PROSKAUER ROSE LLP

International HR Best Practices

Tip of the Month

NOVEMBER 08

A monthly "best practices" alert for multinationals confronting the challenges of the global workplace

This Month's Challenge

Temporary agency workers will have to receive the same pay and certain benefits as regular employees, under a new Directive adopted by the European Parliament.

Best Practice Tip of the Month

Multinational companies must check out local requirements governing the use of temps, and keep abreast of changes as EU member countries enact laws to comply with the new agency workers Directive.

Law & The Workplace℠

European Union Adopts Legislation Mandating Equal Treatment for Temporary Agency Workers

EU Temporary Agency Work Directive

At any time, there are approximately 3 million temporary agency workers in the member states of the European Union, about a third of them in the UK. After six years of on and off consideration and negotiation, the European Parliament voted last month to adopt a Directive to enhance and protect the rights of temporary agency workers. The measure will require countries within the EU to adopt laws assuring that the pay and certain benefits received by temporary agency workers are the same as those provided to regular employees.

The avowed purpose of the Directive is to "promote flexibility combined with employment security" — which the Directive refers to as "principles of flexicurity" — and thereby "help both workers and employers to seize the opportunity offered by globalisation."

Although the Directive specifies that the principle of equality is to apply from the temporary agency worker's first day on the assignment, an exception is permitted to allow labor and management representatives at a national level to agree to subject temporary agency workers to a "qualifying period" before the equal treatment rule takes effect. This exception was specifically intended to accommodate the UK, which had blocked the temporary worker legislation for the past six years. Last June, labor and management representatives in the UK agreed to a twelve-week qualifying period, which broke the deadlock and allowed the legislation to proceed.

In addition to equal pay, the Directive also calls for equal treatment with respect to working time, overtime, breaks, rest periods, night work, holidays and public holidays. These requirements, however, may be modified where the agency workers have a permanent employment relationship with the agency that assigns them (including remaining on payroll between assignments) and by negotiations between labor and management. Other working conditions often tied to length of service, including pensions, sick pay and "financial participation schemes" may be excluded. Agency workers must, however, be afforded equal treatment with respect to protections afforded pregnant women, nursing mothers,

children and young workers. Nondiscrimination policies relating to age, beliefs, disability, ethnicity, race, religion, sex or sexual orientation must be extended to temporary workers.

Under the Directive, restrictions contained in national laws and collective bargaining agreements on the types of work that can be offered to temporary agency workers must be reviewed and justified. Agreements prohibiting agency workers from taking permanent positions with the employer where they had been working as agency temporary workers are "null and void" (though the temporary work agency can be compensated for its investment in the recruitment, training and assignment of the worker). Temporary workers must be given equal access to the host employer's amenities and facilities, including canteens, child care facilities and transportation arrangements, and must be informed of permanent vacancies. Member states also are directed to take "suitable measures" to improve temporary workers' access to training and child care facilities between their work assignments, in order to enhance their employability and careers.

The EU member states have three years to adopt the necessary legislation to implement the new Directive.

The U.S. Experience

There is no comparable legal mandate in the United States requiring employers to afford temporary agency workers the same pay and benefits as their regular employees. However, the misclassification of workers as temporary rather than permanent can have serious consequences. In December 2000, Microsoft Corporation agreed to pay nearly $100 million to settle claims that it had wrongfully deprived thousands of employees of pension, stock option and health insurance benefits by misclassifying them as temporary agency employees rather than regular Microsoft employees.

These so-called "permatemps" had, in some cases, been working at Microsoft for years, in positions that were indistinguishable from those of regular employees, but had been paid through temporary agencies rather than on Microsoft's regular payroll. After the Ninth Circuit ruled that these individuals should not have been excluded from Microsoft's employee stock purchase program, Microsoft agreed to the expensive settlement.

Following the widely reported Microsoft action, many employers in the U.S. adopted strict limitations on the use of temporary agency workers, including limiting the duration of their engagements to no more than a specified period (typically six or twelve months). Benefit plans also were revised to specify that temporary agency workers, even if misclassified, could not qualify for employee benefits.

For many U.S. employment law purposes, both the agency that assigns and pays the temporary worker and the host company where he or she actually works are considered joint employers of the temporary worker. Both entities, therefore, may be held responsible for compliance with a host of employment laws, including minimum wage and overtime requirements and antidiscrimination laws. Many other issues, such as the scope of the right to reinstatement after a family or medical leave, are still being resolved.

Issues for Multinational Employers

Rights of temporary agency workers will continue to be in flux for quite some time. Even within the European Union, member states will be adopting laws and regulations to implement the new Directive over the next three years, and local variations are inevitable. As with many employment issues, multinational employers must adapt their policies to local conditions and requirements.

International Labor and Employment Law Practice Group

Proskauer Rose LLP's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

For more information about this practice, click here or contact:

Bettina B. Plevan
212.969.3065 – bplevan@proskauer.com

Aaron J. Schindel
212.969.3090 – aschindel@proskauer.com

Howard Z. Robbins
212.969.3912 – hrobbins@proskauer.com

Yasmine Tarasewicz
33.1.53.05.60.18 – ytarasewicz@proskauer.com

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Jeremy M. Mittman
310.284.5634 – jmittman@proskauer.com

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com