Ius Laboris BELGIUM
CLAEYS & ENGELS

New rules on temporary work

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Already for some years now, temporary work has been growing at a rapid rate. Although such type of work was originally seen as an emergency operation, the facts show that more and more companies make use of temporary workers as a way to identify workers they eventually hire as employees.

The legal framework for temporary work has, however, lagged behind these developments. Although adapting the legislation that existed on temporary work was already on the political agenda in 2004, it took a very long time for discussions between the social partners to produce results. Only on 23 January 2012 did the social partners came to an agreement on the principle, which they elaborated in Advice no. 1807 of the National Labour Council (NLC).

On the basis of this advice, the legislator has modified the Act of 24 July 1987 on temporary employment, temporary work and putting workers at the disposal of a user with the Act of 26 June 2013 (*B.S.* 16 July 2013). The necessary modalities and procedures are contained in CBA no. 108 of the NLC, signed on 16 July 2013, in which the current CBAs no. 36 and 58 are integrated.

The changes will take effect from 1 September 2013.

The key elements of the changes made are:

- a new justification ("motif") for using temporary workers is now introduced and regulated – this motif is called "inflow";
- the use of daily contracts is regulated;
- rules on information on and control of temporary work have been modified;
- the '48-hour rule' with respect to the signing of employment contracts for temporary work is being phased out.

Action plan/ Practical advice

⇒ From now on, you can make use of the new motif "inflow" to engage temporary employees supplied by a third party. Do however respect the limits: maximum three temporary employees supplied by a third party per vacancy, with an employment contract of minimum one week up to maximum six months, with a maximum of nine months per vacancy. Moreover, you will need to first inform and consult the trade union delegation.

⇒ To make use of successive daily contracts, you should henceforth be able to demonstrate the need for flexibility.

⇒ Do not forget that you have a more extensive information obligation with respect to the trade unions in case you use temporary employees supplied by a third party!

More info:
www.claeysengels.be
info@claeysengels.be

1. New motif: inflow

Currently, there are three main reasons a company can cite to justify its use of temporary workers:

- temporary replacement of a permanent employee whose contract was terminated or temporarily suspended (for example, because of illness, holidays, ...);
- to deal with a temporary increase in work within the company;
- to deal with exceptional work as defined in CBA no. 36.

Henceforth, a temporary employee supplied by a third party can also be engaged in order to fill in a vacancy within the user company with the intention of recruiting him/her afterwards, without having to seek the trade union delegation's prior permission.

1.1 Modalities to avoid abuse

In order to avoid that there would be abuses by a company always using, for the same vacancy, temporary employees supplied by a third party under the motif 'inflow', without this ever leading to a permanent employment, there are some conditions:

- there can be maximum three attempts per vacancy with "inflow" temporary employees supplied by a third party;
- each attempt may last a maximum of six months;
- the employment contract for temporary work must have a duration of minimum one week and maximum six months;
- the total period of activity of the temporary employees supplied by a third party for a vacancy may not be longer than nine months. However, the period of activity of a temporary employee supplied by a third party who has either resigned or been fired for serious cause does not have to be taken into account.

1.2 Information on the number of attempts

For verification purposes, the user company must inform the agency supplying the temporary employees about the number of attempts. The agency should include this information in the employment contract with the temporary employee it supplies. The agency cannot be sanctioned if the information turns out to be incorrect, since only the user company has the possibility to know with certainty whether the information is correct. Only when the agency does not include the information in the employment contract of the temporary employee it supplied, can a sanction be imposed.

If the user provides incorrect information, as a result of which the permitted number of attempts is exceeded, the temporary employee supplied by the agency will be bound by an indefinite-term employment contract with the user.

1.3 Information to the trade union delegation

Before taking advantage of the new motif, the trade union delegation must be informed and consulted on the reasons for making use of the motif, the vacancies concerned, the number of attempts and the duration of each attempt.

1.4 Employment guarantee

In order to give the temporary employees supplied by a third party a real chance, an employment guarantee of one month is provided if the person concerned has himself terminated his indefinite-term employment contract with another employer to work as a temporary employee supplied by a third party. For the other temporary employees supplied by a third party, the concrete duration of the guarantee has yet to be determined. It is provided that more favourable rules can be agreed in CBA's or collective agreements.

If the agency providing the temporary worker terminates, without serious cause, the agreement for "inflow" temporary work during the term of the employment guarantee, the agency must provide alternative work, with equal pay and similar working conditions, until the end of the employment guarantee. If the agency does not respect this obligation, an indemnity equal to the wages until the end of the term of the employment guarantee must be paid.

1.5 Recruitment by the user

There is no obligation to hire, but if the user decides to engage the temporary employee supplied by a third party on a permanent basis, an indefinite-term employment contract must in principle be concluded.

The periods worked as temporary employee supplied by a third party under the motif "inflow" at the user, must moreover be taken into account:

1) If the "inflow" temporary employee supplied by a third party is hired for a function for which he was "tested", the period of activity as "inflow" temporary employee (including periods of holidays or illness) will be counted for the application of agreements or provisions which take into account the seniority within the company (such as for example the granting of a bonus or a wage advantage). The rules on notice periods do not change however. Therefore, there is still a maximum of one year of seniority as temporary employee supplied by a third party for the same function at the user, which is taken into account, regardless of the motive.
2) If a trial period is provided for, this period should be shortened by the entire period of activity at the user as "inflow" temporary employee supplied by a third party.

