In this issue, we focus on ...

The contingent workforce

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In our rapidly changing business environment, growing organizations are now using diverse business models to fill their business needs.

Indeed, in today’s ODE (on-demand economy) or “gig” economy, businesses are now resorting to the use of diverse workforce models across the supply chain. Companies are relying more and more not only on their own workforce to get the job done, but also on the external or contingent workforce.

Some economists say that 50% of the workforce will be composed of “non-employees” by 2020, as companies are using their “own” workforce (employees) in the traditional model, but more and more companies are often utilizing an “external,” or contingent workforce.

This increasing use of a contingent workforce raises complex HR labor law (and even tax) issues and may expose companies to legal, financial, criminal and reputational risk.

In this environment, it is key to have a good grasp of the diverse legal issues relating to the contingent workforce to ensure that the appropriate compliance tools are put in place to avoid unanticipated risks and costs.

In this edition of the EY Labor & Employment Law Strategic Global Topics, we focus on the Contingent Workforce.

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The contingent workforce in Argentina – the work methodology of the future

About two decades ago, the goal of most university graduates in Argentina was to progress in an important company and, eventually, occupy a large office. This goal matters less to the new generations, who view flexibility at the workplace as fundamental to achieving work-life balance. Even though large multinationals have understood this concept and implemented measures to make work conditions more flexible, an increasing number of young people have become freelancers.

Therefore, websites offering this new work methodology landed in Argentina in 2012, offering particularly technical jobs in web design, graphic design, programming, etc. Since then, they have increased exponentially and incorporated workers from other areas, especially social media. These websites have a multicurrency and multilingual nature, and are where employers from all over the world converge, mainly from the United States, the United Kingdom, Canada and Australia. They had to adapt to local features, including the deep government control over foreign currency that was in effect until December 2015.

However, there is no obstacle to considering this to be the future work methodology.

Advantages and disadvantages

The lack of schedules and fixed workplaces provides freedom and supports the productivity of this new professional profile. Organizations had to change the concept of productivity and orient it to results, modifying the working method so that professionals could commit to the idea and the project.

The progress made by workers, plus social revolution, has transformed the market, turning freelance work into one of the new business formulas in Argentina. Technological progress, social network immediacy, the increase in entrepreneurial initiatives and the need for international interconnection have caused these new labor circumstances to be more common and beneficial.

Specifically in Argentina, the growth of this model is supported by companies’ need to reduce the cost of maintaining premises, to avoid losing employees, to hire valuable talent, and to allow people to reconcile work and family life.

Freelancing has flexible schedules, offers the ability to work from almost any location, saves the time of moving to an office, provides freedom of action and promotes project diversity. However, there are negative aspects, such as lacking social security protection and retirement savings, coping with unstable revenues and absorbing a significant portion of business risks.

Legal parameters

From a legal point of view, freelancers are related to a company not through an employment contract, but through a contract for services compensated with fees or commissions.

The new Argentine Civil and Commercial Code, effective since August 2015, has adopted and outlined the main characteristics of self-employment, distinguishing it from the presumed existence of an employment contract, a presumption meant to protect workers against potential abuse.

We expect this new concept to be adopted by case law because one of the most frequent risks for those hiring freelancers is that their business relationship may eventually be interpreted as an employment relationship. That would bring labor, social security and tax fines for the alleged employer and, what’s more, would lead to its inclusion in the Labor Noncompliance Registry (REPSAL), which implies material economic and reputational damage.

In Argentina, the claim related to this alleged unreported labor relationship may come both from governmental authorities and from freelancers themselves. Despite having signed a contract for services, they are entitled to claim severance pay whenever they prove that their business relationship actually had the characteristics of technical, legal or economic dependence on their employers.

The characteristics of self-employment outlined by the Argentine Civil and Commercial Code include:

- Free acceptance or rejection of work within contract terms and conditions
- Free daily work and time schedules in combination with rest, at the freelancer’s discretion
- The power of the principal to give orders and instructions – even though it may be mistaken for the power of an employer, it is mitigated by the freelancers’ freedom to renegotiate, amend or adapt them to achieve their goals
- A fixed or variable location to provide the services – they may even be rendered within one establishment, in full or in part
- Termination of the relationship with no intrinsic labor consequences – it may give rise to damages, such as a loss of profits, actual loss, nonmaterial damage and even potential damage, but not as a result of the termination of the relationship in itself
- Freely agreed-upon exclusivity as part of contracting terms and conditions

A world where each person can decide – personally and responsibly – the time, manner and place of work has ceased to be a product of our imagination and become a possible reality.

