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PARTIAL NATIONAL REPORT GERMANY
LEIHARBEIT (EMPLOYEE LEASING OR TEMPORARY WORK) IN GERMANY

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I. ROLE OF THE LEIHARBEIT IN GERMANY

The Leiharbeit has a slowly growing in Germany so far, but compared with other European countries much role limited easily. Since 1972 are at all legalisiert it. The employee hiring law, which arranges Leiharbeit, permitted at first only hirings up to maximally three months. Since 2003 are permitted a temporally unlimited hiring.

The characteristic of the German employee hiring right is that the lender employer of the borrowing employee remains also during the hiring times and the rental business-free meantime. The legal example is the unlimited employer-employee relationship to the lender, who lends the borrowing employee again and again temporarily different borrowers.

Practice does not correspond to this example predominantly. Frequently borrowing employees of the lenders are adjusted only for the time of a certain hiring. This the legislative intentions contrary-current synchronization of employer-employee relationship and outside firm employment was fought since 1972 with little success against the legislator.

II. REFORM OF THE LEIHARBEIT SINCE 2003

At the end of of 2002 was liberalisiert the employee hiring right in Germany to substantial extent.

Since 2003 there is no more temporal delimitation for the hiring maximum duration. A lender can temporally for an unlimited period leave to a borrower, who employs these borrowing employees like own employees, without however their employer to employee to become.

The reorganization of the employee hiring did not however only let the hiring maximum duration be omitted. The legislator forced Equal Treatment “by the introduction „of the Equal Pay “and „as rule of the remuneration and/or the wage additional service of the borrowing employees the industry actually to collective wage agreements. „Equal Pay “and „Equal Treatment “mean that borrowing employees have a legal requirement on the remuneration and the additional service of comparable employees of the employment enterprise for the time of their hiring.

The legislator permits as exception that a smaller remuneration of the borrowing employees seizes or by work-contractual assumption of the relevant collective agreement between lenders and borrowing employees be agreed upon can either strength of mutual tariff connection. The consequence of this legal organization was that starting from 2003 in the borrowing work industry very fast a larger number of surface and house collective agreements was locked. These collective agreements specify a very low wage level for the simple activities of borrowing employees. In the meantime it is a rare exception that borrowing employees receive the legal remuneration (Equal Pay/Equal Treatment), because became generally accepted the according to tariff regulated conditions of work completely.

With this wage level it is at present attractive quite to employ borrowing employees in particular in place of permanent staff for simple activities. Tarif wages partly lie in the employment enterprises up to 100% over the as fixed in the tariff remuneration of borrowing employees.

The legislator had placed high expectations against this liberalisation of the employee hiring right. One expected a substantial dismantling of unemployment with simple activities. The numbers for the Leiharbeit developed actually clearly upward after the liberalisation. Certainly it is not clear to what extent herein also the shift of permanent staff is contained into the Leiharbeit – that would be actually only a payment shortening without job market effect.

Existence of left borrowing employees

Year	2000	2001	2002	2003	2004
Average	328.011	341.053	319.299	330.219	385.256

Average from 12 months computes

Source: 10. Empiric report of the Federal Government for the application of August, excerpt from table 6 [1][1]

1. Assignments

The length of employment of borrowing employees with a lender extended after the reform on the average slightly. Continuous conditions of employment to the lender with a multiplicity of individual employments with different borrowers are not however by any means the rule.

Also the durable replacement of permanent staff by by far cheaper borrowing employees within the lower range [2][2], discussed in the technical literature, did not take place in practice obviously yet to large extent.

The numbers of the Federal Institution for work, which are enough to end 2004, make clear that altogether the short term work contracts of up to three months in the borrowing work industry outweigh.

Terminated employer-employee relationships after duration of the employer-employee relationship

Deadline	under 1 week	1 week until under 3 months	3 months and more	Together
Year 2000	40.482	208.897	129.880	379.259
Year 2001	37.274	183.486	140.172	360.932
Year 2002	36.701	175.305	124.375	336.381
Year 2003	41.934	184.269	139.164	365.367
Year 2004	44.484	181.422	144.724	370.630

Deadline 31.Dez.

Source: 10. Empiric report of the Federal Government for the application of August, excerpt from table 8 [3][3]

2. Wage level and as fixed in the tariff protection of interests

The remuneration of the borrowing employees are on low level. That has to do probably also with the fact that a as fixed in the tariff protection of interests of the borrowing employees takes place only to very limited extent. The trade unions of the German trade union federation locked 2003 with the two large employer's associations IGZ and BZA collective agreements. But these collective wage agreements were substantially at pressure, because parallel so-called Christian trade unions, which have almost no member basis, which employers much „approve of “collective agreements offered and with smaller employers' associations and individual employers also locked.