If the temporary employee supplied by a third party is not recruited on a permanent basis, the agency must give him an oral (or - at his request - written) explanation of the reasons.

2. Successive daily contracts

2.1 Current regulation

The conclusion of successive fixed-term employment contracts leads in principle to the creation of an employment contract for an indefinite period of time. In the context of temporary work, there is a deviation from this principle and it is possible to conclude successive fixed-term employment contracts, without this automatically leading to an indefinite-term employment contract.

Agencies for temporary employees can therefore employ temporary employees in a very flexible way, by constantly closing daily contracts, even for tasks that take longer. In case of non-renewal of the daily contract, no severance pay or notice will be due.

2.2 New regulation

2.2.1 Only for successive daily contracts

The conclusion of successive daily contracts has now been partly restricted. This concerns daily contracts that:

- are successive: for example a daily contract concluded on Tuesday and on Wednesday;
- are only separated by a normal day of inactivity of the department/company: for example daily contracts on Wednesday and Friday if the department/company for which the temporary employee supplied by a third party is working, is always closed on Thursday;
- are only separated by a public holiday: for example a daily contract on Tuesday and Thursday, with Wednesday being a public holiday.

2.2.2 Need for flexibility

For successive daily contracts, the user will have to demonstrate that the contracts meet a real need for flexibility, because the volume of work:

- very much depends on external factors

  For example the weather has a big influence on the work in fruit cultivation

- fluctuates significantly

  For example in logistics, transport orders often arise on a daily basis

- is linked to the nature of the assignment

  For example a one day trade exhibition for which a number of hostesses are needed

If the user can not demonstrate the need for flexibility, the agency for temporary employees will have to pay an indemnity equal to the wages for an employment contract of two weeks, on top of the normal wages.

2.2.3 Process

An information and consultation process, as well as a dispute resolution process is now provided for. If the user company has a works council or a trade union delegation, the process is dealt with these bodies. If such bodies do not exist, a process is provided at the level of the joint committee of temporary work and the user company itself. Only after that can parties go to court.

3. More extensive information to the trade unions

Up until now the trade unions only received very general information on temporary work within the company. The existing information obligation is maintained, but extended to all justifications for temporary work. This wider information obligation differs according to whether or not the user company has a works council or trade union delegation and must enable a clearer picture to be had on temporary work within the company.

4. Phased abolition of the '48-hour' rule

Finally, the '48-hour' rule will be abolished within a set period.

4.1 Current regulation

The '48-hour' rule provides that employment contracts for temporary work can be signed until two working days after the start of the temporary work. This deviates from the normal rule that a fixed-term employment contract must be signed at the latest on the moment on which the employee enters into service.

The '48-hour' rule permits taking into account the flexible and urgent character which is inherent to temporary work, making the signing of the contract before the start of the assignment not always possible. The other side of the same coin is that the temporary employee supplied by a third party is in a particularly uncertain situation before the moment of signing, since he has no documents to prove that he is employed by the agency that provided him to the user company.

4.2 Phased abolition

In order to end this uncertain situation for the temporary employee supplied by a third party, the social partners agreed to organise this issue electronically in the near future, so that the '48-hour' rule can be abolished:

- 1st phase: abolition of the '48-hour' rule for successive daily contracts for temporary work, as far as it is possible from a technical point of view to determine the beginning of the temporary work. This should already be achieved by the end of 2014;

- 2nd phase: abolition of the '48-hour' rule for all temporary employees supplied by a third party, provided that the closure of electronic employment contracts is possible within the sector of temporary work.

Neither the CBA, nor the Act already contains provisions on this abolition. Social partners have merely promised to comply with the proposed timing.

5. Entry into force

These changes are included in one CBA, in which the existing CBA's no. 36 and no. 58 are integrated, as well as in the Act on temporary work of 24 July 1987. The changes, both of the Act and of the new CBA, will enter into force on 1 September 2013.

Ius Laboris BELGIUM
CLAEYS & ENGELS

Brussels
Boulevard du Souverain 280
1160 Brussels
Tel.: 02 761 46 00
Fax: 02 761 47 00

Liège
Boulevard Frère Orban 25
4000 Liège
Tel.: 04 229 80 11
Fax: 04 229 80 22

Antwerp
Commodity House
Generaal Lemanstraat 74
2600 Antwerp
Tel.: 03 285 97 80
Fax: 03 285 97 90

Ghent
Ferdinand Lousbergkaai 103 bus 4-5
9000 Ghent
Tel.: 09 261 50 00
Fax: 09 261 55 00

Kortrijk
Ring Bedrijvenpark
Brugsesteenweg 255
8500 Kortrijk
Tel.: 056 26 08 60
Fax: 056 26 08 70

Hasselt
Luikersteenweg 227
3500 Hasselt
Tel.: 011 24 79 10
Fax: 011 24 79 11

Partners with you.