

IMPLEMENTATION OF EC DIRECTIVE ON TEMPORARY AGENCY WORK INTO LITHUANIA LEGISLATION

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Abstract. *On 19 May 2011, the Lithuanian Parliament adopted the Law on Temporary Agency Employment to implement the EU Directive on temporary agency work. Up to now there has been no special regulations for the so called “personnel lease”, although Lithuanian companies have been using such service since 2003. The law basically followed the recommendations of the Directive without setting additional restrictions. Temporary agency workers will be subject to the same conditions as permanent workers of employment agency clients are regarding working and leisure time regime and work safety. The Law on Temporary Agency Employment will enter into force on 1 December 2011. The purpose of this article is to analyze the EU Directive on temporary agency work transfer to the Lithuanian legal system and the peculiarities of the theoretical and practical problems associated with the new regulation. Conclusions and suggestions for the improvement of the legal provisions are presented.*

Keywords: *temporary agency work, labour law, Law on Temporary Agency Employment, EU Directive on temporary agency work.*

Introduction

Relevance of the topic. Jobs under non-standard employment conditions have taken root in European labour markets some time ago: fixed-term employment contracts, part time employment contracts (part-time work), work on call contracts, zero-hour contracts, freelance contracts, etc. One of the non-standard forms of employment is employment via temporary employment agencies (temporary employment). Temporary employment is such form of work organization, where having signed the employment contract with the temporary work agency, the temporary worker is under a civil contract temporarily assigned to perform work functions for the user undertaking and under its supervision¹.

Thus, this article deals with a new and relevant issue in Lithuania – application of the Law on Temporary Agency Employment², which will come into effect in December 2011, and assessment of implementation of EU Directive³, which obliged Lithuania to adopt a respective law.

The aim of the present research is to analyse the peculiarities of transferring the EU Directive on temporary agency work into Lithuanian legal system and to establish theoretical and practical problems related to new regulation.

Tasks of the present research:

- establish the causes of adopting the Law on Temporary Agency Employment;
- overview the *background of adopting the Directive 2008/104/EC* and its key targets;
- analyse the plans to regulate temporary employment in Lithuania prior to the Directive;
- analyse whether the *Directive 2008/104/EC* was implemented in Lithuania;
- assess current legal regulation and potential problems.

Research resources. The following research resources were used in the article: Civil Code of the Republic of Lithuania⁴, Labour Code of the Republic of Lithuania⁵, Law on Temporary Agency Employment, Resolution “On approval of the conception of the Law on Labour Lease”⁶, EU Directive 2008/104/EC on temporary agency work, other EU legal acts, and Private Employment Agencies Convention No. 181 adopted

1 Lietuvos Respublikos Vyriausybės 2007 m. birželio 6 d. nutarimas Nr. 569 „Dėl Lietuvos Respublikos darbo nuomos įstatymo koncepcijos patvirtinimo“ [Government resolution on approval of the conception of the Law on Labour Lease of the Republic of Lithuania]. *Official Gazette*. 2007, No. 67-2619.

2 Lietuvos Respublikos įdarbinimo per laikinojo įdarbinimo įmones įstatymas [Law on temporary agency work of the Republic of Lithuania]. *Official Gazette*. 2011, No. 69-3287.

3 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. *Official Journal L 327*. 2008, p. 9–14.

4 Lietuvos Respublikos civilinis kodeksas [Civil Code of the Republic of Lithuania]. *Official Gazette*. 2000, No. 74-2262.

5 Lietuvos Respublikos darbo kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas [Labour Code of Republic of Lithuania]. *Official Gazette*. 2002, No. 64-2569.

6 Lietuvos Respublikos Vyriausybės 2006 m. spalio 17 d. nutarimas Nr. 1020 „Dėl Lietuvos Respublikos Vyriausybės 2006 – 2008 metų programos įgyvendinimo priemonių patvirtinimo“ [Government resolution on approval of the Republic of Lithuania Government Programme 2006-2008 implementation measures]. *Official Gazette*. 2006, No. 112-4273.

by the International Labour Organization on 19 June 1997⁷. The legal doctrine may be distinguished as a separate group of research resources. In Lithuania, this topic is new; aspects of temporary employment were analysed J. Usonis and T. Bagdanskis. Moreover, internet databases were used for the research.

Thus, to implement the aim and tasks of the research, the article will discuss the background of adopting the new law regulating temporary employment, the causes that determined the occurrence of the law, essential provisions of the law, theoretical and practical problems, and will assess the implementation of the EU Directive.