The discussion over the Tariffähigkeit of these so-called Christian trade unions is not final yet. At present a status procedure is introduced, with which the industrial trade union metal wants to let the Tariffähigkeit of the *tariff community of Christian trade unions Leiharbeit* clarify.[4][4]

Substantial meaning is attached to this procedure, because it is important for the wage level in the industry whether such Dumpingabschlüsse, how they were transacted with the Christian trade unions existence to have.

3. Reduction of costs by Leiharbeit in the company

A way to the reduction of costs by Leiharbeit is the establishment of company rental business enterprises, which cover companyly internal the need at cheap wage workers. As far as such an enterprise does not act at the market, it lies near to evaluate it as a stooge. Then the employees are to be assigned to the employment enterprise.[5][5] The adhesion sequences are substantial, because tarif wages valid in the employment enterprise must be paid including all deliveries.

4. Personnel service agencies

The Federal Government tried starting from 2002 to concern the mass unemployment by so-called personnel service agencies [6][6]. The thought was that nationally promoted lenders should lead back also problematic cases of unemployment thereby into the work market that they left this temporarily enterprises. With that so-called sticking effect should be transferred then a large part of these persons into continuous jobs. One hoped thus the fact that the borrowers find after some time of the hiring favor at the left employees and to continuous conditions of employment transfers it.

In practice the concept did not work despite high financial employment. It is shown that with this procedure only such unemployed persons are to be mediated, who were obtainable also in the conventional procedure. Finally the question of full employment is a question of the price. So long the labor costs for simple tasks are not so high, how it is now still the case, can on the fact be counted that employers adjust employees, if these employees are achievement-weakened.

5. Actions at a distance of the reform

Despite the quite small practical meaning of the Leiharbeit, which does not place than 1.5% of all employees liable to social security also after the reform any more, nevertheless effects on the Lohngefüge are recognizable. The collective wage agreements in the Leiharbeit showed with their low level in the aid range that the market price of such simple activities lies substantially lower, as the Tarifniveau for simple tasks in a set of industries. It is to be expected that it will come slowly to a sinking of the remuneration level also in these industries: If it is by the increased use of borrowing employees in the aid range, it is in addition, by own collective wage agreements on lower level. Probably both ways will be committed at the same time. From trade union side one quite sees this development tendency. Obviously one accepted it however, because one would otherwise hardly have transacted so low collective wage agreements, as they came in the year 2003.

6. General survey of the reform

The reform of the employee hiring right did not improve the position of the individual borrowing employees recognizably. Borrowing employees have theoretically requirement on the same protection pertaining to labor law as other employees also. Because a large part of the borrowing employees is busy in simplest activities, their possibilities of the protection of interests are limited. The chances of a collective protection of interests are hardly used in the Leiharbeit. Only few enterprises, which lend employees professionally, have a work council. A tiny portion of the borrowing employees is unionized organized.

These two circumstances show that the borrowing employees do not have supplementing own collective protection of interests the individual protection pertaining to labor law actually. Straight one, where the individual employee hardly is due to its social position and its penetration power able, the own interests alone to represent, is a collective protection of interests a necessary condition of the effective perception of the own interests.

III. LEGAL ORGANIZATION OF THE LEIHARBEIT IN GERMANY

1. Fundamental

The hiring of employees of an enterprise to differently enterprise is permitted without special permission only if it does not take place professionally. A professional hiring is present however already if the hiring takes place more than and is paid at least cost-hitting a corner. Therefore employee hiring can be operated in practice in Germany only in the form of the permission-requiring professional employee hiring.

The only exception facts, which have beside it substantial practical meaning, are company-borrow. Afterwards it is to be left permissible between company sisters employees temporarily. It is presupposed that is from the outset intended, that left employee on his old job back zuholen.

§ 1 August permission obligation

(1) [1]Arbeitgeber, which want to leave third (borrowers) employee (borrowing employee) as lenders professionally for work, require permission. [2]Die delegation from employees to a working group formed for the production of a work is not employee hiring, if the employer is member of the working group, applies for all members of the working group of collective agreements of the same industry and all members are obligated due to the working group contract to the independent contribution of contractual obligations. [3]Für an employer with registered place of business in another member state of the European marketing area is not the delegation fulfilled from employees to a working group formed for the production of a work also then employee hiring, if to him German collective agreements of the same industry do not apply as to the other members of the working group, it however the remaining conditions of the set of 2.

