

Temporary Agency Work in a changing labour market: the Portuguese experience

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SUMMARY

1. Context
2. The atypical feature of temporary agency work *vis a vis* standard employment relationship
3. The proclaimed advantages and the many disadvantages of temporary agency work
4. Temporary agency work in Portugal: basic features
5. General conclusion regarding the Portuguese experience

Context

1. The starting point: the classical model of employment contract and employment relations in Portugal;
2. Some changing factors: new types of undertakings and different types of workers in an ever-changing economy; the technological revolution; the burden of the costs attached to classical employment relations;
3. The need to adapt employment law to the new economic and technologic challenges: the way towards a more flexible employment law and the features of flexibility; external and internal flexibility;
4. Temporary agency work among other atypical forms of employment that put in action external flexibility in employment law.

The atypical feature of temporary agency work *vis a vis* standard employment relationship

- A tripartite relation between a Temporary Agency Worker (TAW), a Temporary-Work Agency (TWA) and a third party, which is the beneficiary of such work (User Undertaking (UU)).
- In Portugal, this tripartite relation is entitled by two different agreements:
 - the temporary-work employment contract, concluded between the TWA and the worker (open-ended or fixed-term contract);
 - the assignment contract, concluded between that TWA and the UU, for the purposes of placing the worker at the UU, to work temporarily under its supervision and direction.

The atypical feature of temporary agency work *vis a vis* standard employment relationship (2)

- Who is the employer? the TWA
- How are the employers' duties divided?
 - Pay / professional training / professional hazards and diseases / social security contributions (TWA)
 - duty to inform / health and safety (UU)
- How are the employers powers divided?
 - Direction and supervision of the worker: UU
 - Disciplinary power and dismissal: TWA



A fragmented employment relationship
A homeless and invisible worker

Proclaimed advantages of temporary agency work

- An important tool to fight unemployment
- An instrument to provide quickly for specialized work
- A positive instrument for managerial purposes
- A way to promote the reconciliation of professional and private life
- Special appeal for companies in more protective legal systems, as in the case of Portugal, since this type of employment relation makes it easier for employers to escape general employment protection rules (mainly the legal requirements of fair dismissal) and to reduce the costs attached to regular employment

The many disadvantages of temporary agency work

- temporary agency workers as homeless and invisible workers: they perform their activity for an entity that is not their employer and inside an organisation to which they do not belong and at the same time they are not visible to their own employer as they are not integrated in its organisation
- the danger of lower protection, isolation and a low level of collective involvement of these workers is real
- as the assignment periods have a fixed-term, the risk of structural unemployment of temporary agency workers is higher.

Temporary agency work in Portugal

- Traditional prejudice against all forms of work involving intermediate entrepreneurs explains the prohibition of temporary agency work in Portugal until 1989 and the restrictive approach of the law regarding this kind of work (Decree-Law No. 358/89, of 17 October)
- This restrictive approach stays until today in relation to:
 - the activity of Temporary-Work Agencies (Decree-Law No. 260/2009, of 25 September)
 - the temporary-work employment relation itself (Articles 180 and ff. of the Portuguese Labour Code (LC), approved by Law No. 7/2009, of 12 February).

Temporary-Work Agencies (TWA)

Decree-Law No. 260/2009, of 25 September, imposes a certain number of restrictions both to the creation and to the activity of TWA

- Creation of TWA
 - Public license and registration; official certification (the suitability of the company and of its managing board); security deposit
 - These conditions are regularly checked by public inspection services and should there be a problem the license to operate can be withdrawn.
- Limitations to the activity of TWAs: strictly limited to activities linked to the recruitment and placement of temporary-agency workers, professional training and other human resources related activities



In short, the Portuguese legislation is rather strict regarding this line of activity.

Temporary-work employment relationship in the Law

- The strict approach of the Portuguese Labour Code (LC) to temporary-work employment relationships, developed in two sets of provisions:
 - Provisions intended to restrain the use of such form of work by the companies
 - Provisions intended to actively protect the temporary agency worker during the assignment periods

Temporary-work employment relationship: provisions intended to restrain the use of such form of work by the companies

- The need of a material, strict and temporary ground for the assignment contract
- Strict formal requirements imposed to the assignment contract and the temporary-work employment contract
- Maximum duration for assignment contracts and also to temporary agency work employment contract when concluded in the form of fixed-term contract
- Prohibition of successive assignment contracts
- Severe consequences for the breach , including the right granted to the employee to automatically transform the unlawful temporary-agency contract in a standard open-ended employment contract either with the temporary-work agency or with the user undertaking (Articles 176 No. 3, 177 No. 5, 178 No. 4, 180 No. 2 and 3, 181 No. 2, and 183 No. 3 of the LC).

Temporary-work employment relationship: provisions intended to protect the worker

- Right to equal working conditions, including pay, when compared to regular workers of the user undertaking performing the same or an equivalent job
- Right to professional training
- Right to protection in case of professional hazard or illness
- Right to severance pay at the end of the temporary-work employment contract
- Accrued protection in case of temporary-agency workers posted abroad, especially as regards health and safety and including the right to return to Portugal at the end of the assignment, at the expenses of the temporary-work agency
- General rule of common responsibility of the TWA and the UU in relation to workers credits and other duties towards the workers and in relation to social security credits

General conclusions

- Portuguese law goes beyond EU Law in the level of protection granted to these workers (Directive 2008/104), since the principle of equal treatment applies beyond «basic working conditions» and the law makes no use of the exemptions to equality principle allowed by Article 5 of the Directive
- Directive 2008/104/EC is a weak directive, that seems unable to find its way between two opposite goals: the objective of promoting temporary agency work and the need to grant accrued protection to temporary-agency workers → As in other areas, the compromise approach of EU Law to the several interests in stake results in a rather soft ruling

The great challenge of temporary agency work

- To avoid an excessive «trade» of workers throughout temporary-work agencies, as working force is not to be treated as a mere commercial good
- To balance the economic advantages of this atypical form of employment with the adequate level of protection of the workers involved, but assuming that they need accrued protection because they are invisible for their own employers and homeless for the entity to which they work
- The Portuguese law is still trying to face these challenges

Thank you for your kind
attention!

