

## NEWSLETTER

# GERMAN LABOR LAW & HR 1/2013

### Termination of Employment – New Risks for Small Businesses

#### Applicability of the German Act Against Unfair Dismissal (*Kündigungsschutzgesetz*) can be influenced by Temporary Workers

#### I. General

In Germany the employment of temporary workers has become very popular in recent years. Some small establishments are employing temporary workers in order to avoid being subject to the German Act Against Unfair Dismissal (*Kündigungsschutzgesetz*, “*KSchG*”), which only applies to establishments with more than ten employees. Also multinational companies with small sales units in Germany are wary of the German Act Against Unfair Dismissal and in many cases do not employ more than ten employees in Germany, in order to avoid triggering the - from a US or UK perspective possibly unwanted – protection of the employees against unfair dismissal. In recent times, small businesses increasingly turned to employing temporary workers for that very reason.

The leading thought for that is the fact that the protection against unfair dismissal pursuant to section 23 paragraph 1 clause 1 *KSchG* does not apply to small business. The applicability of the Act to employees hired after December 12<sup>th</sup>, 2003 requires more than ten employees to be regularly employed in the establishment. As a consequence a small business is exempt from the requirement of social justification for the termination of an employment. The termination does not have to be based on a personal, business or conduct reason in accordance with the German Act Against Unfair Dismissal. The termination of an employment in a small business usually merely requires a notice of termination adhering to the statutory period of notice. However, special

protection against unfair dismissal, as for disabled or pregnant employees as well as for those on parental leave applies regardless of the number of employees.

Until now temporary workers were not taken into consideration for the assessment of the number of employees under the German Act Against Unfair Dismissal of the respective business. A decision of the German Federal Labor Court (*Bundesarbeitsgericht*, "BAG") dated January 24<sup>th</sup>, 2013 (reference number: 2 AZR 140/12) changed the status quo.

## **II. Relevance of temporary workers for applicability of the German Act Against Unfair Dismissal**

The BAG held in its decision dated January 24<sup>th</sup>, 2013 that temporary workers – under certain circumstances – can be taken into account for the assessment of the size of the business and the question related thereto, whether the business under scrutiny is to be considered a small business under the German Act Against Unfair Dismissal.

According to the BAG the pivotal question is, whether the assignment of temporary workers is based on a general need for employees. This means, where the employer assigns temporary workers on a regular basis to cover its need for employees, in the future, such temporary workers will most likely be taken into account for the assessment of the size of the business under the German Act Against Unfair Dismissal. A business employing ten full-time employees and in addition permanently at least one temporary worker would be subject to the general protection against unfair dismissal. In consequence termination of employment would require a social justification. The BAG held that the fact that there is no employment relationship between a temporary worker on the one hand side and the business assigned to on the other hand side is irrelevant in this regard.

### **Practical Consequences:**

Due to the decision of the BAG dated January 24<sup>th</sup>, 2013 businesses of a size around the relevant threshold will have to consider alternative employment structures in order to avoid being subject to the – maybe unwanted – protection against unfair dismissal.

- Outsourcing of individual functions could be an option
- Especially, the agreement on fixed term employments might be a serious alternative to the assignment of temporary workers

It remains to be seen, whether the protection of employees will benefit from the questionable decision of the BAG. It is to be expected that businesses will avoid an impact of the decision by taking pre-emptive measures. Nonetheless, it is advisable for small business to assess whether they fall under the scope of the general unfair dismissal protection as a consequence of their

permanent assignment of temporary workers.

**On our own behalf:**

**Bryan Cave strengthens Labor and Employment Client Service Group in Germany**

In December 2012 Dr. Martin Lüderitz joined Bryan Cave's Labor and Employment Client Service Group in Germany. Mr. Lüderitz adds significant experience to our labor and employment law practice. He is a specialized attorney for Labor Law. Based in Bryan Cave's Hamburg office Mr. Lüderitz advises national and international companies in all labor and employment law matters.

Should you have any questions concerning this newsletter or other matters, please contact us at the following addresses:

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