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Brazilian development of contingent workforce regulations

The use of an external workforce to support operations is a controversial matter, and is currently under discussion in the Brazilian Congress and Justice Courts. These discussions focus on confusion over the concept of a contingent workforce and how it may be misused as part of payroll cost-saving strategies. As an example, 50% of the workforce for the biggest Brazilian companies is external.

The Brazilian employment legislation is historically protective. It was created in the 1940s when the Government was largely based on populist and employee defense propaganda because of abuses by industry. As a consequence, Brazil became a heavily unionized society with a labor justice system that decides in the employee’s favor most times.

Because the legislation was outdated, there were no regulations on contingent workforce until the 1970s, when the Government allowed the use of temporary workers in two situations:

- A temporary substitution of regular personnel
- An extraordinary increase in workforce demand

This limited a temporary employment agreement to 45 days, with the possibility of renewing it only once.

In past years, a great number of Brazilian companies applied a cost-reduction strategy of hiring an external workforce (mostly one-person corporate entities) to perform core business activities. The goal was to avoid the costs of employment benefits, social security and the unemployment fund.

That led to significant litigation with the aim of solving conflicts over the legality of hiring an external workforce outside the parameters of the Temporary Workers Law. In May 2011, the Brazilian Superior Labor Court (TST) issued binding decision No. 331, stating that the use of an external workforce outside the temporary worker framework is illegal and that people hired under these conditions should be deemed regular employees.

This same decision regulated the use of external service providers by Brazilian companies. According to the TST, service providers can be hired only if their work is not related to the companies’ core business. In accordance with this decision, and apart from temporary workers, only activities not related to the business could use an external workforce (e.g., reception, cleaning, maintenance and consulting).

Also, the contracting party has subsidiary responsibility for fulfilling the employment and social security rights of the external personnel.

The TST decision had a positive impact on irregular and illegal employment issues. Nevertheless, it established a tough limit on contingent workforce regulations, which became limited to the two situations described in the Temporary Workers Law.

From the subsidiary responsibility perspective, it is important to emphasize that Brazilian companies often lack a structure to manage risks in connection with hiring external workers and usually face many challenges that affect financial results.

The Brazilian Congress is currently considering a bill to nullify the TST decision by allowing companies to hire an external workforce, regardless of their activity, without binding the workers under an employment relationship. The bill has generated a lot of noise, as its objective is to shift completely the current understanding and the way the contingent workforce has been managed in Brazil for decades. However, it also establishes that the contracting party will have subsidiary responsibility for fulfilling employment rights and obligations.

If the bill passes, external workforce management will have a huge impact on HR routines and strategy. Companies will have to add a mechanism for workforce management to assess the cost and effort of hiring external workers versus hiring regular employees. To be effective, external workforce management should be aligned with the company’s strategy and forecast.
Rendering of nonemployment services in Costa Rica

The rendering of nonemployment services in Costa Rica is an issue of great concern; one that is frequently discussed in courtrooms. The judicial system has therefore called these “border-line cases” or “gray areas.” They involve the rendering of personal services under conditions that are often confused with labor contracts or that, in practice, turn into employee-employer relationships.

Costa Rica has no special laws governing the rendering of professional or outsourced services, or any specific regulations for independent workers. The analysis of these forms of contracting mainly occurs within an employment legislation framework, which assumes, as in other countries, that any personal rendering of a service constitutes a work contract until proven otherwise. Legal loopholes are often used to distort the existence of true employment relations. That is why employment authorities (social security, the Ministry of Labor and the Supreme Court of Justice) usually apply the principles of employment law to rule in favor of the person who provided the service.

The reality principle would apply, and the applicable law would depend on what has actually taken place, beyond the name that the parties have given to the contract or the conditions that were defined. That is to say, each contract should be reviewed to determine whether it has the manifestations of an employment contract – mainly the personal rendering of services, compensation and legal subordination. Personal rendering and compensation are usually present in other forms of nonemployment contracts. So the feature that could tilt the balance is the concept of subordination, understood as the employer’s exclusive faculty of supervising the service, inspecting the work and sanctioning the person performing it, or, rather, supplying work tools or making the company’s infrastructure available to a third party to conduct the engaged activity.

