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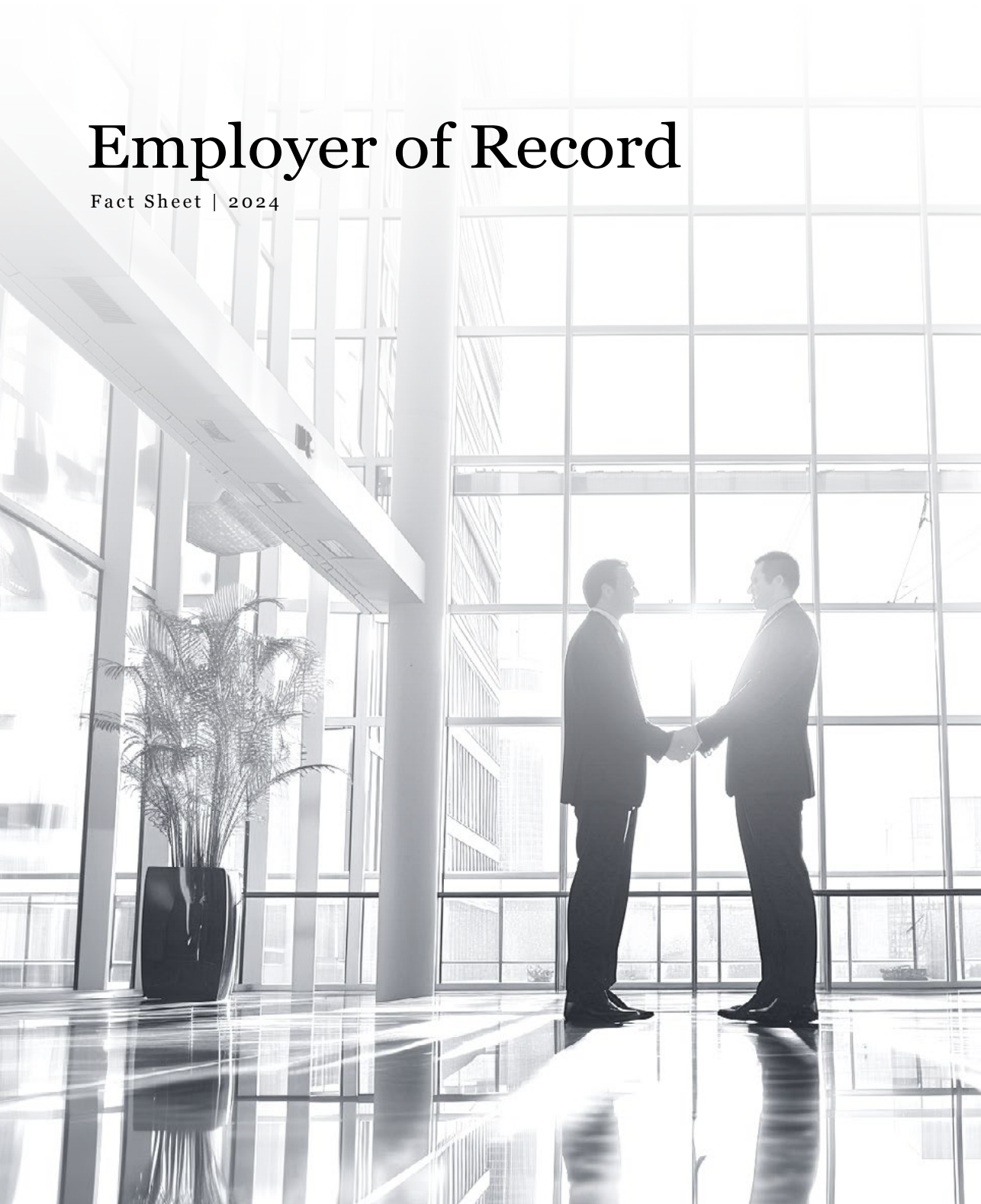
Employer of Record

Fact Sheet | 2024



In this fact sheet we examine the old-new phenomenon in the European labour market called “Employer of Record”.

Under this term we understand the situation where an employer (the “employer of record”, short “EoR”) employs workforce on behalf of another business entity (“client company”). The EoR is technically the employer, and is legally responsible for such matters as recruitment, payroll accounting, taxes, unemployment insurances and generally observing the statutory framework of the workforce concerned. However, the actual employer is the client company, which is entitled to assign tasks to the employee, to monitor the performance of the work and to benefit from the results of the work. EoRs are becoming increasingly popular, in particular with foreign client companies wanting to avoid costs and risks in aforementioned matters. EoRs do not see themselves as temporary work agencies, nor do they fulfil the legal obligations imposed on temporary work agencies. They rather see themselves as merely providing a “service package” to their clients.

May EoRs and client companies refer to contractual freedom or is there a limit due to the special protection for employees granted by labour law? How do the legislators and labour authorities of different Member States approach this issue? These are the questions we seek to answer in this short summary. **Spoiler alert: the topic is relevant in every country.**

If you have any questions on this topic, please feel free to contact our experts.

