Legal Update
Labour and Employment

A recurring topic: Temporary personnel count for the purposes of determining the size of an undertaking

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Cologne, 11.07.2013

Headnote

Temporary personnel must be counted as part of a company's workforce for the purposes of determining the size of a works council (§ 9 of the Works Constitution Act (*Betriebsverfassungsgesetz* – BetrVG)) (Federal Labour Court, 13 March 2013 – 7 ABR 69/11).

Facts

The Federal Labour Court was called upon to assess the validity of the election of a works council in 2010. The company had a total of 879 regular employees and 292 temporary workers as of the record date for the election, and a 13-employee works council was elected.
The works council then contested the election, claiming that a 15-person works council should have been elected. The works council argued that the company's 292 temporary workers should have been counted for the purposes of determining the size of the works council since the first sentence of § 9 of the Works Constitution Act stipulates that the criterion of voting eligibility is irrelevant in the case of works council elections of larger companies.

Decision

The Federal Labour Court accepted the reasoning of the works council and declared the works council election invalid. According to the first sentence of § 9 of the Works Constitution Act, the number of members of a works council is based on the size of the workforce employed by the company *as a rule*. In addition, employees must be eligible to vote in the case of companies with between 5 and 100 employees. According to the second sentence of § 7 of the Works Constitution Act, temporary personnel are also eligible to vote once they have been with a company longer than three months. In the case of undertakings with more than 100 employees, on the other hand, the law makes no distinction as regards eligibility to vote. In the case at issue here, the Federal Labour Court confirmed that the company had more

then 1,001 employees. In so doing, the court introduced a change in the case law (see on the previous legal situation Federal Labour Court 10 March 2004 – 7 ABR 49/03). According to the court, a construction of the law based on the intent and purpose of the above thresholds would dictate that temporary personnel also be counted for the purposes of determination of the size of an undertaking. In any case, the question as to whether or not temporary employees are eligible to vote is no longer relevant when a company has more than a hundred employees.

Comments

Although temporary employment has definitely played a positive role in Germany in the fight against unemployment, it is increasingly frowned upon as an instrument of labour market policy. This was reflected not only in the fact that the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz* – AÜG) was amended to make its provisions more stringent in December 2011, but also in changes in the case law made by the Federal Labour Court immediately thereafter. In the previous issue of our Newsletter, we referred to the decision of the Federal Labour Court of 24 January 2013, (2 AZR 140/12), which also dealt with determination of company size, but in connection with the question of protection against dismissal. Departing from previous case law, the Federal Labour Court ruled that temporary personnel employed "as a rule" must be taken into account. This change in the case law now also applies to the law governing co-determination. Companies with a high percentage of temporary personnel will in the future have to expect to find themselves confronted with a works council with at least two more members. This will of course increase the costs incurred by the necessity of releasing works council members from their usual duties and providing appropriate training.

Changes in legislation and the case law are making the use of temporary employees less attractive in practice, for temporary employees must in many ways be treated like regular employees. The new legal situation can be summed up in a few words: temporary personnel vote *and* count!

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author himself: Jens Völksen on +49 221 33660-506 or by email to jvoelksen@goerg.de. For further information about the author/visit our website www.goerg.com.

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