legal handling of labor leasing arrangements: an immigration law perspective

By Andreas Meier

After a rather long wait, the German Parliament has finally passed an amendment to the German Labor Lease Act (Arbeitnehmerüberlassungsgesetz) that will take effect on April 1, 2017. While the reform has been widely discussed since the beginning of 2015, the discussion has predominantly focused on potential labor law implications.

Labor leasing models in Germany

Generally speaking, labor leasing is the assignment of temporary workers from one legal entity, the "staffing company," to another legal entity, the "user company" or "hirer." During the assignment, temporary workers are under the supervision of the user company while employed by the staffing company.

There are two types of labor leasing arrangements, the professional labor lease and the unlicensed labor lease, that exist in practice. While professional labor lease arrangements require a specific license from the Federal Employment Agency (Bundesagentur für Arbeit), unlicensed labor lease arrangements do not. "Intragroup labor leasing," an arrangement encompassing employee transfers among companies of the same group, is one example of an unlicensed labor lease. For such arrangements, the German Labor Lease Act does not generally impose a license requirement unless arrangements are pursued under the umbrella of personnel pool entities (Personalführungs-gesellschaft).

Personnel pool entities are established with the sole purpose of employing and administering staff that will be assigned to operating companies within a corporate group. In practice, this is widely used to maintain flexibility in staff deployments and to standardize labor conditions. Under such circumstances, a license is required.

The impact of the German immigration law

The German immigration law makes a significant distinction between professional and unlicensed labor leasing simply because unlicensed labor leasing arrangements receive special attention and are distinguished under this law.

In Germany, citizens of non-EU or non-EEA countries are generally required to obtain a work and residence permit when considering employment. Immigration law differentiates between work and residence permits in that some permits require approval from the Federal Employment Agency while others do not.
If a citizen of a non-EU or non-EEA country intends to pursue labor lease assignments, for instance, the Federal Employment Agency generally must refuse work authorization approval. Consequently, employees who are assigned to Germany as part of a professional labor leasing arrangement are not eligible for such work authorization. In those cases, employees and companies should try to obtain work and residence permits that don’t require approval. These types of permits typically require employees to meet higher standards in terms of qualifications, salary and job title.

For unlicensed labor leasing arrangements, all permit types may be applicable; in some circumstances this may result in lower requirements for qualifications, salary and job titles.

**Work and residence permits without approval requirement**

The most common work and residents permits without an approval requirement are the EU Blue Card, the permanent residence permit and the family reunion permit.

For highly skilled workers, the EU Blue Card may be obtained without approval from the Federal Employment Agency. This generally applies when certain requirements are fulfilled by the employee. The main requirements include:

- A gross annual salary of €50,800
- Possession of an acknowledged university degree or a university degree comparable to a German degree
- A German employment contract

In combination with an intended labor leasing arrangement, the EU Blue Card will face the challenge of needing a German employment contract. Due to its very nature, labor leasing takes the form of assignments or secondments, where no employment contract is issued.

To address this issue with an alternative solution, some employers will commonly resort to issuing temporary contracts or secondment agreements. Experience shows, however, that authorities typically insist on the submission of a German employment contract.

Due to that fact that employers with an entity in Germany may want to exercise the option of issuing a German employment contract in order to obtain an EU Blue Card and assign or lease their employees to clients in Germany.

Besides the EU Blue Card, permanent residence permits and family reunion permits may be obtained without additional approval from the Federal Employment Agency. These types of permit grant full access to the German labor market and therefore cannot be refused due to an individual’s intention to pursue labor leasing. To be eligible for a family reunion permit, the employee has to reunite with a principal family member living in Germany. In addition to other demands, obtaining a permanent residence permit generally requires the employee to have a prior stay in Germany of at least five years. However, employers should bear in mind that the issuance of those types of permits is subject to personal employee requirements that are beyond a company’s influence and are therefore not a practical corporate option.

**Work and residence permits that require approval**

For work and residence permits that require approval, employers mainly use ICT permits (inter-company transfer), “specialists” permits, and permits for citizens of privileged countries.

Residence and work permits for citizens of privileged countries are generally applicable to employees with certain nationalities (e.g., the US, Canada, Australia, etc.) and who maintain an appropriate job title related to their qualifications.

In addition, other individual requirements should be considered, including minimum salary levels and the like, that vary depending on the different permit types.

**Consequences of noncompliance**

Should an employee hold work and residence permits that require approval from the Federal Employment Agency and this individual engages in a professional labor lease assignment, his or her work authorization will be revoked. Consequently, his or her work and residence permit will also be revoked and the employee might have to leave Germany. This may cause disrup-
tions, a loss of work authorization in Germany and possible penalties.

**Brief example**

A company based in the US intends to lease an employee to Germany. The employee does not qualify for an EU Blue Card or any other work or residence permit that does not require approval from the Federal Employment Agency.

The employer now wants to understand if labor leasing is possible and if the company is indeed compliant.

Generally speaking, the employer will not be compliant if the hirer is unaffiliated with the corporate group of the sending company.

However, should the hirer be affiliated with the sending company and the employee qualifies for any other work and a residence permit in Germany, the employer is compliant, as this would fall under unlicensed labor leasing – i.e., the intra-group labor leasing exemption would apply.

**To summarize**

The most recent amendments to the German Labor Lease Act have brought to light that not only labor law but also immigration law influences the legal handling of labor leasing arrangements.

German immigration law distinguishes between professional and unlicensed labor leasing and therefore dictates what work and residence permits are applicable.

Noncompliance could result in disruptions and in the loss of authorization to work in Germany. And that is in addition to that penalties that could be imposed.

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