

**Srbija: Objavljen nacrt Zakona o agencijskom
zapošljavanju**

Ministarstvo za rad, zapošljavanje, boračka i socijalna pitanja Republike Srbije („*Ministarstvo*“) pripremiilo je i objavilo nacrt Zakona o agencijskom zapošljavanju („*Nacrt zakona*“).

Nacrtom zakona uređuje se:

- zaštita prava zaposlenih koji zaključuju ugovor o radu sa agencijom za privremeno zapošljavanje („*Agencija*“) radi ustupanja na privremeni rad poslodavcu korisniku („*Poslodavac*“);
- jednak tretman ustupljenih zaposlenih („*Zaposleni*“) u pogledu ostvarivanja prava iz radnog odnosa sa „uporednim zaposlenima“ kod Poslodavca (tj. zaposlenima koji kod Poslodavca obavljaju istu ili sličnu vrstu poslova);
- uslovi za rad Agencija;
- način i uslovi ustupanja zaposlenih;
- odnos između Agencije i Poslodavca, kao i
- obaveze Agencije i Poslodavca prema Zaposlenima.

Nacrtom zakona je predviđeno da Agencija sa Zaposlenima mora da zaključi ugovor o radu na određeno ili neodređeno vreme, a takođe su propisani i obavezni elementi takvog ugovora. S druge strane, Agencija i Poslodavac stupaju u pravni odnos na osnovu ugovora o ustupanju, čiji su obavezni elementi takođe predviđeni Nacrtom zakona.

Nacrt zakona predviđa da će Zaposleni imati jednake uslove rada kao i uporedni zaposleni kod Poslodavca i to u pogledu:

- trajanja i rasporeda radnog vremena,
- prekovremenog i noćnog rada,
- odmora u toku rada,
- odsustva uz naknadu zarade,
- elemenata za obračun i isplatu zarade,
- bezbednosti i zdravlja na radu,
- zaštite trudnica i majki dojilja, zaštite omladine,
- zabranu diskriminacije po svim osnovima.

Navedene uslove rada Zaposlenima obezbeđuje Poslodavac, dok obračun i isplatu zarade, kao i naknadu troškova obezbeđuje Agencija. Ipak, Poslodavac je supsidijarno odgovoran za isplatu zarade i naknade troškova sa Agencijom.

Serbia: Draft Law on Agency Employment published

Ministry of Labour, Employment, Veterans' and Social Affairs of the Republic of Serbia („*Ministry*“) has prepared and published the Draft Law on Agency Employment („*Draft Law*“).

The Draft law regulates:

- the protection of the rights of employees who conclude an employment agreement with the temporary employment agency („*Agency*“) for the purpose of assigning on temporary work to the employer user („*Employer*“);
- equal treatment of the assigned employees („*Employees*“) in terms of exercising employment rights with “comparable employees” at the Employer (i.e. employees at the Employer carrying out the same or similar type of jobs);
- conditions for the work of Agency;
- the manner and conditions for the assigning of Employees;
- the relationship between the Agency and the Employer, as well as
- the obligations of the Agency and the Employer towards Employees.

The Draft Law stipulates that the Agency has to conclude employment agreement with an Employee for an indefinite or definite period, as well as which elements such agreement has to contain. On the other hand, the Agency and the Employer enter into a legal relationship based on agreement on the assigning of employees, whose mandatory provisions are also prescribed by the Draft Law.

The Draft Law stipulates that the Employees shall have equal working conditions as well as comparable employees at the Employer in terms of:

- the duration and schedule of working hours,
- overtime and night work,
- pauses during work,
- paid leave,
- elements for calculation and payment of salaries,
- safety and health at work,
- protection of pregnant women and breastfeeding mothers, protection of the youth,
- prohibition of discrimination on all grounds.

The Employer provides stated work conditions for the Employees, while the calculation and payment of the salary, as well as the reimbursement of expenses, is provided by the Agency. However, the Employer is liable together with the Agency (as a secondary debtor) for payment of salaries and costs to the Employee.