With kind regards,
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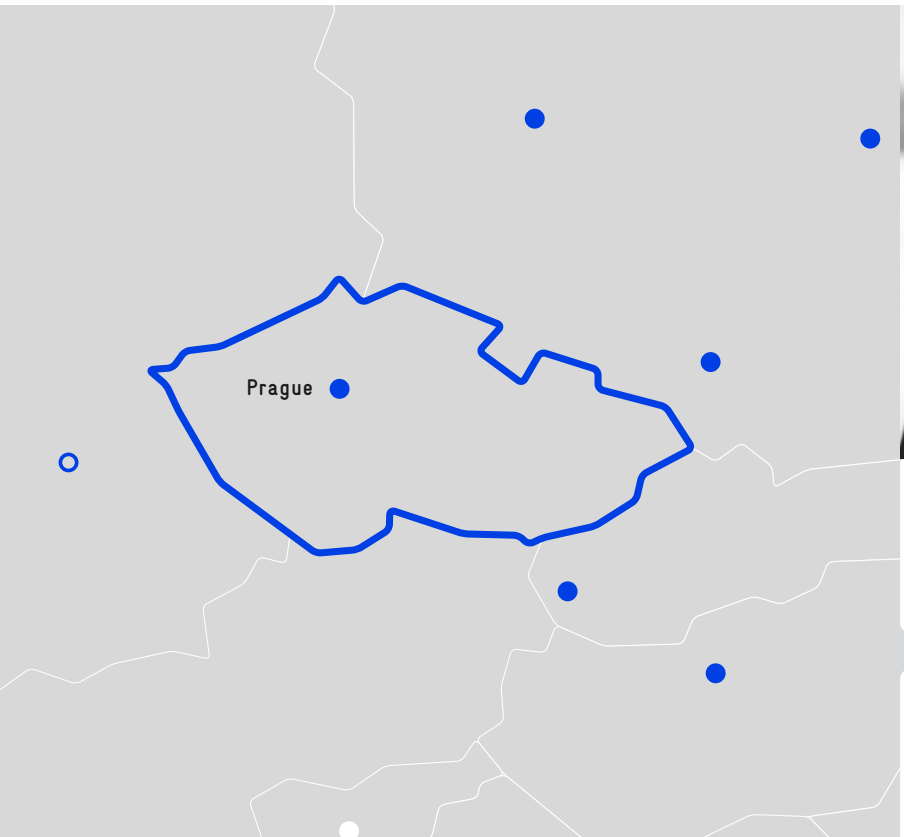

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1. Requirements of temporary agency work

The Employment Act addresses the provision of temporary agency work, establishing a structured framework for agencies and their workers. Temporary agency work involves the supply of personnel to recipient companies, maintaining the employment relationship between the worker and the agency. This arrangement imposes specific obligations on both the agency and the recipient, ensuring the protection of workers' rights and compliance with employment regulations.

Temporary work agencies must comply with the legal requirement of obtaining and maintaining proper licensing as prescribed by the Employment Act. This ensures that agencies engaging in the supply of temporary labour adhere to regulatory standards and maintain transparency in their operations.

2. Assessment of EoR, risk of re-classification

Czech legislation does not regulate the "Employment of Records". Furthermore, the Czech Labour Code neither permits employment of employees on behalf of another entity, nor so-called “dual employment”, in which an employee is allocated to more than one employer within one employment relationship. The only form of mediated employment explicitly regulated by the law is temporary agency work. Specifically, the agencies must comply with several requirements. One of the obligations is obtaining an employment agency permit issued by the Labour Office. Applying for an employment agency permit also requires provision of a deposit of CZK 500,000, some 20,000 EURO. An agency intending to employ individuals to perform work for a recipient who assigns and supervises the performance of work requires a permit that the EoR would be required to hold.

The provision of services as an EoR could be considered as circumvention of the law or as illegal employment with the associated consequences, such as heavy fines from the Labour Inspectorate. This type of employment will also have a major impact in terms of labour law as regards the validity of the contractual arrangements between the parties. The impact can include the topic of intellectual property rights. While intellectual property rights may not be expressly covered in the employment contract or other agreement with the employee regarding the treatment of the employee's work in the Copyright Act, this is recommended, in particular to exclude further possible claims by the employee for additional remuneration. However, in the case of EoR-employment, the statutory regime, as well as any contractual arrangements in the employment contract, will only apply between the employee and the EoR. The same problem may arise, for example, in the case of a negotiated competition clause.

Thus, in case of EoR, a re-classification is possible and may result in heavy Labour Inspectorate fines, tax penalties, social security penalties, as well as interest on late payments etc.

3. Case law

Disguised employment is always assessed by the labour inspectorates according to the actual situation and not according to the description in the contract. In particular, the assessment of the actual maintenance of the independence, autonomy, and responsibility of the contractor for the result of his activities is essential for the assessment of the characteristics of disguised employment and the distinction from the performance of work or the provision of services (legal outsourcing). In assessing the nature of the performance provided, inspectorates normally carry out a comprehensive on-site investigation in which they assess the sub-aspects of the contractual relationship between the Client company and the EoR. These include aspects such as the determination of the result of the activity, the place of performance of the activity, the way work tasks are assigned and controlled, the recording of time worked, the use of work equipment or the cooperation between the EoR’s assigned staff and the Client company's core staff.

In the Czech Republic, however, there are court decisions that have upheld the Labour Inspectorate's decision on the commission of offences under the Employment Act in connection with the provision of labour by employees of an employer assigned to another employer without a relevant permit.