The contracts that are usually more susceptible to confusion are independent professional services, outsourcing services and temporary worker services. To avoid problems, these types of services should be freely conducted – that is, in a truly independent manner – and the party performing the service should have the legal and economic capacity to do so autonomously. In this regard, labor judges also usually review whether there is a relationship of economic dependence between the party rendering the service and the party contracting it, since it is not expected to be an exclusive relationship.

Other types of contracts can also end up becoming work contracts, such as the activities of interns performing their professional practice at a company. In these cases, the type of relationship between the party rendering the service and the one receiving it is again analyzed. At present, there are no proposals in Costa Rica to regulate professional service relationships. However, the legislative power is analyzing bills to define matters such as dual education, where employers can conduct agreements with educational institutions so that students can specialize in a specific area without creating the risk of being considered workers, or the possibility that the company will assume payment of employment rights and social security. Meanwhile, the decision on whether an arrangement is an employment or nonemployment relationship falls to employment judges and the social security office. As we have seen, they usually consider the existence of a work contract, protecting the party rendering the service and obligating the company to pay the corresponding severance benefits.

In summary, the contracting of independent personal services is possible as long as they are performed freely and the party performing them has the economic capacity to dedicate itself to the activity. If the party contracted is a company selling a service (outsourcing), the company shall comply with the employer obligations over those designated to carry out the activity. In the event of noncompliance, there is always the possibility of determining a responsibility of solidarity by the party that finally benefited from the service – that is, the rights of the party that carried out the service will always be protected.
The contingent workforce in Cyprus

There is no legal notion of a contingent worker under Cyprus employment law. In practice, a contingent worker is usually considered an employee under a fixed-term contract, but may be considered an independent contractor instead.

Fixed-term workers

A fixed-term worker is defined as a person having a fixed-term employment contract or relationship, concluded directly between the employer and the worker, where the end of the contract or relationship is determined by objective conditions, such as the arrival of a specific date, the completion of a specific task or the occurrence of a specific event.

Employers usually choose fixed-term contracts for certainty and flexibility, often when:

- An employee is required to complete a specific task.
- The employer wishes to have a trial period before committing to offering a permanent position.
- A temporary replacement is needed for someone on maternity or long-term leave.

According to Eurostat, the percentage of employees working on a contract of limited duration in Cyprus was about 19% in 2014. Employers are often under the false impression that fixed-term employees have fewer rights than employees with contracts of indefinite duration. But the law generally makes no distinction between the rights of the two types of employees. Specific legislation deriving from a European directive provides for the principles of nondiscrimination and proportional employment terms for fixed-term employees. They have the same level of protection as employees with contracts of indefinite duration, except that they can generally be lawfully dismissed at the end of their contracts. The law also calls for providing information to fixed-term employees about any vacancies of indefinite duration within the company.

Employment under a fixed-term contract is considered automatically terminated when the term expires – unless the Industrial Disputes Tribunal determines that the contract was for an indefinite period. Successive renewals or extensions of a fixed-term contract, as well as an overall employment period exceeding 30 months, will be regarded as a contract of indefinite duration.

Employers should therefore be well informed about the legal implications of entering into fixed-term contracts.

Independent contractors

The law in Cyprus does not specifically define the term “independent contractor,” but it is generally considered a person who provides services on a contractual basis, not as an employee.

Therefore, the relationship between an employer and an employee differs from the relationship between a principal and an independent contractor. The former is considered a “contract of service,” whereas the latter is a “contract for services.”

According to case law, whether a person offering services is an “employee” or an “independent contractor” depends on the facts of each case. Relevant factors include the degree of control over the work, the means of production, the right to give instructions on how to perform the work and the economic realities of the relationship (for example, who pays social insurance contributions and income tax). The Industrial Disputes Tribunal will examine the essence and substance of the whole relationship, rather than the label that the parties give to that relationship.

Whether a person is an employee or an independent contractor has significant legal consequences:

- The two forms of relationship are mutually exclusive. Each will give rise to different legal rights and obligations in contractual, tortious and fiduciary terms.
- The law grants employees rights and obligations that are not enjoyed by independent contractors.
- The classification influences the tax liabilities of both the employer and the employee.
- An employer’s liability for an employee’s acts, particularly in the context of vicarious liability, arises principally when the worker is an employee, not an independent contractor.