1. Reasons for Adopting the Law

The mechanism of employment via agencies is trilateral relations among the employing agency, temporary worker, and the company hiring the employee (user undertaking). Employment agencies sign fixed-term or indefinite time period employment contracts with the employees and commercial agreements with the user undertaking for providing the services of employees (service agreement). The main differences between employee leasing and traditional job is that work functions are performed not for the employer (employing agency), but for the person indicated by the employer (user undertaking). Work results are also transferred to the user undertaking and the employees must observe the procedure established by the user undertaking. In turn, user undertaking must ensure that the employee was treated the same way as permanent employees of that company. The pay and other benefits related to work relations are paid to the employee not by the company he/she performs the work functions for, but by the employing agency. The employing agency takes care for search and selection of employees, their recommendations, signing the employment contract, accounting of the wages, state taxes, and dismissal of the employee from work. Meanwhile, the user undertaking takes care of employee training, supervision, motivation, ensuring safe work equipment and safe working conditions, and, of course, payment for the services. Moreover, the agency together with the user undertaking the agency establishes work conditions for the employee. The standards the work of the employee must meet and the requirements he/she must observe are set forth in the service agreement between the user undertaking and the employing agency. The employee in turn must be familiarized with applicable requirements. The main issue in this form of employment is the protection of rights of employees assigned to work for a temporary user undertaking, i.e. ensuring that they are not discriminated against in comparison to permanent employees of the user undertaking. With regard to the specificity of employment model, special legal regulation of these public relations is necessary.

On 19/05/2011, the Seimas of the Republic of Lithuania adopted the Law on Temporary Agency Employment, implementing the EU Directive on temporary agency work⁸.

7 1997 ILO Private Employment Agencies Convention No. 181.

8 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. *Official Journal L* 327. 2008, p. 9–14.

Having ratified the Private Employment Agencies Convention No. 181 of 19 June 1997 adopted by the International Labour Organization in 2004⁹, Lithuania undertook to introduce the institution of “labour lease”. The Convention sets forth the areas, where appropriate security must be ensured to temporary workers by national legislation, i.e. the freedom to join organisations, sign collective agreements, minimum wage, establishing the working hours and other work conditions, guarantee of social benefits, professional training, occupational health and safety, compensation in the event of accidents at work or occupational disease, maternity and paternity security and benefits.

However, the so-called “personnel lease” or “labour lease” was not specifically regulated until 2011, although Lithuanian companies have been using such service for some time now. Nevertheless, there were some public opinions that such employment via temporary employment agencies is illegal, which, of course, caused distrust of both employees and the enterprises and the unwillingness to use such tool of human resources management. After the law comes into effect, this problem should disappear. Prior to adopting the law, Lithuania had no control mechanism, which could not only monitor and control the activities of temporary employment agencies, but also present certain information on the number of temporary workers, hours of work, their correlation with non-working time, number of temporary employment agencies, and indices of employees’ satisfaction with temporary work.

Lack of trust in the above institution caused the unpopularity. Meanwhile, temporary work agencies of the European Union Member States were expanding. The turnover of temporary work in France has grown by 16.5 % and in Sweden by 40 % in a year, and by 8 % in the Netherlands in comparison to the first quarter of 2010¹⁰. The attitude of employees towards their work possibilities and nature was also positively assessed. According to the data of the Confederation of British Industry (CBI), two thirds of temporary workers say that the decision to work via an agency is positive, because it allows combining work and personal life. One third of employees believe that it provides essential employment skills and experience, necessary to find a permanent job.

From 2008 to 2009, the number of companies providing the services of labour lease in the world grew by 1 % and reached 72,000. International Labour Organization recognized that “temporary employment agencies play an important role in the contemporary labour market. In the last three decades, the growing need of employees and services in the rapidly growing and flexible labour market lead to striking development of such companies”¹¹. Such intense growth in numbers of temporary employment agencies indicates that contemporary labour market demands flexible forms of work organization, encouraged by cutting production costs and the processes

9 Lietuvos Respublikos įstatymas dėl Konvencijos dėl privačių įdarbinimo agentūrų ratifikavimo [Law on Ratification of Private Employment Agencies Convention of the Republic of Lithuania]. *Official Gazette*. 2004, No. 40-1291.

10 EUROCIETT agency work business indicator: June 2011 [interactive]. [accessed 19-06-2011]. <www.eurociett.eu>.

11 CIETT economic report „The agency work industry around the world“ 2011 [interactive]. [accessed 19-06-2011]. <www.ciett.org>.

of production itself. Temporary employment agencies providing the services of labour lease is the fastest growing form of non-standard employment. According to official data of Ciett (International Confederation of Private Employment Agencies), the number of temporary workers has nearly doubled in the European Union Member States from 1998 to 2009.

Therefore, adopting the law was determined by legal and economic causes: not only the Directive and ILO Convention, but the demand of the market as well. Certainly, the determinant factor is the obligation under the Directive to transfer its provisions to national law by 5 December 2011.

2. Background of the Directive 2008/104/EC and its Key Targets

Prior to adopting the Directive, the EU law regulated some aspects of temporary employment to a certain extent: Council Directive 91/383 of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship¹². The Directive provides for an essential requirement that for such employees the same health and safety at work conditions must be ensured as for other employees employed by the company or institution (where they perform the work). Member States must also take measures to inform interested employees of necessary qualifications and peculiarities of vacant positions.