Germany

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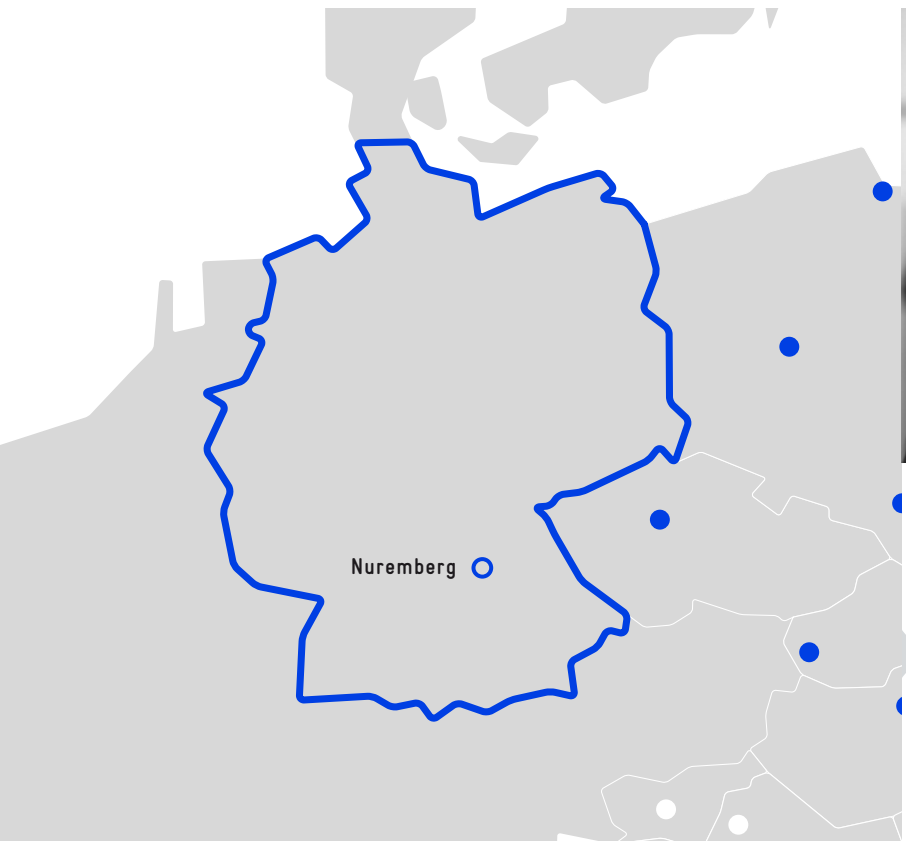

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1. Requirements of temporary employment agency work

A permit from Agentur für Arbeit is required for the provision of temporary employment services in Germany. The provision of services without a permit is punishable by a fine of up to EUR 30,000.

The permit is granted for a limited period of one year in the first three years. At the end of each year, an audit of the temporary employment agency is carried out by the Agentur für Arbeit. Only after three years is it possible to apply for a permanent permit.

It is important to note that temporary employment is generally prohibited in certain sectors in Germany, such as the construction sector. The hiring out of employees from other EU countries, e.g., in the transport sector, is currently gaining particular importance.

2. Assessment of EoR, risk of re-classification

Under German law, the existence of a temporary employment relationship requires the exercise of the right to issue instructions to be switched to the hirer. Furthermore, German law stipulates the integration of the employee into the work organisation of the hirer as a criterion. The term “integration” does not mean the mere external integration into the hirer’s company; the fact that the work is carried out in the hirer’s company organisation does not make the engagement of external personnel automatically temporary employment.

The decisive factor is that the person is integrated into the work organisation of the hirer, so that the hirer makes decisions typical for an employment relationship regarding the time and place of work, this means the hirer has the personnel sovereignty. However, whoever makes the decision on the time and place of the work assignment automatically exercises the employer's right to issue instructions. If the right to issue instructions required for the needs-based management of the work assignment is fully assigned to the hirer, this is a case of temporary employment.

The term integration does not fulfil an independent demarcation function in addition to the exercise of the employer's right to issue instructions. This means that the criterion of the right to issue instructions alone is sufficient for temporary employment to exist.

To sum up, in case of EoR, if the right of instructions switches from the EoR to the Client company, then – regardless of the contract’s labelling – temporary employment takes place. Thus, a re-classification is a realistic outcome alongside with the penalty mentioned above.

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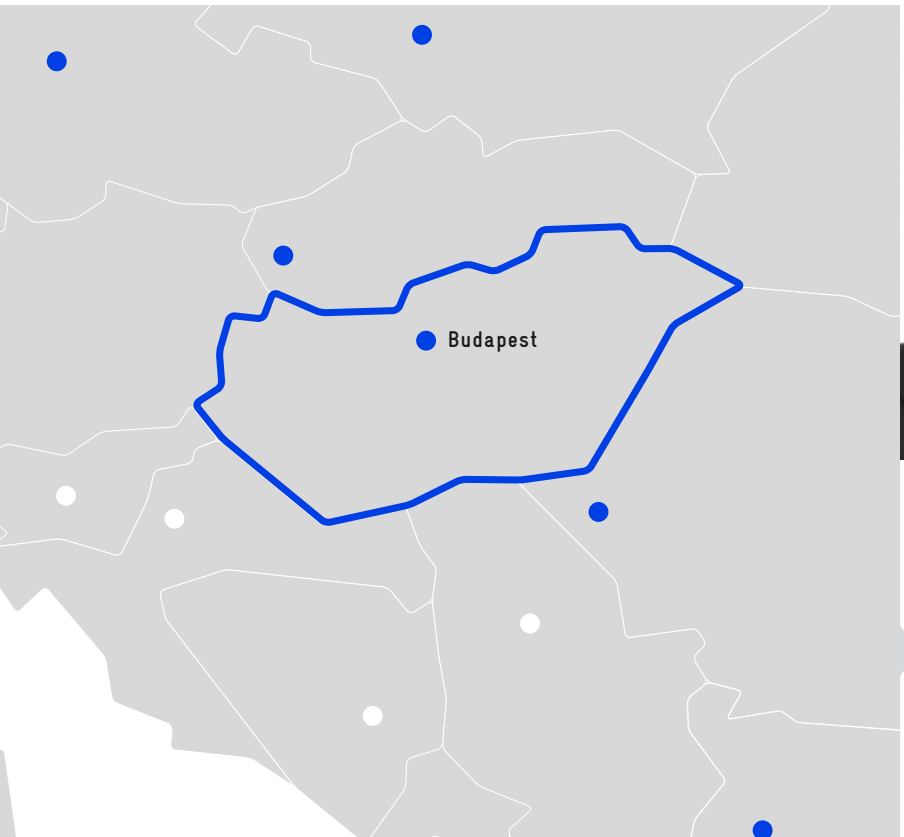