(2) If employees third are left for work and if the leaving does not take over the usual employer obligations or the employer risk (§ 3 exp. 1 No. 1 to 3), then it is assumed that the leaving employment agency operates.

(3) This law is with exception § of the 1 b sentence 1 to apply § 16 exp. 1 No. 1 b and exp. 2 to 5 as well as §§ the 17 and 18 not to the employee hiring

of 1. between employers the same industry for the avoidance of short-time work or dismissals, if a collective agreement valid for the borrower and lender plans this,

2. between company enterprises in the sense § 18 of the law on limited companies, if the employee does not carry its work out temporarily at its employer, or

3. abroad, if the borrowing employee is lent in a German foreign joint undertaking justified on the basis of intergovernmental agreements, in which the lender is involved.

2. Hiring permission and illegal hiring

The professional employee hiring is permissible only if the rental business enterprise possesses an employee hiring permission. Such a employee hiring permission is relatively simple to get. She is given by the federal agency for work and is at first limited and later unlimited. Each enterprise, which is due to its organisational structure able to complete employee hiring can request and against an appropriate fee receive this permission.

If employee hiring without permission is operated, that has substantial legal consequences. The employee hiring law determines that with absence of permission the contracts between lenders and borrowers and the employer-employee relationship between lenders and borrowing employees are legally ineffective. Instead strength of law an employer-employee relationship between the borrower and the borrowing employee is justified. That illegaly active lenders and the borrowers are punished with a noticeable penalty. In the year 2001 2183 proceedings for assessing fines were locked because of the rental business by employees without permission ith S. v. § 16 I No. 1a August and determined caution funds, fines and amounts of purge at a value of € 13 million.[7][7]

In the year 2002 the number of the final proceedings for assessing fines was about 1886, whereby caution funds, fines and purge contributions at a value of € 4,6 million were determined.[8][8] In the year 2003 2217 proceedings for assessing fines were settled and determined caution funds, fines and purge contributions at a value of € 3,3 million.[9][9] For the year 2004 no statistic data concerning irregularities are present because of illegal employee hiring, since these irregularities in the total number of the procedures seized in the work statistics of the customs administration come up.[10][10]

Usually a multiplicity of masking tactics is used, in order to pretend the appearance of the legality between the business partners, whereby after the realizations of the customs administration it is

new that enterprises cover their personnel requirements next to each other both by permission owners and by illegal lenders (illusory work contracts).[11][11]

3. Protection pertaining to labor law of the borrowing employees

The industrial law protects the left borrowing employees to approximately the same extent as other employees. They enjoy protection against dismissal after the protection against dismissal act.

They have requirement on collective protection of interests by mechanism of a work council. Certainly the employees a work council must be selected, thus this right to collective protection of interests be realized can – so far occurs only rarely.

While the hiring of the employee to the borrower the employer-employee relationship remains existing to the lender continuously. The lender is thus further employer of the borrowing employee. Nevertheless the borrower exercises the substantial employer powers during the time of the hiring of the borrowing employee. The borrower determines during the hiring time in the context of the management right, which the borrowing employee has to do. Of it consists the core of the employee hiring, which resembles to that extent a lease, which surrenders the use of the rented counter of conditions temporarily to the tenant.

The remuneration of the borrowing employee is paid also during the hiring time by the lender. This is also obligated to exhaust the social insurance contributions and the wage tax. There is to that extent a limited, supplementing adhesion of the borrower for not paid social insurance contributions, which works as a kind endorsement.

The lender as employers is responsible to terminate the employer-employee relationship. If it wants the borrowing employee well-informed, the legal conditions must be present. An effective notice is possible only if the lender for operatingconditioned reasons, thus from lack of work, which borrowing employee cannot employ any longer. Otherwise there are the usual grounds for giving notice as for instance heavy obligation to perform injuries or durable inability to work.

The borrower does not have a power for the notice of the borrowing employee. It can only of the lender require to take back and to it if necessary another employee send an unfit borrowing employee. From this right it can make use, if the borrowing employee is not efficient in the agreed upon form.

A stipulation of a time limit of the borrowing employer-employee relationship is however not only in the usual borders legally permissible – that means that it would be in practice uncommon. A borrowing employer-employee relationship can with the first reason of the employer-employee relationship on maximally 2 years limited to become, whereby a up to threefold extension is possible in this time. The general rules of the partial time and stipulation of a time limit law apply.

A stipulation of a time limit alone, because the order for hiring seized by the lender in the eye is temporally limited, remains inadmissible against it, because it is the function of the borrowing employer-employee relationship not to only cover the need of only one borrower to serve but as employer-employee relationship of own kind a long set from Entleihen to.

