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Recent Employment Law Developments affecting the Hotel Business

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Introduction

With regard to certain aspects of employment law the hotel business somewhat differs from other lines of business. The hotel industry is a very personnel-intensive industry and it is of great importance to hotels that their guests have confidence in the quality and reliability of the hotel staff. Moreover, hotels often require temporary staff at short notice, for example during holiday periods or to accommodate an increased number of guests during a trade fair. This newsletter provides an update on recent developments in the field of employment law.

Lease of employees

The employment of temporary agency staff is very common in the hotel business, especially to bridge short-term staff shortages. A recent decision of the Federal Labour Court (*Bundesarbeitsgericht*, BAG), handed down on 14 December 2010, is of considerable significance for the hotel industry. The subject of this decision was the collective bargaining capacity of the Christian Trade Union for Agency Work and Personnel Service Agencies (*Christliche Gewerkschaft für Zeitarbeit und Personalserviceagenturen*, **CGZP**).

Federal Labour Court rules that the CGZP has no collective bargaining capacity

Any departure from the equal-pay-principle, i.e. to pay different wages to agency staff and to regular staff (e.g. of a hotel), is only permissible if this is done in accordance with a collective bargaining agreement applicable to the employment relationship, or if it is expressly stipulated in the employment contract that a certain collective bargaining agreement shall apply. Up to now, many employment contracts with agency staff contained such a reference to a collective

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bargaining agreement made with the Christian Trade Union for Agency Work and Personnel Service Agencies (CGZP).

The Federal Labour Court has now ruled that the CGZP has no collective bargaining capacity and therefore cannot finalize legally valid collective bargaining agreements. This also means that the existing collective bargaining agreements signed by the CGZP are void and that any reference to such collective bargaining agreements contained in employment contracts will, in all probability, also be held to be legally ineffective.

It is not yet very clear what the legal consequences of this decision will be because the reasons for the judgement have not yet been published.

It is probable, however, that agency staff with employment contracts containing a reference to the CGZP collective bargaining agreement will be entitled to **payment of the difference between the pay they received and the amount they are entitled to under the "equal pay" principle**. Such claims for additional payment will probably have retroactive effect for a period of at least three years. Moreover, social insurance carriers will most likely be entitled to claim **additional social insurance contributions** on the balance between wages paid under the invalid collective bargaining agreement and the wages due under the "equal pay" principle. Such additional social insurance contributions may be claimed irrespective of whether the agency staff concerned actually demand additional wage payments. Any business that employed agency staff (e.g. hotel operators) are legally liable for such demands for payment being met, even if the staff agent has filed for insolvency. Judging by experience, we assume that the social insurance carriers will demand such additional contributions.

Practical tips

Hotels employing agency staff should terminate any contracts with personnel agencies that operate on the basis of collective bargaining agreements with a trade union which does not have collective bargaining capacity.

As of now, hotel operators requiring agency staff should only enter into personnel leasing contracts with agencies leasing out staff paid in accordance with a collective bargaining agreement made with a trade union which has collective bargaining capacity. Written confirmation of compliance with this requirement should be obtained before entering into any new personnel leasing contracts.

However, even this procedure is not entirely risk-free, given that for the time being there is no judicial confirmation of the collective bargaining capacity of the other trade unions, some of which may not have sufficient members to quality for such capacity.

Protection of employee data

The permissibility of collecting, using and storing employee data is a very important issue for a staff-intensive line of business such as the hotel industry.

In principle, it is permissible to gather, use and store employee data required for deciding whether to employ a specific individual and/or for the proper management of existing employment relationships. Which specific data may be gathered, used and stored must be determined on a case-by-case basis.

Video surveillance

It is very important that hotel guests have confidence in the honesty and reliability of hotel staff. Therefore, it may be appropriate in many cases to consider whether hotel staff (e.g. barkeepers, receptionists) should be supervised using video equipment.

In this respect, it is necessary to distinguish between open and concealed video surveillance. Open video surveillance is legally permissible, provided that it serves a legitimate purpose and is reasonable considering the interests of all parties concerned. Whether these requirements are met must also be examined on a case-by-case basis.

The requirements needed in order for concealed video surveillance to be permissible are far more stringent. Such surveillance is not allowed unless it serves to investigate specific suspicions of illegal activities or other serious misconduct that cannot be tolerated by the employer. It is further required in order for concealed video surveillance to be permissible that no other possibility exists to prove a suspect guilty of any illegal activities. Only video materials obtained in a legally permissible manner may be used as evidence in court proceedings.

Amendments to the Data Protection Act

The German government plans a far-reaching reform of existing legislation for the protection of employee data.

For instance, it is intended to provide for restrictions limiting the permissibility of Internet inquiries on job applicants. The proposed amendments will not affect the right of employers to "google" job candidates or to use data obtained from career networks such as Xing. However, it is to be forbidden to use social networks, such as Facebook, for such inquiries.

Furthermore, new provisions are to be introduced regulating the issue of which questions an employer may ask a job applicant. All job applicants may be asked to provide basic data such as their name, address, telephone number and e-mail address. However, any disclosure of further personal data may only be required if and to the extent that this is necessary for determining whether a candidate is "suitable for the job or position" in question.

Major changes are also planned that will affect the management of existing employment relationships and some of these changes will considerably restrict existing control rights of employers.

It is unlikely that this new legislation will be passed before the middle of this year.

Effects of the Emmely decision (petty offences)

It happens that staff members commit so-called petty offences and the hotel industry is no exception to this (e.g. consumption of left over food, theft of low-value items).

Following the Federal Labour Court decision that a supermarket cashier could not be simply dismissed for having taken a deposit receipt for empty bottles worth EUR 1.30, several appeal courts have handed down decisions in similar cases specifying, among other things, that even in cases where an employee may have committed a criminal offence due consideration must be given to criteria such as the length of prior employment. In other words, not even a criminal offence does automatically justify the immediate dismissal of an employee. Even in such cases, consideration must be given to the employee's conduct since the beginning of his employment.

In practice, this means that any decision on whether an employee is to be dismissed without notice, or should only be issued a formal warning, must be based on a thorough assessment of the specific case, taking into consideration all facts and circumstances that may be regarded as being of relevance, which includes any misconduct in the past. An important aspect to be considered in such cases is the amount of confidence built up over many years of loyal service.

Amendments to the Work Permit Ordinance

Many hotel businesses require seasonal staff to an extent that is far greater than in other industries. Up to now, any nationals of the new EU member states required a work permit to take up employment in Germany. However, following an amendment of the Work Permit Ordinance (*Arbeitsgenehmigungsverordnung*), it is permissible since 1 January 2011 to employ seasonal staff from the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, the Republic of Malta, Poland, Slovenia and Slovakia without a work permit, albeit that this only holds true for typical seasonal jobs, which are particularly common in the hotel and catering industry. As of 1 May 2011, nationals of these countries will be entitled to take up any employment in Germany without requiring a work permit.

Such unrestricted free movement of labour for Bulgarian and Romanian nationals will take effect as of 1 January 2014 at the latest.

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