The Directive 91/383/EEC regulates health and safety requirements for the employees employed on the basis of fixed-term contract or labour lease agreement in the European Union. The main imperatives of the Directive are that prior to assigning a task to an agency employee, the user undertaking must inform the employment agency about the occupational qualifications necessary to perform the task and its specifics. The agency is responsible for informing the employee about all known circumstances related to the potential assignment. The user undertaking is responsible for observing occupational health, safety, and hygiene requirements throughout the implementation of agency employee's assignment. EU Member States have supplemented their legislation with many principles of this Directive.

Agency work is also referred to in the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services¹³. Paragraph c) of Part 3 of Article 1 of the Directive stipulates that being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during

12 Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship. *Official Journal L* 206. 1991, p. 19–21.

13 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. *Official Journal L* 18. 1997, p. 1–6.

the period of posting. Therefore, when an employee of employment agency is assigned to the user undertaking in another Member State, the conditions regarding maximum working period and minimum rest period, minimum rates of pay, conditions of hire-out, health, safety and hygiene at work, provisions of non-discrimination, etc. effective in the Member State are applicable to the temporary worker.

In October 2008, after nearly three decades of discussion and unsuccessful attempts to reach a compromise on regulation, approved the EU Directive on temporary agency work (2008/104/EC). It was the beginning of the solution to the problem of protection of temporary workers raised in the Council resolution of 21 January 1974 concerning a social action programme (OJ C13/1, 1974). During the time many proposals of regulation were created, but the attempts to adopt them were not successful until 2008¹⁴.

In order to interpret the Directive as correctly as possible, one must note its sources, which start in Germany. Based on Hartz I¹⁵ report, in 2004, the Government of Gerhard Schröder amended the Law on Employee Leasing (Deu. *Arbeitnehmerüberlassungsgesetz*)¹⁶. Two-year validity limit of agency contracts was rejected and the equal treatment principle in terms of pay, working hours, parenthood, and fight against discrimination was established¹⁷. Hartz report appeared at the same time as draft directive on temporary agency work. Both the draft of 2002 and the new Directive expressed a suppressed position in terms of the status of employees and other rights, which caused concerns in Germany. All employees in Germany irrespective of their type of work already had the right to at least two weeks notice and Labour Councils in Germany were paying severance compensations¹⁸. The European Commission was hoping to have the Takeover Directive passed with Mediterranean support but Germany wanted a compromise to strip the law of key articles that prevent management using takeover defences and poison pills without prior authorisation. The UK Cabinet was believed to have abandoned support for the free market principle and, instead, formed an alliance with Germany in return for its support in wrecking the Temporary Agency Workers Directive. Since December 2002 the proposal had been deadlocked in the Council, until 9 June 2008 when a breakthrough was achieved. It was considered under the co-decision procedure which involves the European Parliament and is subject to qualified majority voting in the Council of Ministers. The UK had maintained a blocking minority for many years

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- 14 Countouris, N.; Horton, R. The Temporary Agency Work Directive: Another Broken Promise? *Industrial Law Journal*. 2009, 38(3): 329.
 - 15 Hartz. concept is a set of recommendations that resulted from a commission on reforms to the German labour market in 2002. Named after the head of the commission, Peter Hartz, it went on to become part of the German government's Agenda 2010 series of reforms, known as Hartz I - Hartz IV.
 - 16 Freckmann, A. Temporary Employment Business in Germany. *The International Company and Commercial Law Review*. 2004, 15(1): 7.
 - 17 Waas, B. Temporary Agency Work in Germany: Reflections on Recent Developments. *The International Journal of Comparative Labour Law and Industrial Relations*. 2003, 19(3): 387; Keller, B. The Hartz Commission Recommendations and Beyond: An Intermediate Assessment. *The International Journal of Comparative Labour Law and Industrial Relations*. 2003, 19(3): 363.
 - 18 McGaughey, E. Should Agency Workers Be Treated Differently. *LSE Legal Studies Working Paper*. 2010, 7: 6.

which appears to have collapsed in December 2007. The Directive was finally passed on 22 October 2008.

The main provision of the Directive establishing the guarantee of temporary workers' protection is the equal treatment principle set forth on Part 1 of Article 5: "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." When establishing the minimum of individual, employment, and collective rights to temporary workers, the Directive also gives many possibilities to divert from them by providing for exceptions and time periods to implement respective rights, and even cases of non-application of the Directive provisions¹⁹. It is explained in Paragraph 10 of the preamble, which stipulates that there are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union. And although the flexible approach of the Directive was deliberate to ensure adoption by Member States, it resulted in creating a minimum level of rights and security for temporary workers²⁰. Created and adopted in the framework of the strategy encouraging the integration of the flexicurity principle (combination of employment, flexibility, and security)²¹ in the European labour market. The Directive seeks that temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives (Paragraph 11 of the preamble). Based on this Part 1 of Article 4 provides that prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

The Directive is applicable to employees who have signed the employment contract or have labour relations with temporary work agency and are temporarily assigned to perform work functions for a user undertaking and under its supervision and management. It is noteworthy that Article 3 of the Directive gives definitions of the "worker", "temporary work agency", "temporary worker", and "user undertaking". Part 2 of Article 3 of the Directive establishes that the Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker.