Leiharbeit is in principle in all industries permissible. The only exception is at present still the building main trade. [12][12]

1. Structure of the contractual relations

The hiring of the employee is regulated in the employee hiring contract between lenders and borrowers. The present Treaty specifies, for which period of the lenders its borrowing employee to the borrower leaves and receives which remuneration of the lenders for the hiring. The borrowing employer-employee relationship between lenders and borrowing employees is basis for the

obligation to perform of the borrowing employee. This obligation to perform consists of for which respective borrower and after its instructions to work (contract to favor third).

Thus there are two contracts, which arrange the work of the borrowing employee. The hiring contract between lenders and borrowers and the Leiharbeitsvertrag, which are a contract pertaining to labor law and which regulates employer-employee relationship of the borrowing employee to the lender.

An adhesion of the borrower for obligation injuries pertaining to labor law of the lender, e.g. during non-payment of the pay to the borrowing employee, gives it only to very limited extent. There is the deficiency guarantee for the social insurance contributions, already mentioned. With substantial obligation injuries of the lender however the legal assumption exists that the lender is in reality only stooge and for the borrower as such functioned. It is then assumed strength of law employment agency. The meaning of this regulation is very limited. Because the borrower and the lender can relieve themselves from the reproach of the employment agency by the fact that they lead the proof that it concerned employee hiring nevertheless. The proof is furnished, if the lender at the market arises and does not only adjust its borrowing employees for a borrower. The obligation injury does not indicate thus employment agency, but it fictitious it.

5. Collective protection of interests

Here must between labor management relations, which as fixed in the tariff protection of interests and enterprise participation are differentiated. The collective protection of interests of the borrowing employees is inevitably problematic, because the emphasis of the activity lies not in the lender, but in the borrower enterprise.

The operational protection of interests of the borrowing employees takes place both in the lender enterprise and in the borrower enterprise.

§ 14 August: Co-operation and rights of codetermination of the operating and personnel council

(1) Borrowing employees remain also during the time of their work with a borrower member of the enterprise sending of the lender.

(2) [1]Leiharbeitnehmer are not selectable with the choice of the workers' delegates into the supervisory board in the borrower enterprise and with the choice of the labor management relations-legal representativeses for the employees in the borrower enterprise. [2]Sie are justified to visit the consulting hours of these representativeses for the employees and participate in the operating and youth meetings in the borrower enterprise. [3]Die §§ 81, 82 exp. 1 and §§ the 84 to 86 of the industrial democracy act apply in the borrower enterprise also regarding those transact there borrowing employees.

(3) [1]Vor of the assumption of a borrowing employee for work is to be taken part the work council of the borrower enterprise after § 99 of the industrial democracy act. [2]Dabei has to submit the borrower also the written explanation of the lender to the work council after § 12 exp. 1 sentence 2. [3]Er is obligated reports of the lender furthermore, after § 12 exp. 2 the work council admits immediately to give.

(4) The paragraphs 1 and 2 sets of 1 and 2 as well as paragraph 3 apply to the application of the federal personnel agency law in a general manner.

In the lender enterprise the borrowing employees can select like other employees a work council, which is responsible for their protection of interests in accordance with condition of the industrial democracy act. Since the borrowing employees furnish in practice their work in the borrower enterprise and are there comparably protection needy like the permanent staff, it is incumbent on however the work council of the borrower enterprise to represent their interests there as far as it concerns the expiration of the work, the work. The borrowing employees have, in order to found this protection of interests, after one activity duration of six months an additional right to vote in the

borrower enterprise. Whether they take in account there also with the staff size, is not yet finally clear. The iurisdiction [13][13], which selecting accepted, but assumes that that the borrowing employees do not take in account, to the legal situation 2003 ago was issued. At that time the employee hiring was as a rule limited on maximally one year. The actual situation during an employee hiring, which possibly takes several years, is today however another. Therefore here the possibility exists that the iurisdiction changes.

The as fixed in the tariff protection of interests of the borrowing employees is still very unsatisfactory. The DGB trade unions united to a tariff community, which locked 2003 for the first time with the large syndicates of the lenders of collective agreements. Certainly the level of organization of the borrowing employees is so small that the protection of interests does not develop also by the DGB trade unions on a healthy member basis.

At the so-called Christian trade unions this missing tying to a serious member existence is still more precarious, because these have neither among borrowing employees nor among other employees a member basis, which can control the trade union. Here the function carriers of the trade union can act to a large extent without control by a member basis and lock dubious collective agreements. Therefore a substantial opinion in the literature pertaining to labor law assumes it does not concern here at all trade unions. Accordingly the collective agreements locked by these organizations would be ineffective and the employees have requirement on „Equal Pay/Equal Treatment “.