Employers and principals should assess the substantive nature of the working relationship to determine whether the person is truly an employee or an independent contractor.

Conclusion

Depending on the facts of each case, contingent workers may be employees under a fixed-term contract or independent contractors. In both cases, it is imperative for employers and principals to be fully informed of the legal implications before they enter into any arrangement so they can be certain that it reflects their intentions and they adhere to the law.
The contingent workforce in the Czech Republic

Czech law does not expressly use the term “contingent workforce.” Natural persons can be employed or provide services as independent entrepreneurs (freelancers). Under Czech law, dependent work may be carried out exclusively within labor law relationships, unless stipulated otherwise by other statutory provisions. Dependent work means the personal performance of work by an employee who is subordinate to the employer and acts in their name and in accordance with their instructions. Such work shall be remunerated and carried out within regular working hours at the employer’s workplace or another agreed-upon place, at the employer’s own cost and liability.

Contingent workforce within labor law relationships

Employees in an employment relationship have extensive protections under the Czech Labor Code, including dismissal only for statutory reasons, severance pay, paid vacation, the right to assignment of work and payment of monthly wage, rest periods, statutory surcharges and limited liability. Aside from the classic employment relationship, the Labor Code enables the following forms of contingent workforce:

- Workers employed by an employment agency that has received special permits from the Labor Office and leases its employees to other employers for profit
- Temporary assignment of long-term employees from one employer to another (used mainly for assignments between group companies), but only for wage costs – no profit is allowed
- More flexible labor relationships on the basis of so-called agreements outside the employment relationship
- Fixed-term employment relationships can be established for up to three years and repeated or prolonged twice. Except for the automatic termination by expiration of time, fixed-term employees enjoy all the protections ensuing from the employment relationship.

Temporary assignment

The agency employees and the temporarily assigned employees are available to the user employer for a certain agreed-upon period of time (usually several months). The user employer can assign tasks to the employees and control and manage their work. The working and salary conditions of the agency/temporarily assigned employees may not be worse than the conditions of a “comparable” employee of the user employer. A bill is in legislative process that will toughen the rules for agency work.

Flexible form of employment

The agreements outside the employment relationship allow work “on call” and provide less protection to employees, including flexible dismissal with a 15-day notice, with no need to stipulate a reason, and the absence of the obligation to schedule working hours (i.e., provide work). The agreement on work performance can be concluded only for 300 hours or less per calendar year. The working hours within the agreement on working activity cannot exceed half the standard weekly working hours (the maximum is, therefore, 20 hours per week on average).

Freelancers and limits on their use

The legal regulation was toughened several years ago, and no further changes are planned for the near future. The freelancer concept was abused in the past to deprive “employees” of employment protections and to avoid partially mandatory deductions of social security and health insurance contributions paid by the employer. The basis for calculating these deductions differs between employees and freelancers. In addition, freelancers have possibilities to reduce this basis. A freelance relationship fulfilling the criteria for dependent work may be reclassified as an employment relationship. Additional personal income tax and social security contributions can be ordered, including penalties. In addition, dependent work performed outside a labor law relationship is considered illegal. An entrepreneur enabling the performance of illegal work can be fined from CZK50,000 (about US$2,050) to CZK10 million (about US$410,250). The pseudo-freelancer can also be fined for performing illegal work – up to CZK100,000 (about US$4,100).

Mitigating tools

To avoid having a freelance relationship reclassified as an employment relationship, the freelancer shall:

- Not provide services or work on behalf of and in subordination to a contractual partner
- Not be incorporated in the organizational structure of a contractual partner
- Not keep records on working time (from-to)
- Not work at the workplace of a contractual partner if possible with regard to the nature of the services or work
- Not provide comparable services or work as (former) employees of a contractual partner
- Have an opportunity to use subcontractors or their employees
- Act under their own name and not use the contractual partner’s business cards, stamps or emails
- Be directly liable for damage caused to third parties
- Use their own or leased equipment
- Have more clients (not only one contractual partner)
- Supply a complete work result, if possible
- Have an opportunity to use subcontractors or their employees
- Be directly liable for damage caused to third parties
- Use their own or leased equipment
- Have more clients (not only one contractual partner)
- Supply a complete work result, if possible

The limitations on freelancers apply only to services or work provided by a natural person, not a company.