The aim of the Directive set forth in Article 2 could be relatively divided into 2 parts:

1. protection of temporary agency workers by ensuring that the principle of equal treatment, is applied to temporary agency workers and by recognising temporary work agencies as employers;

19 Part 3 of Article 1, Part 2-4 of Article 5 of the of the Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work.

20 Countouris, N.; Horton, R., *supra* note 14, p. 329.

21 Usonis, J.; Bagdanskis, T. Darbo nuoma ir jos teisinio reguliavimo perspektyvos Lietuvoje [Perspectives of regulation of Temporary Agency work in Lithuania]. *Jurisprudencija*. 2008, 8(110): 65–72.

2. contribution of temporary employment agencies to creation of jobs and recognition of their responsibilities as employers.

3. Draft Laws on Temporary Employment in Lithuania prior to the Directive

In 2007, the Ministry of Social Security and Labour prepared the conception of labour lease²² and the draft Law on Labour Lease was prepared based on it. The above draft law addressed the restrictions of temporary employment often applicable in other EU Member States, some of which we will discuss.

One of the first drafts of the Law on Labour Lease provided for licensing of employment agencies activities. This provision attempted to follow the example of other EU Member States. For example, analysing the practice of EU Member States, the most frequent measure in order to protect temporary workers and regulate the relations of labour lease was issuing licences to enterprises engaged in this activity. In 2007, only 4 out of 24 EU Members States had no licensing requirements for employee leasing agencies (Finland, the Netherlands, Sweden, and United Kingdom).²³ Moreover, mandatory insurance was discussed in the event the agency became insolvent. However, after the Directive was adopted, these provisions were rejected as the Directive does not require that.

Draft Law on Labour Lease provided for a case of fixed-term employment contract becoming an indefinite term contract: “<...> if the temporary worker is working in the same position under a fixed-term employment contract for more than eight months in the period of twelve months, <...> upon employee’s request, such fixed-term employment contract is recognized as indefinite time period contract²⁴”. It is noteworthy that this provision was rejected in the new law.

Draft Law on Labour Lease proposed to establish the pay rate to the employee not only in the employment contract with the employee, but also in the service agreement between the agency and the user undertaking. Such provision aimed at facilitating control and preventing discrimination in terms of wages. This provision was rejected.

Other restrictions applicable to temporary employment in foreign practice were the following:

- certain restrictions of sectors and professions when using the employee leasing as the form of labour relations;
- maximum time period of employment contract;

22 Lietuvos Respublikos Vyriausybės 2007 m. birželio 6 d. nutarimas Nr. 569 „Dėl Lietuvos Respublikos darbo nuomos įstatymo koncepcijos patvirtinimo” [Government resolution on approval of the conception of the Law on Labour Lease of the Republic of Lithuania]. *Official Gazette*. 2007, No. 67-2619.

23 Usonis, J.; Bagdanskis, T., *supra* note 21, p. 65–72.

24 Draft Law on Labour Lease of the Republic of Lithuania [interactive]. [accessed 26-09-2008]. <www.lps.lt/usr_img/Darbo%20nuomos%20istatymo%20projektas%202008-04-07.doc>.

- reasons for using the form of employee leasing employment relations and the circumstances, when temporary work may be used (e.g. many countries prohibit employing temporary agency workers during a strike in the user undertaking)²⁵.

The above restrictions were covered in various drafts of the Law on Labour Lease. For example, there was a prohibition to use labour lease for dangerous work, there was also a provision that temporary employment cannot last longer than two years. Adoption of the Directive was the grounds for the content of the law and rejection of prohibitions not provided by the Directive.

4. Implementation of Directive 2008/104/EC in Lithuanian National Law

The Draft Law was prepared implementing Paragraph 617 of the Republic of Lithuania Government Programme 2008-2012 implementation measures²⁶ approved by Resolution No. 189 of the Government of the Republic of Lithuania of 25 February 2009²⁷: to prepare a draft law on labour lease of the Republic of Lithuania in order to transfer the provisions of the Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

Prior to adopting the new Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008, the draft law was prepared by the Working Group established under the Order No. A1-206 “On establishing a Working Group to prepare the draft law on labour lease” of the Minister of Social Security and Labour of 23 July 2007. In order to harmonise the law with the provisions of the above Directive, the Draft Law was corrected by the Working Group established by the Order No. A1-109 “On amending the Order No. A1-206 on establishing a Working Group to prepare the draft law on labour lease of the Minister of Social Security and Labour of 23 July 2007” of the Minister of Social Security and Labour of 18 March 2010.

With regard to the above Directive, the notion “labour lease” was replaced by “temporary agency employment” in the Draft Law.²⁸

After adoption of the Directive, the process of law preparation may be divided into two stages:

25 Temporary agency work in the European Union. European Foundation for the improvement of living and working conditions [interactive]. [accessed 26-06-2011]. <<http://www.eurofound.europa.eu/ewco/reports/TN0408TR01/TN0408TR01.pdf>>.