Here clarifying is to be expected shortly, because the IG-Metall lets the trade union characteristic of the Christian tariff community examine work-judicially.[14][14]

Which concerns enterprise participation, there is probably no protection of interests of the borrowing employees, since lenders are after knowledge of the author no contributed enterprises at present. Already the absence of a work council excludes it actually that legal enterprise participation is implemented there.

[1][1] Tenth report of the Federal Government over experiences with the application of August, BT-DS 15/6008.

[2][2] Melms/Lipinski, BB 2004, 2409; restrictivy Berlin WAS APPROPRIATE, for 7.1.2005 - 6 SA 2008/04 - BB 2005, 672 = AuA 2005, 249.

[3][3] Tenth report of the Federal Government over experiences with the application of August, BT-DS 15/6008.

[4][4] detailed to it Schüren, demn. BB 2006.

[5][5] BAG 24.3.2004, 5 AZR 303/03 - BB 2004, 1909; Bay OLG 1981, AP Nr.4 too § 1 August; Brors/Schüren, BB 2005, 494; Brors/Schüren, BB 2004, 2745; contrarily: Wilhelmsen/Annuss, BB 2005, 437; Melms/Lipinski BB 2004, 2409.

[6][6] Ausf. Reipen, the personnel service agencies, 2006.

[7][7] Tenth report of the Federal Government over the effects of the law for the fight of the illegal employee hiring, BT-DS 15/5934, 47, 72 (table 11).

[8][8] Ebenda, 47, 74 (table 13).

[9][9] Ebenda, 47, 76 (table 15).

[10][10] Ebenda, 47.

[11][11] Ebenda, 47.

[12][12] § 1b August reads as follows:

[1] professional employee hiring into enterprises of construction industry for work, which is usually performed by workers, is inadmissible. [2] you is permitted

A) between enterprises of construction industry and other enterprises, if these enterprises intend seizing, for generally binding explained collective agreements this,

b) between enterprises of construction industry, if the lending enterprise is seized as can be prove for at least three years by the same framing and social insurance collective agreements or by their general commitment.

[3] from sentence 2 professional employee hiring is deviating also permitted, if the foreign enterprises are not seized by German framing and social insurance collective agreements or for generally binding explained collective agreements, it however as can be prove for at least three years activities predominantly exercises, which fall under the area of application of the same framing and social insurance collective agreements, from which the enterprise of the borrower is seized for enterprises of construction industry with registered place of business in another member state of the European marketing area.

13 [13] Rejecting so far: BAG 10.3.2004 - 7 ABR 49/03 - BB 2004, 2753 = NZA 2004, 1340; BAG 16.4.2003 - 7 ABR 53/02 - MDR 2033, 1422 = RAILWAYS 2003, 2128.

For a consideration of the borrowing employees entitled to vote: Schüren, note to the BAG Beschl. v. 16.4.2003-7 ABR 53/02, RdA 2004, 184; Brors/Schüren, BB 2004, 2745; More since-badly, AuR 2004, 81; More since-badly/Kittner/sticks (Hrsg.) *Trümmler,* BetrVG 9. Aufl., § 5 Rn. 15; Richardi/*Thüsing* (Hrsg.), BetrVG 9.Aufl., § 15, Rn. 13; Ulber, comment on August 2. Aufl., § 14 Rn. 49a; Hamann, note EzA § 9 BetrVG 2001 No. 2; ders., NZA 2003, 526; Schüren/*Hamann*, comment on August, § 14 Rn. 137; Brors, NZA 2003, 1380; Boemke, comment on August, 2002, § 14 Rn. 57; Etzel, BetrVG 8. Edition, Rn. 85.

On the other hand: Brose, NZA 2005, 797; Kreutz, industrial law in the social dialog (anniversary publication for Helmut Wissmann to 65.

Birthday) 2005, 376; ders., SOW 2004, 168; Franke NJW 2002, 656; Lime tree man/Simon, NZA 2002, 365; Neumann BB 2002,

510; Slate/Korte, NZA 2002, 57; Konzen, RdA 2001, 76; Löwisch, BB 2001, 1734; Machine man, railways 2001, 2446; Löwisch/emperor, BetrVG, 5. Aufl., § 7 Rn. 7.

[14][14] To the opinion conditions: Böhm, railways 2005, 2023; Reipen, NZS 2005, 407; Beautiful one, railways 2004, 136; Schüren/Riederer Frfr. v. Few, AuR 2004, 241; Buchner, railways 2004, 1042; Schüren/Behrend, NZA 2003, 521.