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1. Requirements of temporary agency work

In Hungary, to hire-out staff, the company must be registered as a temporary work agency at the competent Government Office. This – among other duties – requires a financial deposit of HUF 15,000,000 (approx. EUR 39,000) as well as the employment of personnel with certain qualifications. Further, the employment contract itself and the service contract between the temporary work agency and the "recipient" company must fulfil certain requirements.

2. Assessment of EoR, risk of re-classification

On one hand, any company is allowed to render its services in a way that includes the personal presence of an employee at the recipient's premises from time to time. On the other hand, this may neither lead to the circumvention of the protection of employees granted by labour law, nor of the rules and guarantees of temporary agency work.

In case of an investigation by the Hungarian Labour Authority – which can be a result of a simple tax audit procedure – the Authority is entitled to re-classify the legal relationship as a hidden temporary agency work. In extreme cases, even the employee may claim that an employment relationship has been established between him/her and the recipient. The deciding factor is which entity is responsible for the coordination of the activities and for giving instructions to the employee.

The Hungarian Labour Authority examines:

- whether the employee is integrated in the recipient's work organization,
- which company defines tasks, instructs the employee, which entity controls the result of the employee's work, whether the employee has the same tasks he/she habitually renders for the employer, and/or whether the employee has the same or similar tasks as the recipient 's own employees,
- the ratio between the employee's work for the employer and for the recipient, and
- whether the recipient registers the posted employee's work hours, breaks, annual leave, sickness etc.

There is a real chance that, in the event of an investigation, the Authority will re-classify the EoR's activity as unauthorised temporary agency work.

The re-classification may result in a labour inspection fine, tax arrears, late payment interest, tax fines, social security fines, exclusion from state aid etc.

3. Case law

There are several published examples for re-classification. The main reason for the re-classification as temporary agency work is the fact that the "service" did not take place for specific tasks to be rendered by the employee (the same tasks he/she habitually carries out for their ordinary employer) but was set up to provide a full-time job, i.e., to meet the labour needs of the Recipient.

Latvia

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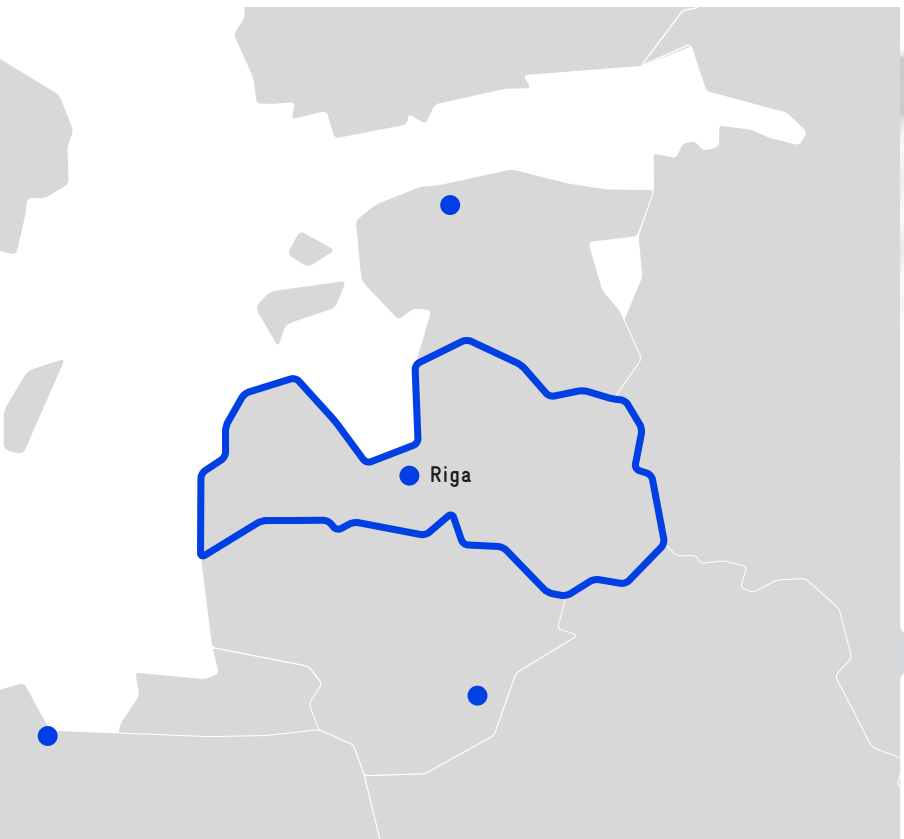

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1. Requirements of temporary agency work

In Latvia, a temporary work agency (TWA) needs to obtain a licence from the State Employment Agency. The applicant for the licence must fulfil various criteria, such as

- no tax debts,
- no filings for bankruptcy or liquidation process,
- members of the management bodies cannot have a criminal record, nor can they have a record of being active in an TWA whose licence has been revoked in the past.

In addition, the Agency must be provided with several documents, such as a draft employment contract, draft contract for the provision of temporary workforce, etc.