26 Lietuvos Respublikos Vyriausybės 2008-2012 metų programos įgyvendinimo priemonės, patvirtintos Lietuvos Respublikos Vyriausybės 2009 m. vasario 25 d. nutarimu Nr. 189 [Government Programme 2008-2012 implementation measures of the Republic of Lithuania] [interactive]. [accessed 26-06-2011]. <[http://www.smm.lt/veikla/docs/lrv/LRV\(15\)_programos%20nr189_priemones.pdf](http://www.smm.lt/veikla/docs/lrv/LRV(15)_programos%20nr189_priemones.pdf)>.

27 Lietuvos Respublikos Vyriausybės 2009 m. vasario 25 d. nutarimas Nr. 189 dėl Lietuvos Respublikos Vyriausybės 2008-2012 metų programos įgyvendinimo priemonių patvirtinimo [Government resolution on approval of the Republic of Lithuania Government Programme 2008-2012 implementation measures]. *Official Gazette*. 2009, No. 33-1268.

28 Aiškinamasis raštas dėl Lietuvos Respublikos įdarbinimo per laikinojo įdarbinimo įmones įstatymo projekto [Explanatory note to the Draft Law] [interactive]. [accessed 26-06-2011]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=389066&p_query=&p_tr2=>>.

- preparation of Draft Law prior to submitting to the Seimas;
- correction of the Draft Law by the Seimas.

It is noteworthy that some amendments to the Draft Law related to the provisions of the Directive and its implementation were made after submitting the Draft Law to the Seimas (by the Seimas Committee on Social Affairs and Labour), it means just before two months till the adoption.

The main aim of the Law as well as of the Directive is to protect the rights of temporary workers. This aim was achieved, as apart from the general provision of applying the principle of equal treatment (requirement to provide equal basic work conditions), the law ensures it by particular prohibitions. It is prohibited to the user undertaking: 1) to assign temporary workers to perform the functions of the user undertaking employees on strike; 2) to conclude a contract of temporary employment in order to replace former employees of user undertaking; 3) to discriminate temporary workers against the user undertaking employees performing the same or equivalent functions (provide less favourable working conditions to temporary workers); 4) to limit the possibilities of professional training and qualification raising for temporary workers; 5) to limit the possibilities of permanent employment for temporary workers.

The Directive is implemented by giving a lot of attention to employee safety. Temporary employment agency and user undertaking are obliged to comprehensively discuss the rights and obligations of the user undertaking and temporary employment agency in terms of ensuring occupational safety. The Law on Temporary Agency Employment provides that the temporary employment agency must make sure of safe working conditions of the temporary worker assigned to user undertaking and the latter ensure appropriate and safe working conditions. It is noteworthy that according to the Law, user undertaking may allow the temporary worker to start working only after informing the temporary worker about existing and potential risk factors and the use of protective measures, instructing him on safe work in a particular working place, regardless of the fact that the temporary worker was instructed and trained in work safety by the employment agency in set procedure.

Using Part 1 of Article 4 of the Directive 2008/104/EC it was established that the Law on Temporary Agency Employment does not apply to vessel crews subject to the Republic of Lithuania Law on Maritime Shipping²⁹. It is noteworthy that the peculiarities of vessel crew work and employee guarantees are regulated by the above Law to ensure the protection of employees' rights.

5. On the Extent of Equal Working Conditions

The Draft Law submitted to the Seimas provided that "The provisions of collective agreement between the user undertaking and its employees and local regulations of the user undertaking shall be applicable to a temporary worker. If the provisions

29 Lietuvos Respublikos prekybos laivybos įstatymas [Law on Maritime Shipping of the Republic of Lithuania]. *Official Gazette*. 1996, No. 101-2300.

regarding work conditions of the collective agreement between the user undertaking and its employees or other local regulations of the user undertaking are different from the provisions of the collective agreement between the employment agency and its employees or other local regulations of the employment agency, the provision that is most favourable to the temporary worker shall apply (Article 4, Peculiarities of work of temporary workers, Part 2).³⁰

Temporary Employment Agencies Association proposed rejecting surplus and impracticable provisions and replacing them by exact text from the Directive. Part 4 of Article 6 of the Directive provides that “Without prejudice to Article 5(1), temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons.” Part 1 of Article 5 of the Directive establishes that 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. In this case, the Directive relates the application of equal treatment principle only with the basic conditions of work and employment, defined in the Directive. With regard to the above, the Draft Law was corrected by supplementing by Part 7 of Article 2: ‘Basic working and employment conditions’ means working and employment conditions laid down by legislation, other regulations, collective agreements and/or other local provisions in force in the user undertaking relating to the work and rest time regimen and pay. Moreover Part 2 of Article 4 of the Draft Law was amended (Basic working and employment conditions of temporary workers during the period of their assignment to work for user undertaking must be at least such as would be applicable if the user undertaking directly hired the temporary workers for the same work) and this Article was supplemented by Part 3 (Without prejudice to Part 2 of this Article, temporary workers are granted the right to use the facilities and collective infrastructure of user undertaking, especially the canteen, child care and transportation services, and the services used by the employees hired directly by the user undertaking, except for the cases when application of different conditions is justified by objective reasons).

