

(in Serbian)

**Srbija: 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 uređuju se:

- prava i obaveze zaposlenih koji zaključuju ugovor o radu sa agencijom za privremeno zapošljavanje („*Agencija*“) radi ustupanja tih zaposlenih 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 vrstu poslova*);
- uslovi za rad Agencije;
- način i uslovi ustupanja Zaposlenih;
- odnos između Agencije i Poslodavca, kao i
- obaveze Agencije i Poslodavca prema Zaposlenima.

Međusobni odnos Zaposlenog, Agencije i Poslodavca

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

Jednak tretman Zaposlenih sa ostalim zaposlenima kod
Poslodavca

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

- 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,

(in English)

**Serbia: Draft Law on Agency
Employment**

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

The Draft Law regulates:

- rights and duties of employees which conclude an employment agreement with a temporary employment agency (the "*Agency*") for the purpose of their assignment on temporary work to an employer user (the "*Employer*");
- equal treatment of the assigned employees (the "*Employees*") regarding exercising employment rights with "comparable employees" at the Employer (*i.e. employees at the Employer carrying out the same jobs*);
- conditions for the performance of Agency business activity;
- manner and conditions for the assignment of Employees;
- relationship between the Agency and the Employer, as well as
- Agency's and Employer's obligations towards Employees.

Mutual relation between Employee, Agency and
Employer

The Draft Law stipulates that the Agency is obliged to conclude an employment agreement with the Employees. Mandatory elements of such agreement are also prescribed, depending on whether an agreement is concluded for definite or indefinite period of time. On the other hand, the Agency and the Employer enter into a legal relationship based on assignment agreement, whose mandatory elements are also prescribed by the Draft Law.

Equal treatment of Employees compared to other
Employer's employees

The Draft Law stipulates that the Employees will have equal working conditions as well as comparable employees at the Employer regarding the following:

- duration and schedule of working hours,
- overtime work and night work,
- rest in the course of work,
- absence from work with provided salary compensation,
- elements for calculation and payment of salaries,
- safety and health at work,
- protection of pregnant women and breastfeeding

- 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 pored Agencije supsidijarno odgovoran za isplatu zarade i naknade troškova.

Ograničenje broja Zaposlenih koje Poslodavac može angažovati preko Agencije

Poslodavac će moći na ovakav način (putem Agencije) 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 i obavezama iz radnog odnosa sa uporednim zaposlenima kod Poslodavca, nejasni su motivi za ovu vrstu ograničenja, budući da isto nije predviđeno ni u korist Zaposlenih ni u korist Poslodavaca.

Navedena odredba Nacrta ostala je sporna i nakon održane javne rasprave, budući da oko rešavanja sporne odredbe predstavnici sindikata i poslodavaca nisu postigli saglasnost. Naročito, u ovom pogledu primedbe su, tokom javne rasprave, imali Savet stranih investitora (*FIC*) i Američka privredna komora (*AmCham*). U narednom periodu Ministarstvo će predložiti kompromisno rešenje.

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

Ustupanje Zaposlenih Poslodavcu na određeno vreme mora biti u skladu sa srpskim Zakonom o radu

U pogledu mogućnosti za angažovanje Zaposlenih na određeno vreme od strane Agencije, Nacrt zakona predviđa da 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

- mothers, protection of the youth,
- prohibition of discrimination on all grounds.

The Employer is obliged to provide stipulated work conditions to the Employees, while the calculation and payment of the salary, as well as the reimbursement of expenses are provided by the Agency. However, besides Agency, the Employer is subsidiary liable for the payment of salaries and costs to the Employee.

Limitation of number of Employees that may be engaged by Employer through Agency

In this manner (through Agency) the Employer will be able to employ up to 10% of the Employees, but at the most up to 30% with the prior consent of the Ministry (and with prior positive opinion of the ministry competent for the Employer's business activity). Practically, this provision may lead to an increasing amount of expenses for the Employers who need this type of the Employees engagement, since the workforce exceeding stipulated limit shall be hired through other type of agreement, that may cause negative effects for those who are engaged in such manner (e.g. if this would be in a form that is out of employment engagement). On the other hand, since the Employees are equalized in employment rights and duties with comparable employees at the Employer, motives for this type of restriction are unclear, since it is not prescribed neither as a benefit for the Employees nor as a benefit for the Employers.

This provision of the Draft Law remained disputable even after the public debate, since the representatives of trade unions and employers did not agree upon disputed provision. In particular, during this public discussion, the Foreign Investors Council (*FIC*) and the American Chamber of Commerce (*AmCham*) had objections. In the upcoming period, the Ministry will propose a compromise solution.