In any subsequent temporary work relationship, the TWA will have the status of the employer, and the respective employees are seconded to the recipient of the services based on a contract for the provision of temporary workforce.

2. Assessment of EoR, risk of re-classification

The main risks associated with utilisation of services of an EoR are those leading to a possible classification of the employee's involvement in the client company's business as an employment relationship between the client company and the EoR's employee. When evaluating the possible existence of an employment relationship between the EoR's employee and the Client company, the following criteria may be utilised:

- Is it the EoR or the Client company who assigns work task to the employee, organises, directs and controls his work and instructs him for this purpose?
- Is work predominantly performed in the premises of the EoR or the Client company?
- Whose equipment is used for the performance of the assigned tasks?
- Who evaluates the quality of the performed work?

If the above-mentioned assessment leads to the conclusion that the client company – rather than the EoR – exercises the main authority over the employee, the respective contractual relationship between employee and the Client company could be qualified as employment relationship.

The said risks can be minimised if the employee providing the service does not report to the client company in a way that may resemble an employee subordination.

To sum up, in addition to fines, late payment interest etc., a re-classification may establish a direct employment between the Client company and the EoR's employee.

3. Case law

There are number of cases decided by the Latvian courts (including the Supreme Court of Latvia) dealing with TWA issues. The courts, for instance, have acknowledged that dismissal of an employee by a TWA due to contract termination between the TWA and the recipient of services is illegal. In another case, the court pronounce the concluded services contract between a TWA and an employee to constitute an employment relationship based on criteria set by the Labour Law.

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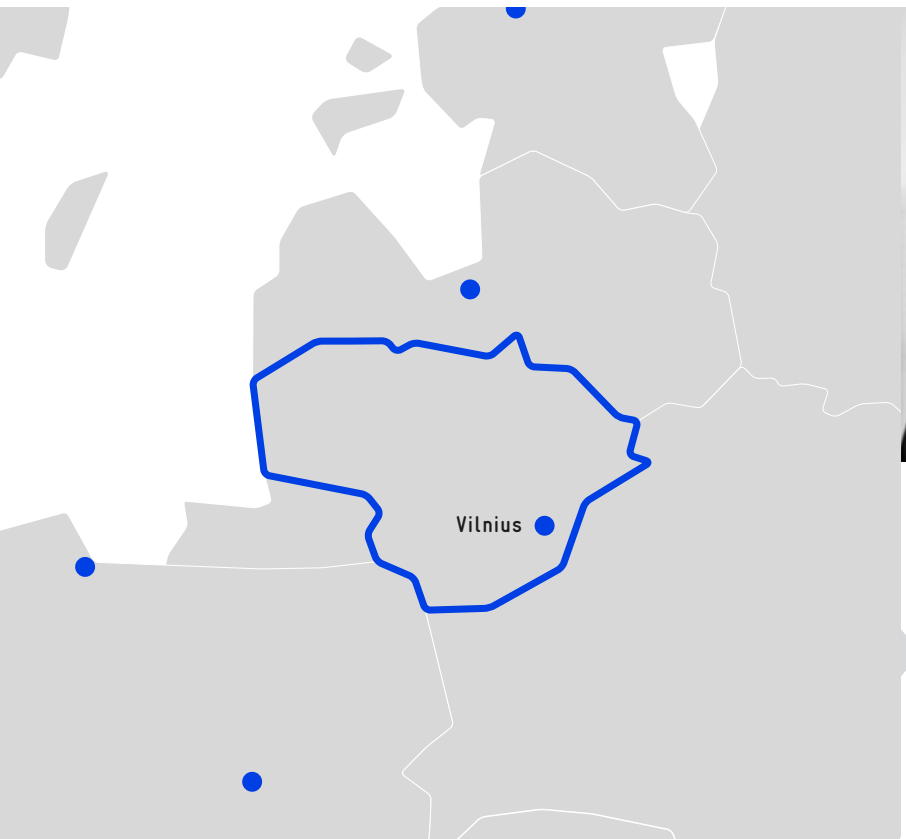

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1. Requirements of temporary employment agency work

An employer who intends to carry out temporary employment activities must submit a written request to the State Labour Inspectorate to include it in the list of temporary employment agency companies, accessible online via. The maximum fine for non-compliance is EUR 1,100.

Essentially, only the reputation of the employer and its managing director is checked for registration.

To be included, the employer must generally meet the following criteria:

- its activities have not been suspended or restricted,
- it has not been filed for bankruptcy, and
- it has no outstanding debts to the State Budget of the Republic of Lithuania.

In addition, against the managing director of the employer, in the last one year:

- not more than one fine was imposed for illegal work, undeclared work, or violations of the procedure for employment of foreigners,
- no administrative penalty was imposed for illegal work,
- not more than one administrative penalty was imposed for violations of labour laws, occupational safety, and health normative legal acts, and
- not more than two administrative penalties were imposed for violations of wage calculation and payment procedure or work time accounting.

Furthermore, an important criterion is that the managing director did not commit crimes such as violation of labour safety and health requirements, human trafficking, exploitation for forced labour or services, use of forced labour or services of a person, and does not have an unexpired or unexpunged criminal record.

Once a month, temporary employment agencies must submit information on their activities and the number of temporary workers employed by them to the State Labour Inspectorate. If a temporary employment agency fails to do so, it can be deleted from the list of temporary employment agencies.

A typical area of temporary employment in Lithuania is the cross-border hiring out of transport drivers by Lithuanian employers to hirers abroad, which is becoming increasingly important.

2. Assessment of EoR, risk of re-classification

Temporary employment takes place if the employee undertakes to perform work activities for a certain period for the benefit and under the direction of the person specified by the temporary employment agency, and the temporary employment agency undertakes to pay for this service. The essential criterion is therefore subordination, in particular the right to issue instructions.