6. On Application of Equal Payment Principle

Article 3 of the Draft Law provided that “The pay of a temporary worker during the time of work for the user undertaking must be such as it would be if the temporary worker was hired directly by the user undertaking”. A proposal was submitted to the Seimas that the Law should establish the provisions of the Directive regarding the employees working under indefinite time period contracts (Part 2 of Article 5 of the Directive), i.e.,

30 Lietuvos Respublikos įdarbinimo per laikinojo įdarbinimo įmones įstatyto projektas [Draft Law on temporary agency work of Republic of Lithuania] [interactive]. [accessed 26-06-2011]. <<http://www.pvpa.lt/media/2011-03-01-Projektas.DOC>>.

as regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments. With regard to the above, the Law was supplemented providing that the pay of a temporary worker during the time of work for the user undertaking must be such as it would be if the temporary worker was hired directly by the user undertaking, except for the cases when temporary workers having signed contracts of employment of indefinite time period receive equal pay between the assignments and during the assignment (Paragraph 3 of Part 3 of Article 3 of the Law). So, according to the Directive, there was made exception in national legislation.

7. On Payment for the Periods between Assignments

The Draft Law established that minimum monthly salary approved by the Government of the Republic of Lithuania must be paid to the temporary worker during the periods between work assignments for idle time (Article 4, Part 1). It is noteworthy that the time period between work assignments (the worker did not go to work) and idle time are different things and have to be paid for differently. Such provision of the Draft Law did not comply with the Directive as the Directive does not provide for mandatory payment for the periods between assignments. Payment for the periods between assignments is a rare exception in EU Member States, related to deviation from equal payment for work. Part 2 of Article 5 of the Directive provides for payment for the periods between assignments as an exemption, which would be applicable in the event of deviation from the principle of equal pay. With regard to the above, the Law was supplemented by the provision that Idle time of temporary workers between assignments for work, when the workers do not work, are not paid for, if the pay of the temporary worker during time period of work for user undertaking is at least equal to the pay applicable to the worker, if he was directly hired by the user undertaking for the same position, and such time periods constitute up to 5 business days in a row. If the time period between assignments for work is longer than 5 business days in a row, at least the minimum monthly salary approved by the Government of the Republic of Lithuania must be paid to the temporary worker (Part 1 of Article 4 of the Law).

8. On Prohibition to Conclude Temporary Employment Contract

Paragraph 2 of Part 2 of Article 8 of then Draft Law sought to establish a prohibition for the user undertaking to conclude a contract of temporary employment, under which temporary workers would work for the user undertaking for a certain time period, if the user undertaking had dismissed more than 10 percent of its employees under employer's initiative and without the fault of the employee.

A proposal to reject this requirement was submitted to the Seimas, as the prohibition under the Draft Law is not provided by the Directive. *With regard to the above, the Law was amended as follows:* It is prohibited to the user undertaking to conclude a contract of temporary employment in order to replace former employees of user undertaking (Paragraph 2 of Part 2 of Article 8 of the Law).

9. On Supervision of Temporary Agency Employment

Part 1 of Article 11 of the Draft Law provided that the employment agencies must provide the information on started temporary agency employment activities, user undertakings temporary employment contracts were signed with, and the number of temporary workers assigned to work for the user undertakings to State Labour Inspectorate of the Republic of Lithuania in the procedure and time period set by the Government of the Republic of Lithuania or its authorised institution. A proposal was submitted to the Seimas to strike off the text “user undertakings temporary employment contracts were signed with” and “workers assigned to work for the user undertakings”, as user undertakings may be all enterprises without restrictions. Temporary workers are working with employee’s certificates just like permanent employees. The provisions regarding the supervision and control mechanisms are not elaborated in the Directive. With regard to the above, the Draft Law was amended establishing that Employment agencies must provide the information on started temporary agency employment activities and the number of temporary workers to State Labour Inspectorate of the Republic of Lithuania in the procedure and time period set by the Government of the Republic of Lithuania or its authorised institution (Part 1 of Article 11 of the Law). In the procedure set by the Section 4 of the Law on Public Administration of the Republic of Lithuania, State Labour Inspectorate of the Republic of Lithuania supervises the compliance of employment agencies and user undertakings with this Law, the requirements of occupational safety and health regulations and other regulations when performing the activities of temporary agency employment; consult them in the issues of application of Labour Law and this Law; and assess the information obtained in accordance with Part 1 of this Article (Part 2 of Article 11 of the Law).