Another aspect of exercising the Employees' rights under the Draft Law is that agreement provisions, prohibiting an Employee from establishing an employment with the Employer, will not produce a legal effect after the expiration of an assignment period.

Assignment of Employees to Employer for a definite period of time have to be in accordance with Serbian Labour Law

Regarding the possibility for engagement of Employees for a definite period of time by the Agency, the Draft Law prescribes that the Agency may assign the Employee for a definite period to the Employer in cases and for a period of time 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

angažovanja u skladu sa Zakonom o radu – npr. zbog povećanja obima posla kada se ugovor o radu na određeno vreme može zaključiti do 24 meseca.

Isto tako, 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 – npr. radi rada na projektu ili zamene privremeno odsutnog zaposlenog.

Shodno Nacrtu zakona, ustupljeni Zaposleni na određeno vreme koji je prethodno kod Poslodavca radio preko iste ili druge Agencije suprotno odredbama Zakona o radu koje regulišu slučajeve i trajanje radnog odnosa na određeno vreme, 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 mogućnosti da Zaposleni koji se već nalazi u radnom odnosu u Agenciji (sa prvobitnom namerom Poslodavca da to bude privremeno angažovanje) zasnjuje radni odnos na neodređeno vreme kod Poslodavca.

Otkaz ugovora o radu Zaposlenih

U kontekstu prethodno rečenog, važno je pomenuti i da Nacrt zakona predviđa 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 vraćanje na rad i naknadu štete u visini 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.

Ove odredbe Nacrta zakona će biti predmet dodatnog usaglašavanja od strane Ministarstva – kako bi bila usaglašena sa odredbama Zakona o radu.

circumstances at the Employer that justify such form of work engagement in accordance with the Labour Law - for example, due to the increased volume of work when the employment agreement for a definite period of time may be concluded up to 24 months.

Also, 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 – for example, for working on a project or for replacing a temporary absent employee.

Pursuant to the 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 Labour Law regulating situations and duration of fixed-term employment or who continues working at the Employer for at least 5 working days after the expiration of the assignment period, shall be considered to be permanently employed with the Employer. In practice, this solution may cause difficulties for large companies which by its business nature have need for temporary engagement of workers due to 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 of the possibility for an Employee who is already in employment relationship with the Agency (with the original intention of the Employer to have a temporary engagement) to establish an indefinite term employment with the Employer.

Termination of employment of Employees

In the context of the previously stated, it is important to highlight that the Draft Law stipulates that the Agency will terminate the employment agreement or issue another measure to the Employee after the Employer provides evidence on 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 labor dispute for compensation of damages against the Agency. However, since the Draft Law does not regulate the relationship between the Agency and the Employer, in such 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 request to be return to work as well as compensation of damages consist of 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.

These provisions of the Draft Law will be subject to further harmonization by the Ministry - in order to comply with the provisions of the Labor Law.

Naknada štete Zaposlenima i odgovornost kod povrede na radu

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.

Osnovna pitanja o kojima nije postignuta saglasnost tokom javne rasprave

Tokom javne rasprave nije postignuta saglasnost, između ostalog, o sledećem:

- Mogućnost da Agencija angažuje Zaposlene po osnovu ugovora o privremenim i povremenim poslovima – tj. za obavljanje poslova koji su po svojoj prirodi takvi da ne traju duže od 120 radnih dana u kalendarskoj godini; te
- Da se zabrani zaključenja ugovora o ustupanju zaposlenih na upražnjenim radnim mestima kod Poslodavca, te na novoootvorenim radnim mestima.

Usvajanje zakona

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. Nakon usvajanja, Poslodavci i Agencije će imati rok od 9 meseci za usaglašavanje.

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Damage compensation to the Employees and liability for injuries at work

The Draft Law also stipulates that the Employer is obliged to compensate the damage to 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 the subsidiary liability of the Agency if the Employee does not charge from the Employer, in whole or in part, the amount of the damage compensation determined in the court proceedings.

Main issues on which no consensus was reached during public debate

During the public debate, no consensus was reached, among other things, on the following:

- Possibility for the Agency to engage the Employees on the basis of agreement on performing temporary and periodical jobs - i.e. for carrying out activities which by their nature are such that they do not last more than 120 working days in a calendar year;
- Prohibition of the conclusion of the agreement for assignment of employees to vacant workplaces with the Employer, and in newly opened workplaces.

Adoption of Law

The Draft Law, modeled on regulations applying in the European Union countries, was on the public debate by 23 November 2018. In the upcoming period, adoption of proposal of this Law is expected, which will be then directed to the parliamentary procedure. After the adoption of the law, Employers and the Agency will have a deadline of 9 months for harmonization.