In case of EoR, if the subordination switches from the EoR to the Client company, then – regardless of the contract's labelling – temporary employment is established, leading to a likely re-classification resulting in a penalty as mentioned above.

Poland

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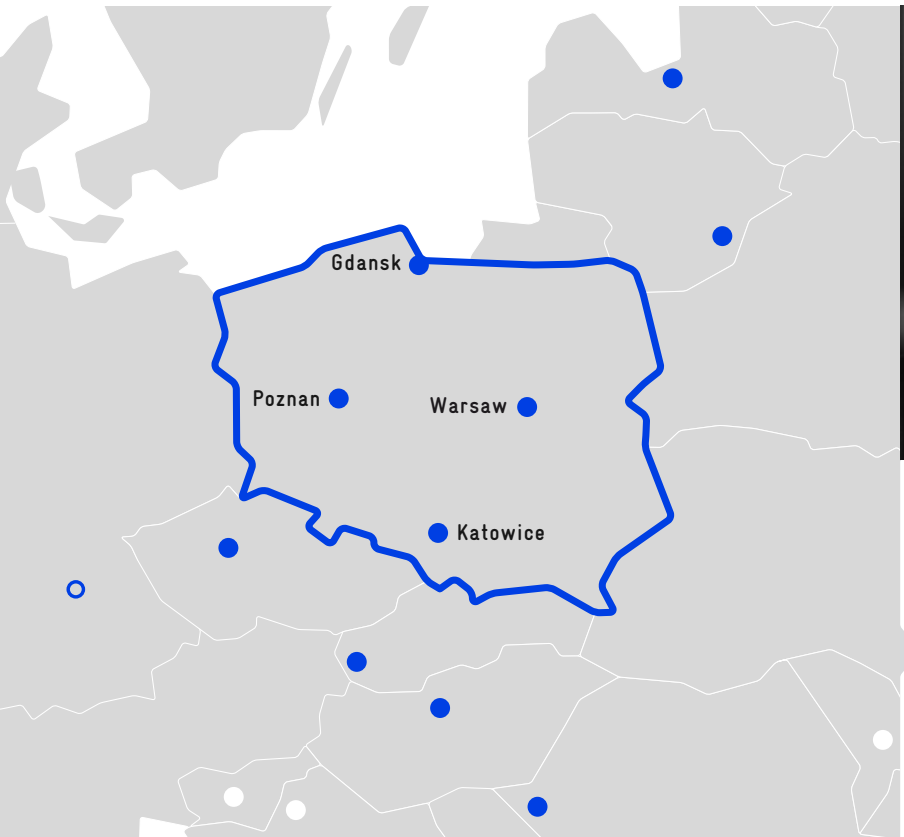

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1. Requirements of temporary agency work

The legal way to hire-out employees in Poland is through a temporary work agency. Such an entity is legally an employer who directs the employee to perform work for another entity (the "client employer". Temporary employment agencies conduct a regulated activity, and several legal requirements must be satisfied for before they can be registered. These requirements entail not being in arrears on public charges related to employees and not having a record for labour market-related offences, as well as not being in a liquidation proceeding.

The activity of a temporary employment agency is a legal activity, regulated by means of law. Conducted lawfully manner, this activity bears no risk.

A creative way to take on workers on a temporary basis without being a temporary employment agency is to use employee leasing. It involves the secondment of an employee by another employer. The other employer then grants him unpaid leave and the host company signs a fixed-term employment contract with him. At the end of this time, the employee returns to the main employer.

2. Assessment of EoR, risk of re-classification

A very common alternative to temporary agency work is the use of EoRs. This – although it is allowed through the principle of freedom of contract – from the point of view of labour law, is a form of circumvention of law.

The main risks are that public authorities may recognize the client company as the employer of the employee providing services.

In this case a re-classification may lead to requirements such as having to pay social security contributions and tax advances. This can lead to the discovery of further infringements. It might be determined that the foreign employee was employed illegally, or that occupational health and safety requirements were not satisfied which in turn might be sanctioned by fines. Finally, employees might claim the client company may be their actual employer entitling to benefits only awardable to employees.

The situation may become more complex by different authorities taking an interest (State Labour Inspectorate, Social Insurance Institution, courts – in case of dispute with the employee). Since outsourcing is done under the principle of freedom of contract and there is no law precisely regulating these issues, these authorities may have their own different practices, which makes it more difficult to prepare and address possible risks when using an EoR.

To minimise the risk of re-classification, care should be taken to ensure that the employee providing the service does not report to the Client company (or any of its employees) in a way that may resemble an employee subordination. The Polish Labour Inspectorate also verifies payment arrangements so that they do not resemble employee remuneration, but payment to the EoR for a service.

To sum up, in case of EoR, the re-classification is a realistic outcome and has various consequences both for the EoR as well as for the client company.

3. Case law

The determination that the actual employer was an entity other than the one indicated in the written contract occurs in various types of cases. As such, case law exists and is quite casuistic (the facts of a particular case should almost always be examined).