Poslodavac će moći na ovakav način da angažuje do 10% Zaposlenih, a najviše do 30% uz prethodnu saglasnost Ministarstva (i uz prethodno pozitivno mišljenje resornog ministarstva za delatnost Poslodavca). Ova odredba bi u praksi mogla dovesti do povećanja troškova Poslodavaca kojima je ovakav vid angažovanja Zaposlenih neophodan, budući da će radnu snagu koja prelazi ovo ograničenje morati da angažuju putem neke druge vrste ugovora, što bi za one koji su angažovani na taj način moglo imati negativne efekte (npr. ukoliko se radi o nekom vidu angažovanja van radnog odnosa). S druge strane, kako su Zaposleni izjednačeni u pravima iz radnog odnosa sa uporednim zaposlenima kod Poslodavca, nejasni su motivi za ovu vrstu ograničenja, budući da nije predviđena ni u korist Zaposlenih ni u korist Poslodavaca.

Još jedan vid zaštite Zaposlenih predstavlja to što Nacrt zakona propisuje da neće proizvoditi pravno dejstvo odredbe ugovora kojima se zabranjuje Zaposlenima da zasnju radni odnos sa Poslodavcem nakon isteka perioda na koje su ustupljeni.

U pogledu mogućnosti za angažovanje Zaposlenih na određeno vreme od strane Agencije, u skladu sa članom 16. stav 1. Nacrta zakona, Agencija može da ustupi Zaposlenog na određeno vreme Poslodavcu u slučajevima i u trajanju utvrđenom za zasnivanje radnog odnosa na određeno vreme u skladu sa Zakonom o radu. Drugim rečima, Agencija može zaključiti sa Zaposlenim ugovor o radu na određeno vreme jedino ako kod Poslodavca postoje okolnosti koje opravdavaju takav vid radnog angažovanja u skladu sa Zakonom o radu.

Isto tako, shodno stavu 2. člana 16. Nacrta zakona, Agencija ne može da ustupi Zaposlenog na određeno vreme koji je bio u radnom odnosu kod Poslodavca na određeno vreme u trajanju od 24 meseca, osim u slučajevima kada je rad na određeno vreme kod Poslodavca dozvoljen u dužem trajanju u skladu sa Zakonom o radu.

Shodno stavu 3. člana 16. Nacrta zakona, ustupljeni Zaposleni na određeno vreme koji je prethodno kod Poslodavca radio preko iste ili druge Agencije suprotno odredbama stava 1. tog člana, ili koji ostane da radi kod Poslodavca najmanje 5 radnih dana nakon isteka vremena za koje je ustupljen, smatra se da je zasnovao radni odnos na neodređeno vreme kod Poslodavca. U praksi bi ovo rešenje moglo izazvati poteškoće za velike kompanije koje po prirodi delatnosti imaju potrebe za privremenim angažovanjem radnika usled povećanog obima posla, pri čemu nije moguće unapred odrediti dužinu trajanja privremenog angažovanja Zaposlenog. Dodatno, Poslodavac ne bi trebalo da snosi rizik da Zaposleni koji se već nalazi u radnom odnosu u Agenciji (sa prvobitnom namerom Poslodavca da to bude privremeno angažovanje) zasnju radni odnos na neodređeno vreme kod Poslodavca.

The Employer will be able to employ up to 10% of the Employees in this way, and at the most up to 30% with the prior consent of the Ministry (and with prior positive opinion of the competent ministry in charge for the Employer's business activity). This provision in practice could lead to an increase in the cost of Employers who need this type of the Employees engagement, since the workforce exceeding this limit would have to be hired through some other agreement, which could have negative effects for those who are engaged in such a manner (e.g. if this would be a form of out of employment engagement). On the other hand, since the Employees are equalized in employment rights with comparable employees at the Employer, motives for this type of restriction are unclear, since they are not foreseen neither for the benefit of the Employees nor for the benefit of Employers.

Another form of Employees' protection is that the Draft Law prescribes that a provision of an agreement prohibiting an Employee from establishing an employment with the Employer after the expiration of a period of assignment will not produce a legal effect.

With respect to the possibility for engagement of Employees through fixed-term employment agreement by the Agency, according to the Article 16, Paragraph 1 of the Draft Law, the Agency may assign the Employee for a definite period to the Employer in cases and for duration determined for establishment of definite term employment in accordance with the Labour law. In other words, the Agency may conclude a fixed-term employment agreement with the Employee only if there are circumstances at the Employer that justify such form of work engagement in accordance with the Labour Law.

