

AGENCY WORK

November 2021

1. What is Agency Work?

Agency work (*Arbeitnehmerüberlassung*) is a highly regulated business area in Germany and occurs when an employer (Agency) provides a third party (Client) with an employee employed by him, the Agency Worker (Agency Worker). The Agency Worker is fully integrated into the Client's work organization and is subject to the Client's instructions. The employment relationship, however, exists between the Agency and the Agency Worker, no employment relationship between the Client and the Agency Worker is being established.

2. What Alternatives Exist to Agency Work?

Third-party personnel deployment on the basis of a service contract (*Dienstvertrag*) or work contract (*Werkvertrag*) is to be distinguished from agency work. In distinction to agency work, the employees remain included in the service provider's/contractor's organization and are subject to their instructions, although working at a third party. In these cases, the rules on agency work do not apply. However, great caution is indicated here: If it should turn out that, despite the agreement of a service or work contract, the employees were integrated into the third party's organization, this can be a case of unauthorized agency work, which can result in fines for Agency and Client and the creation of an employment relationship between the Client and the Agency Worker.

3. What's the Difference to an Employer of Record?

Services offered as EoR (Employer of Record) or PEO (Professional Employer Organization) generally fall under the agency work regulations in Germany. Thus, from a German law perspective, EoR/PEO and agency work are usually the same. However, some EoR/PEO providers are of the opinion that they do not fall under agency work, even when assigning workers in Germany. Caution is required here. Before accepting EoR/PEO services as a Client in Germany, it should be checked thoroughly which regulations apply.

4. Who May Offer Agency Work in Germany?

To offer agency work in Germany, the Agency-to-be must submit a written application to the competent state authority for the granting of a licence. The competent state authorities are the employment agencies (*Agentur für Arbeit*) in Kiel, Düsseldorf or Nuremberg, depending on the seat of the Agency-to-be. The licence is limited to one year. A licence for an indefinite period can be issued only if the Agency has successfully applied for a licence for three consecutive years.

The provision of agency work is possible without a licence in a limited number of cases, for example if:

- the assignment is only occasional, and the employee is not hired and employed for the purpose of the assignment or
- short-time work or redundancies are to be avoided between employers in the same economic sector, if a collective agreement applicable to the Agency and Client so provides.

5. What Other Special Obligations With Regard to Agency Work Does the Agency Have?

After the licence has been granted, the Agency is also obliged to notify the competent employment agency without being asked of any changes that relate to the agency work. This may include, for example, the relocation, closure and construction of establishments or parts of establishments.

In addition, the Agency is obliged to submit business documents proving the correctness of his information to the state authority upon request.

Before starting agency work, the Agency must also expressly designate it in the contract as an "agency work contract". The Agency Worker must be specified with reference to this contract. The agency work must therefore be mandatory disclosed.

6. What are the Formal Requirements for the Agency Work Agreement?

The agency work agreement between the Agency and the Client must be concluded in writing.

In addition, the Agency must declare in the contract whether it holds a permit to supply Agency Workers and inform the Client without delay of the date on which the permit expires. In the event of non-renewal, withdrawal or revocation, the Agency must also indicate the expected end of the settlement and the statutory settlement period.

The Client must also indicate the special characteristics of the work for the Agency Worker and the professional qualifications required for it, as well as the essential working conditions, including the remuneration applicable in the Client's company for a comparable employee of the Client.

7. What Does the Equal Pay Principle Entail?

The equal pay principle obliges the Agency to pay the Agency Worker the salary applicable in the Client's company for the duration of the agency work., i.e. the Agency Worker must earn as much as a comparable employee at the Client. In addition to the regular salary, this also includes other entitlements such as bonuses or overtime compensation.

In addition, the Agency Worker has a claim against the Agency for the essential working conditions applicable in the Client's business, such as the duration of working hours or vacation.

8. What Should be Considered if There is a Collective Bargaining Agreement?

In principle, deviating regulations to the equal pay principle can be made in a collective bargaining agreement (CBA), concluded between trade unions and employer's associations. These CBAs apply if the Agency and the Agency Worker are both members of the union and the employer associations, or if they agree on applying the CBAs in the employment agreement. Nevertheless, after nine months assignment at the latest, the equal pay principle must be observed again. A different maximum assignment period can also be agreed in a CBA. In practice, however, this has not yet been the case.

9. For How Long Can Agency Workers be Assigned to Client?

An Agency Worker may not be assigned to Clients for longer than 18 months. The applicable maximum assignment period is employee-related, so rotation models, where jobs are filled by changing employees, are possible.

In case that the Agency Worker is employed beyond the permitted 18 months, an employment relationship arises between the Client and the Agency Worker unless the Agency Worker declares that he or she wishes to maintain the employment relationship with the Agency.

The Client and the Agency are liable for an administrative offense if the maximum assignment period is exceeded and must expect fines of up to EUR 30.000.

10. What Happens if the Assignment of an Agency Worker is Interrupted?

If the interruption of the assignment of one Agency Worker with the same Client does not exceed three months, the previous assignment must be taken into account when calculating the maximum assignment period. However, if the interruption lasts more than three months, the previous assignment for the Client is not taken into account. This means that if the three-month interruptions are observed, an assignment can last longer than 18 months in total.

11. Can the "First Client" Reassign the Agency Worker to a "Second Client"?

No. Agency work is only possible if there is an employment relationship between the Agency Worker and the Agency. This rule prohibits chain assignments (*Kettenüberlassungen*) and ensures that the Agency Worker is only assigned by his contractual employer.

12. Can Agency Workers Work During Strikes?

No. If the Client's business is directly affected by a strike or a labor dispute, the Client may not allow the Agency Worker to work.

13. Do Agency Workers Have to be Included in the Thresholds for Co-Determination?

Yes. For the purposes of co-determination, the Agency Workers are legally assigned to both the Agency's and the Client's operation. Insofar as regulations on co-determination require a certain number of employees, Agency Worker must be taken into account in the Client's company. However, this only applies if the Agency Workers have already been working at the Client for more than six months.



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