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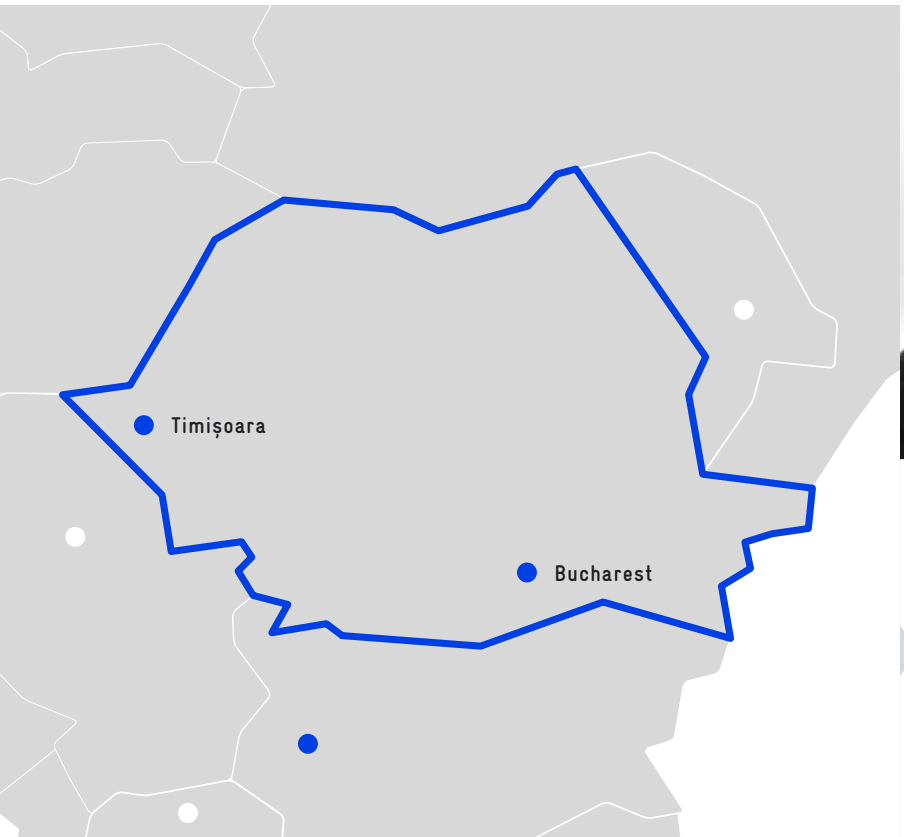

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1. Requirements of temporary agency work

In Romania, supply of human resources to third parties should be conducted solely by temporary labour agencies, temporary work being strictly regulated both in terms of the temporary labour agency obligations, third party user of temporary work obligations and temporary employees' rights during the temporary employment assignment.

Thus, a temporary labour agency needs to be registered with the National Register of Temporary Labour Agencies, meeting some specific conditions in terms of setting-up, functioning and authorisation. Among such specific conditions, the temporary labour agency shall constitute a financial guarantee equivalent to 25 gross minimum basic wages (approximately EUR 17,500).

Moreover, the temporary labour agency shall conclude temporary employment agreements with the temporary employees which include specific provisions. Likewise, the relationship between the temporary labour agency and the third-party user of temporary work shall be governed by a specific agreement also including specific provisions.

In terms of temporary employees' rights, during the temporary work assignment, temporary employees benefit of all basic working and employment conditions related to working time, overtime, daily and weekly rest, night work, holidays, bank holidays, and wages applicable to the employees of the third-party user of temporary work, carrying out the same or similar activity as the temporary employee. Likewise, temporary employees benefit of all working and employment conditions established by internal regulations, applicable collective labour agreement, as well as any other specific regulations of the third-party user of temporary work, temporary employees having access to all the services and facilities provided by the third-party user of temporary work to its own employees.

2. Assessment of EoR, risk of re-classification

A hidden temporary work might be established by the Labour Authority/courts of law on one side by analysing the provisions of the agreement concluded between the EoR and the Client company and on the other side based on the factual situation. In principle, the Labour Authority/courts of law take into consideration the contractual provisions and practices that could demonstrate a dependency relationship between the client company and the EoR's employees.

The re-classification may result in fines, late payment interest etc. Likewise, as temporary employees are entitled to the same benefits as the third-party user of temporary work employees, the employees themselves may be interested in requesting the re-qualification of the employment relationship with the client company as being one of temporary work, claiming the same salary rights and benefits as those offered by the Client company to its own employees.

In case of EoR, a re-classification is very likely (being even in the interest of the employees) and may result in heavy Labour Inspectorate fines, late payment interests etc.

3. Case law

There are a couple of published case law examples in terms of re-classification.

By way of example, a decision of the Bucharest Court of Appeal did not allow the appeal by a company (also authorised as a temporary employment agent) against the decision of the Bucharest Court upholding the corrective measures imposed on the company by the Labour Authority which re-qualified the service agreements concluded between the company as service provider and specific companies as being agreements for the supply of human resources.

The Labour Authority considered that both the provisions of the service agreement and the way the activity was carried out led to the conclusion that the activity was specific to a temporary labour agency. Thus, the Labour Authority concluded that the company, as service provider, entered into service agreements to provide production and technical support, handling and product management services to third parties instead of entering into temporary labour agreements for the supply of human resources to third parties and that the

service provider should have concluded temporary labour agreements with its employees instead of individual employment agreements.

The court held that the Labour Authority had correctly decided. In particular, the court pointed out that the individual employment agreements concluded by the service provider with its employees stated the employees place of work at the beneficiary premises and that the salaries were paid by the service provider based on the timesheets held and communicated to the service provider by the beneficiary, all these being considered elements that clearly suggested that the service provider activity was in fact one of providing human resources to beneficiaries.

Therefore, the court maintained the measures imposed by the Labour Authority and obliged the service provider to conclude specific temporary work agreement with the third-party user of temporary work instead of the service agreements as well as temporary labour agreements with its employees, instead of individual employment agreements.