Also, according to the Article 16, Paragraph 2 of the Draft Law, the Agency may not assign fixed-term Employee who was employed at the Employer for a fixed term of 24 months, except in cases when such fixed-term engagement of prolonged duration is permitted under the Labour Law.

Pursuant to the Paragraph 3 of Article 16 of Draft Law, assigned fixed-term Employee who had previously worked at the Employer through the same or different Agency contrary to the provisions of the Paragraph 1 of that Article, or who continues working at the Employer for at least 5 working days after the expiry of the assignment period, shall be considered to be permanently employed with the Employer. In practice, this solution could cause difficulties for large companies that by nature of business have the need for temporary engagement of workers due to the increased workload, while it is not possible to determine in advance the length of the temporary engagement of the Employee. Additionally, the Employer should not bear the risk that an Employee who is already in employment relationship with the Agency (with the original intention of the Employer to have a temporary engagement), will establish an indefinite term

U kontekstu prethodne odredbe, važno je pomenuti i odredbu člana 23. Nacrta zakona kojom je predviđeno da će Agencija otkazati ugovor o radu ili izreći drugu meru Zaposlenom nakon što Poslodavac dostavi dokaze za utvrđivanje okolnosti koje predstavljaju razloge za otkaz ugovora o radu. U slučaju nezakonitog otkaza ugovora o radu, Zaposleni može pokrenuti radni spor za naknadu štete protiv Agencije. Međutim, kako Nacrt zakona ne uređuje odnos između Agencije i Poslodavca u tom slučaju, ovo pitanje bi trebalo da bude regulisano ugovorom između Poslodavca i Agencije. Dodatno, predviđeno je da Zaposleni u slučaju nezakonitog otkaza ima pravo na naknadu štete u visini preostalog iznosa zarada od momenta prestanka radnog odnosa pa do isteka trajanja ugovorenog ustupanja, a najviše 18 zarada, kao i pravo na uplatu poreza i doprinosa za taj period.

Nacrtom zakona takođe je predviđeno da je Poslodavac dužan da Zaposlenom naknadi štetu koju pretrpi na radu ili u vezi sa radom kod Poslodavca, u skladu sa pravilima iz Zakona o radu. Međutim, u slučaju povrede na radu ili profesionalnog oboljenja upućenog Zaposlenog, Nacrtom zakona predviđena je i supsidijarna odgovornost Agencije u slučaju da Zaposleni ne može od Poslodavca da naplati u celini ili delimično iznos naknade štete utvrđen u sudskom postupku.

Nacrt zakona, pripremljen po ugledu na propise koji se primenjuju u zemljama Evropske unije, je bio na javnoj raspravi do 23. novembra 2018. godine. U narednom periodu očekuje se usvajanje predloga ovog zakona koji će biti upućen u skupštinsku proceduru.

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employment with the Employer.

In the context of the previous provision, it is also important to mention the provision of Article 23 of the Draft Law, which stipulates that the Agency will terminate the employment agreement or issue another measure to the Employee after the Employer provides evidence of circumstances that constitute the reasons for the termination of an employment agreement. In case of unlawful termination of employment agreement, the Employee may initiate a labour dispute for damages against the Agency. However, since the Draft Law does not regulate the relationship between the Agency and the Employer, in such a case, this issue should be regulated by an agreement between the Employer and the Agency. In addition, it is envisaged that in case of unlawful dismissal the Employee has the right to damages in the amount of the remaining salaries from the moment of termination of employment until the expiration of the agreed assignment, and not more than 18 salaries, increased for taxes and contributions for that period.

The Draft Law also stipulates that the Employer is obliged to compensate the damage the Employee suffered at work or in connection with work at the Employer, in accordance with the provisions of the Labour Law. However, in case of an injury at work or occupational illness of the assigned Employee, the Draft Law envisages also liability of the Agency (as a secondary debtor) if the Employee may not collect from the Employer, in whole or in part, the amount of the damage compensation determined in the court proceedings.

The Draft Law, based on the example of the regulations applying in the European Union, was on the public debate by November 23, 2018. In the coming period, it is expected adoption of proposal of this Law, which will be submitted to the parliamentary procedure.