

## **Collective Dismissal Notification - Impact of Temporary Workers on Employee Thresholds**

Pursuant to sec. 17 para. 1 Dismissal Protection Act, employers might be obliged to notify the Employment Agency if a particular number of dismissals as compared to the total number of regular employees is exceeded. Whether temporary workers have to be considered as such regular employees has not yet been decided by the Federal Labor Court.

### **Higher Labor Court Düsseldorf**

According to a judgement of the Higher Labor Court Düsseldorf dated September 8, 2016 (file no. 11 Sa 705/15), temporary workers do not have to be taken into account when determining the number of regular employees.

In the underlying case, the regular number of employees has been 120. In addition, the employer hired between three and four temporary workers. Prior to giving notice to at least 12 employees, the employer did not file a collective dismissal notification.

The employer argued that the prerequisites for a notification were not met given a number of 12 dismissals as compared to 123 or 124 total regular employees (including temporary workers). As opposed to that, the employee argued that the employer had been obliged to file a collective dismissal notification given a number of 12 dismissals as compared to only 120 regular employees (not including temporary workers). As no notification had been filed, the dismissal had been null and void in her opinion.

The Higher Labor Court Düsseldorf followed the employee's argumentation.

In case of 61 to 499 regular employees, the threshold triggering notification proceedings is exceeded in case at least 10% of the employees are dismissed, i.e. 12 out of 120 respectively 13 out of 123 or 124 regular employees. As temporary workers may not be taken into account, 12 dismissals already triggered the employer's notification obligations.

Although according to the case law of the Federal Labor Court, temporary workers have to be considered as regular employees of the hiring company for multiple employee thresholds, this legal assessment may not generally be applied to any employee thresholds but only where the original objectives of the legislator justify such interpretation. The particular objectives of the notification proceedings under sec. 17 Dismissal Protection Act, however, object to considering temporary workers as regular employees. The proceedings shall in particular allow the Employment Agencies to take actions with respect to envisaged dismissals at an early point in time whereas redundancies at the hiring company do not necessarily go along with a termination of the employment relationship between temporary worker and leasing company.

### **Preliminary Ruling Procedures**

Following an appeal of the employer, the Federal Labor Court decided on November 16, 2017 (file no. 2 AZR 90/17 (A), press release no. 51/17) that preliminary ruling procedures with the European Court of Justice shall be initiated. The ECJ has in particular been asked to clarify whether Art. 1 para. 1 subpara. 1a of the EU Directive 98/59/EC (transposed into German law by sec. 17 para. 1 Dismissal Protection Act) must be interpreted as considering temporary workers for the calculation of the regular employee number of a hiring company in the context of collective dismissals.

### **Comment**

As a rule of thumb, the higher the number of regular employees, the more employees have to be dismissed to trigger the employer's obligation to file a collective dismissal notification. Accordingly, considering temporary workers as regular employees but not taking them into account for the number of dismissals might distort the requirements for initiating notification proceedings. It is therefore of high practical importance which impact temporary workers have on this employee threshold.

Until the preliminary ruling of the ECJ, the impact of temporary workers in the context of

collective dismissal notification obligations should be evaluated carefully, esp. if – for the time being – temporary workers are still not considered as regular employees and a (precautionary) collective dismissal notification is filed to ensure the effectiveness of the individual dismissals.

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