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B2B: New Law Bans Temporary Agency Work, But Allows For Secondment

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HR professionals were alarmed when a draft law to ban temporary agency work (TAW) was put before the State Duma in December 2010. Thanks to the business community working together with great dedication, this draft law remained a draft for almost three-and-a-half years. However, all good things come to an end. And the draft, after hundreds of editions, was passed into law on 5 May 2014 (Federal Law No. 116-FZ). The law will take effect on 1 January 2016.

During the discussion process, businesses took a clear-cut position: in a market economy it is impossible to ban a practice that is widely used in other market economies. This argument was taken into account. In contrast to the initial draft, the final version of the law not only bans TAW, but allows for secondment (referred to in the law as "provision of labor to third parties"). Thus, trade unions and employers should both be happy. The former got the ban of TAW they wished for, while the latter will (probably) still use personnel provided by temporary employment agencies.

But...

Firstly, it will be impossible to tell the difference between TAW and secondment under the law, because the definition is the same! Both TAW and secondment involve (a) an employee being assigned by their employer, (b) to a third party, (c) where the employee works on behalf, and under the control and supervision of this third party. Although the definition of secondment also mentions the temporary nature of work and the employee's consent, it adds little to the substance of the matter. Inaccurate wording imposes great risks on good faith employees and agencies while increasing the risks of corruption.



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Secondly, companies other than temporary employment agencies will have the right to second their employees only if a separate law on secondment is adopted. If this is not passed by 2016, provision of temporary personnel will be exclusively an option for agencies. The Ministry for Economic Development has been instructed by the Parliament to prepare the initial draft by July 2014. This draft has not yet been published for discussion.

Thirdly, there is a severely limited scope for agencies to provide temporary staff. There is an exhaustive list of situations in which such provision is allowed, which is in fact limited for businesses to two situations: to replace absent employees and to extend production/services on a temporary basis for up to 9 months. In addition, agencies will not be able to provide temporary employees to perform certain types of work (such as some work at hazardous facilities). Also, it is not allowed for temporary personnel to replace workers who are on strike, to work at a company which is subject to bankruptcy proceedings, or to work at a user company where there is idle time. Thus, there is a checklist for engaging temporary agency employees, which seems too long to follow.

Finally, a user enterprise bears secondary liability to temporary agency employees. Such liability is not limited to arrears in wages, as was suggested during the consultation process. Therefore, virtually all claims that employees may have against their formal employer (i.e. the agency) may also be addressed to the user enterprise. This makes using TAW less attractive for businesses.

As a result of the new law, temporary agency employees will cost more for businesses, as the new regulations mean that agencies will have additional costs.

Companies should assess whether they will fully meet the requirements to be able to use temporary personnel, taking account of new limitations effective from 1 January 2016. If not,

companies may replace (in full or in part) existing contracts for temporary personnel to be provided with agreements for services to be provided: the latter fall outside the scope of the new law. However, this is possible only if amendments are made to business processes. And particular attention should be paid to whether there is a risk of courts or regulatory authorities treating these agreements as contracts for provision of personnel rather than services.

With the adoption of the law, the first step has been taken from a ban towards regulation. However, there is a strong need for this law to be amended so that there are greater options for using TAW and secondment while preserving employees' rights.

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