Slovakia

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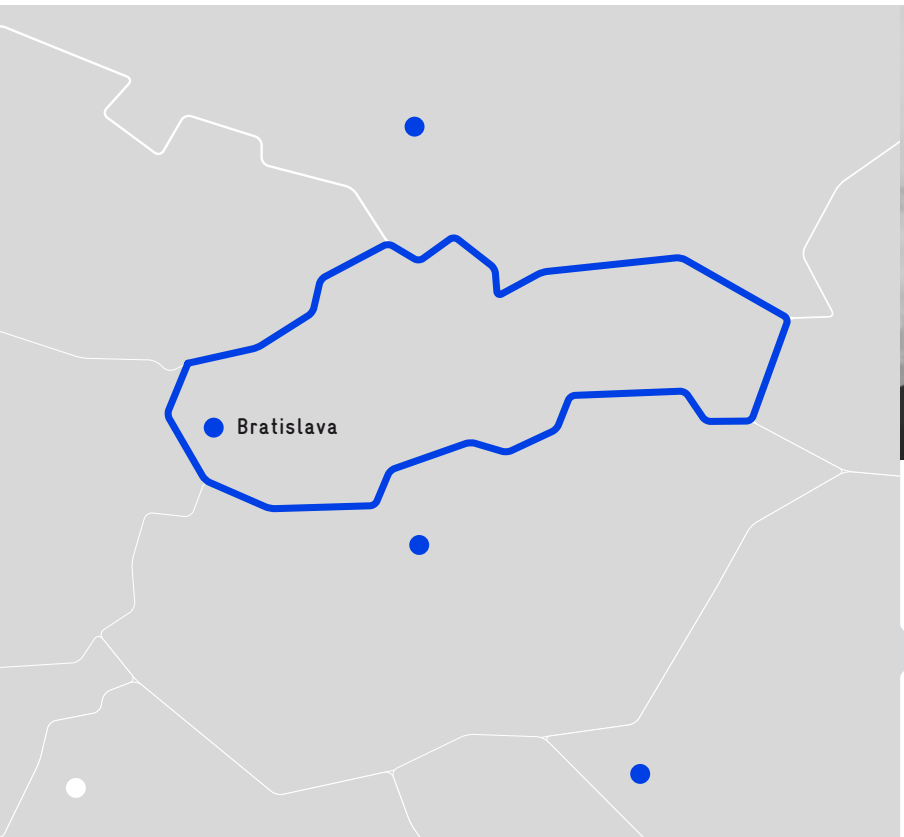

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1. Requirements of temporary agency work

In Slovakia, a legal or natural person may only carry out the activity of a temporary work agency (short "TWA") under permit issued by the Central Office of Labour, Social Affairs and Family, otherwise faces a fine up to EUR 100,000. This – alongside many other substantial obligations – requires a legal person to have at least EUR 30,000 in equity and a natural person to be covered by a bank guarantee of at least EUR 15,000. The permit is granted for an unlimited period and must be registered with the commercial register. To execute a temporary assignment, three written contracts meeting the statutory requirements shall be concluded, namely (i) an employment contract between the employee and the agency, (ii) a temporary assignment contract between the employee and the agency as well as (iii) a commercial-labour contract between the user employer and the agency.

2. Assessment of EoR, risk of re-classification

In general, EoRs rarely have a permit to operate as a TWA. When providing their services, it is essential to examine whether the object of the service provided is a result of a service, e.g., a product, or whether it is de facto the supply of workforce. Reasons for the concealment of temporary assignment may include the circumvention of provisions related to equal treatment and, notably, equal remuneration. In the event of an inspection conducted by the Slovak Labour Inspectorate regarding hidden temporary assignment, primarily the cumulative fulfilment of the attributes of temporary assignment, as defined by the Labour Code, are controlled, specifically:

- who assigns work task to the employee, organises, directs, and controls his work and instructs him for this purpose,
- in whose premises the work is predominantly carried out and by whose means or with whose equipment,
- whether it is an activity the Client company has as its object of operation registered in the commercial register (in particular, whether it constitutes one of its main objects of activity),
- it is also examined who evaluates the work carried out by the employee concerned, who assures that occupational health and safety conditions are met, as well as whether the employee is included in the work organization of the Client company of the services jointly with his core employees, etc., and
- the terminology of the contracts involved also play a major role.

Should the labour inspectorate identify a hidden temporary assignment and conduct a re-classification with the primary risk of imposing a fine of up to EUR 100,000 on the EoR. This can subsequently result in the establishment of a direct employment relationship with the client company followed by further difficulties for the client company such as illegal employment and the associated fines, registration in the register of illegal employers, additional social and health contributions and taxes, supplementary reimbursement of wages together with the associated fines and penalty interest for late payment.

Thus, the re-classification is possible and may not only result in fines but also in the establishment of a direct employment relationship between the EoR's employees and the Client company.

3. Case law

Both civil and administrative proceedings are available. In a civil proceeding, the employee may claim his rights arising from his status as a temporary employee, especially the same wages as core employees of the Client company, or even a direct employment contract with the Client company. Such disputes are not yet known in Slovakia.

Administrative law disputes concerning re-classification performed by the labour inspectorate have already been decided. One of the reasons for reclassification as temporary agency work is the fact that the EoR in fact holds both a TWA licence and a trade licence, whereby services performed based on a trade license manifest the characteristics of agency work. In such a case, courts focus on the content and terminology of the contract

concerned – irrespective of its title – and examine whether the ratio of the contract is the hiring of workforce to the Client company, and whether the Client company is entitled to instruct the workforce.

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bnt at a glance

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FACTS

13 offices in CEE	60+ partners	200+ lawyers
22 working languages	20+ years of expertise in CEE	MANY awards

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