The Law does not discuss the cases when the temporary worker wishes to be directly employed by the temporary work user undertaking. With regard to the above, it is recommended for the parties to agree beforehand on the cases when the user undertaking decides and the temporary worker agrees to be employed by the user undertaking. Although the Law on Temporary Agency Employment restricts the possibilities of permanent employment of temporary workers by the user undertaking, the parties are free to agree (it is not prohibited) that the user undertaking must pay a certain (reasonable) fee to the employment agency for permanent employment of the temporary worker by the user undertaking. This complies with the provisions of the Directive.’

In conclusion, we could state that the Directive was the guide considering what clauses should be in the Law, of course, implementing the Directive into national legislation.

10. Problems in Application of the New Law

The following problems of application of the new Law may be distinguished: cooperation of the employment agency and temporary work user undertaking to implement the provisions of the Law, distribution of responsibility between the parties, and the intention of market players to conceal temporary employment.

As mentioned above, the basic working and employment conditions of temporary agency workers must 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. One of the key targets of the Law and the Directive is the application of equal pay principle. The Parties seeking to implement the provisions of the Law will have to work together to assess the conditions of payment conditions, size and possibilities of its changing for permanent employees of user undertaking and temporary workers, as the pay of a temporary worker during the time of work for the user undertaking must be such as it would be if the temporary worker was hired directly by the user undertaking, except for the cases when temporary workers having signed contracts of employment of indefinite time period receive equal pay between the assignments and during the assignments. In order to avoid violation of the Law, the parties should define their responsibilities in the contract (sharing information, information type, provided guarantees) to ensure the application of the principle of non-discrimination.

Part 1 of Article 6 of the Law is an imperative provision that the relations of employment agency and user undertaking are based on a written contract of temporary employment between them. This contract must stipulate the qualification of a temporary worker(s), work functions, work regimen, and the procedure of training, assignment and withdrawal from work for the user undertaking of temporary worker(s). It is noteworthy that the *employment contract with the temporary worker* must provide for the following necessary conditions: 1) the procedure of call and assignment of temporary worker to work for the user undertaking and withdrawal from the work for the user undertaking; 2) the procedure of notification about the start and end of work for the user undertaking; 3) the amount of pay and procedure of payment for the time periods between assignments to work for the user undertaking. The pay of a temporary worker during the time of work for the user undertaking must be such as it would be if the temporary worker was hired directly by the user undertaking, except for the cases when temporary workers having signed contracts of employment of indefinite time period receive equal pay between the assignments and during the assignments; 4) work time regimen of a temporary worker. Prior to starting work, the user undertaking must familiarize the temporary worker against a signature with working conditions, collective agreement, rules of procedure, and other legal acts regulating his work for user undertaking, as well as applicable requirements of occupational safety and health regulations. Temporary employment contract may be concluded for assigning or withdrawing one or several temporary workers. With regard to the requirements of a temporary employment contract seeking to ensure the guarantees for temporary worker(s) provided by the law and other legislation, it is likely that such

regulation will be problematic to implement in practice, as the temporary employment agency has limited possibilities to make sure and check actual working conditions of the workers at the user undertaking. In this case, implementation of the obligation of trust and fair cooperation between the parties is necessary, as otherwise if one of the parties abuses its status, proper protection of the workers will not be ensured.

It is recommended to discuss in the agreement what information should be presented by the user undertaking to the temporary employment agency so that it was sure about the safety of the temporary worker (e.g. written proof of familiarization with the instructions of safety at work). It should be established how and when the user undertaking will instruct and train temporary workers on occupational health and safety requirements, familiarize with applicable operation procedure, and direct work functions.

The parties must agree on the compensation of the damages caused by the temporary worker to the user undertaking. Although the Law of Temporary Agency Employment provides that the employment agency is liable for the damage caused by the actions or failure to act of a temporary worker to user undertaking, the parties may agree upon the limitations of compensation for such damage³¹. A possible variant is for the parties to agree that the above damage to user undertaking shall be compensated not exceeding the limits of employee's liability for the employer under the Labour Code of the Republic of Lithuania³². The provision of the new Law that the employment agency is liable for the damage caused by the actions or failure to act of a temporary worker to user undertaking is subject to criticism, as the temporary employment agency does not control the work of the employees, which is characteristic in the cases of contracting or providing regular services. It is also recommended for the parties to discuss the guidelines of cooperation between the parties when discussing the breaches of discipline of temporary workers. It is noteworthy, that it is the user undertaking who establishes the procedure of operation and familiarizes temporary workers with it. An agreement between the parties of temporary employment contract is possible that under a certain procedure and certain terms the user undertaking shall inform the temporary employment agency about the breaches of discipline by the temporary worker, for which disciplinary liability may be applied by the user undertaking.

When the temporary employment model is used and the parties seek to avoid inspections and following the requirements for such activities under the law, the parties may conceal such activities and formally represent that they are working under contracting or service agreements. In this case, temporary employment could be proved only with the help of the temporary worker. It is noteworthy, that a situation where the user undertaking is recognized as the employer of the temporary worker is possible. Foreign practice shows that the employer may change *de facto*, e.g. in the United Kingdom case of *Motorola v. Davidson*, the user undertaking was recognized

31 Lietuvos Respublikos civilinis kodeksas [Civil Code of the Republic of Lithuania]. *Official Gazette*. 2000, No. 74-2262.

32 Note: according to the general rule, the employee's liability shall not exceed employee's three monthly salaries.

as the employer and responsible for dismissing the temporary worker, as it has actually controlled and supervised a leased employee for a very long time³³.

Conclusions

1. Adopting the Law on Temporary Agency Employment in Lithuania was determined by legal and economic causes: not only the Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work and 1997 ILO Private Employment Agencies Convention No. 181, but the demand of the market as well.

2. In 2007, the Ministry of Social Security and Labour prepared the conception of labour lease³⁴ and the draft Law on Labour Lease was prepared based on it. The above draft law addressed the restrictions of temporary employment often applicable in other EU Member States but the Adoption of the Directive was the grounds for the content of the law and rejection of prohibitions not provided by the Directive. With regard to the Directive, the notion “labour lease” was replaced by “temporary agency employment in the Law.

3. After adoption of the Directive, the process of law preparation may be divided into two stages: preparation of Draft Law prior to submitting to the Seimas and correction of the Draft Law by the Seimas.

4. The Directive was the guide considering what clauses should be in the Law, by the same implementing the Directive into national legislation.

5. Cooperation of the employment agency and temporary work user undertaking to implement the provisions of the Law, distribution of responsibility between the parties, and the intention of market players to conceal temporary employment could be distinguished as potential problems of application of the new Law.

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DIREKTYVOS DĖL LAIKINOJO ĮDARBINIMO ĮGYVENDINIMAS LIETUVOS DARBO TEISĖJE

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Santrauka. Šiame straipsnyje analizuojami ES Direktyvos dėl darbo per laikinojo įdarbinimo įmones perkėlimo į Lietuvos teisės sistemą ypatumai ir nustatomos teorinio bei praktinio pobūdžio problemos, susijusios su naujuoju reglamentavimu. Pasirinkta tema aktuali tuo, kad nuo 2011 m. gruodžio 1 d. Lietuvoje įsigalios Įdarbinimo per laikinojo įdarbinimo įmones įstatymas, perkeliantis ES Direktyvos dėl darbo per laikinojo įdarbinimo įmones nuostatas. Nesant teisinio reglamentavimo šis personalo valdymo įrankis tiek darbuotojams, tiek verslui kėlė nepasitikėjimą. Įsigaliojus įstatymui, ši problema išnyks.

Straipsnyje aptariama naujojo laikinąjį įdarbinimą reglamentuojančio įstatymo priėmimo prieštara, priežastys, nulėmusios įstatymo atsiradimą, detalios nagrinėjamos esminės šio įstatymo nuostatos, analizuojamos teorinės ir praktinės problemos, atliekamas ES direktyvos įgyvendinimo įvertinimas.

Naujasis įstatymas iš esmės apsiriboja Direktyvos rekomendacijomis, nenustatydamas papildomų suvaržymų. Įdarbinimo per laikinojo įdarbinimo įmones įstatyme apibrėžiami darbo santykių tarp laikinųjų darbuotojų ir laikinojo įdarbinimo įmonės ypatumai, tokie kaip darbo užmokestis laikiniejiems darbuotojams nedarbo laikotarpiu, įdarbinimo per laikinojo įdarbinimo įmones santykiuose dalyvaujančių asmenų teisės ir pareigos, kurios įtvirtina darbo naudotojų prievolę užtikrinti laikiniejiems darbuotojams saugias ir sveikatai nekenksmingas darbo sąlygas, atsakomybę už padarytą žalą ir kt. Įdarbinimo įmonės draus laikinuosius

darbuotojus socialiniu draudimu tokiomis pat sąlygomis, kaip draudžiami ir kiti darbuotojai. Laikiniems darbuotojams galios tos pačios sąlygos kaip ir nuolatiniams įdarbinimo įmonių klientų darbuotojams dėl darbo ir poilsio laiko režimo, darbų saugos ir darbo užmokesčio. Laikinieji darbuotojai galės naudotis ir visais darbo vietoje esančiais patogumais ar infrastruktūra (pavyzdžiui, valgykla, vaikų priežiūros ir transporto paslaugomis), tomis pačiomis sąlygomis, kuriomis naudosis ir kiti darbuotojai.

Išvadoje teigiama, kad Direktyvos nuostatos įgyvendinamos naujajame įstatyme, tačiau tai anaiptol neužkerta kelio praktinių įstatymo taikymo problemų atsiradimui, tarp jų ir laikinojo įdarbinimo slėpimui rangos ar paslaugų sutartimis.

Reikšminiai žodžiai: laikinasis įdarbinimas, Lietuvos Respublikos įdarbinimo per laikinojo įdarbinimo įmones įstatymas, darbo teisė, nestandartinė darbo forma, Direktyva dėl darbo per laikinojo įdarbinimo įmones, agentūrinis darbas, laikinoji darbo sutartis, darbo nuoma.

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