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Major legal risks in connection with employers’ use of independent contractors

Danish companies often have a business need to use independent contractors instead of employees, because they would like to avoid the requirements involved with them (holiday rights, pensions, notice periods, severance payments, compensation, etc.).

In Danish case law, however, independent contractors have repeatedly been deemed employees when performing services for a contracting party. When that designation is made, the employer faces huge claims from the employee if the employee goes to court.

Such an employee is entitled to seek holiday rights, mandatory notice, severance payments in case of unjust dismissal, severance payments for seniority, pension rights and other rights arising from applicable collective bargaining agreements. And the employer may be obligated to pay taxes and make social security contributions.

Restrictive covenants are often deemed invalid

An agreed-upon non-compete or non-solicitation clause will often be deemed invalid if the consultancy agreement does not fulfill the mandatory requirements of employment law.

Which criteria are paramount?

Under guidelines set by the Organisation for Economic Co-operation and Development (OECD), Danish/EU employment law, and tax and social security rules, these main criteria are considered paramount when determining whether the independent contractor is actually an employee:

> The worker is paid a fixed monthly fee instead of invoicing by the hour.
> The employer pays all expenses related to the consultancy services delivered (e.g., office, internet, cell phone, materials and car).
> The consultant is treated the same way as employees, enjoying rights arising from a staff handbook or company policy, etc.
> The employer has the right to instruct the consultant on the performance of the services.
> The consultant is prohibited from performing consultancy services for non-competing parties.
> The consultant performs services only for the employer.
> The consultant bears no risk for the services.
Employment relationships in subcontracting and for a temporary workforce in Finland

When we look at different aspects of the contingent workforce in Finland, an interesting question arises: does employment legislation apply to different forms of work, and to what extent? For the provisions of the Finnish Employment Contracts Act (2001/55) and other employment legislation, an employee must be working under the direction and supervision of an employer and in an employment relationship. There are situations when the relationship between a company and a worker cannot be regarded as an employment relationship. In these instances, employment legislation does not apply.

This may be the case when the individual is hired through a temporary work agency, or works as a subcontractor or a freelancer, or when the work is more entrepreneurial in nature. An overall assessment is used to determine whether the relationship fulfills the employment relationship criteria. A relationship meets those criteria — making employment legislation applicable — if an employee or a team of employees enters into a contract while agreeing to perform work for the employer under the employer’s direction and supervision in return for pay or other remuneration.

The term “freelancer” is used variably and may refer either to the entrepreneurial nature of the work or to an employment relationship. With subcontracting or a temporary workforce, the absence of an employment relationship is clearer, because the worker does not work under the employer’s direction and supervision to an extent that would meet the employment relationship criteria.

Particularities of subcontracting and temporary workforce

There are also differences between a temporary workforce and subcontracting, mainly concerning the employer’s direction right. With a temporary workforce, the employee is in an employment relationship with a temporary work agency, not the user company, even though the direction right has been transferred from the agency to the company. For that reason, most employment legislation provisions do not apply to dealings between a temporary workforce and the user company.

However, the user company is obligated to follow some provisions of the Employment Contracts Act regarding minimum terms of employment. With subcontracts, employees are in an employment relationship with the subcontractor, not the contractor, even though the work is generally executed at the contractor’s premises rather than the subcontractor’s. Recent legal developments have centered on the contractor’s obligations and liabilities. On 1 September 2015, the Act on the Contractor’s Obligations and Liability when Work Is Contracted Out (2006/1233) came into force. This requires companies concluding contracts on temporary agency work or subcontracted labor with other companies to make certain that the companies fulfill their statutory obligations.

Before concluding a contract, an orderer must check that the counterparty has paid its taxes and taken out pension insurance; what type of collective agreement or principal terms of employment it applies to the work; and whether it abides by the provision of occupational health care. The same information must also be obtained on foreign companies.

Because of companies’ changing employment needs, subcontracting and a temporary workforce constitute a flexible, quick and temporary option. When using subcontractors and a temporary workforce, the employer does not assume the same risks and responsibilities as it would in a “regular” employment relationship. However, the increased use of temporary workforce raises some issues. Does it give companies the undesirable opportunity to circumvent employment legislation, thereby reducing worker protections?

In conclusion, attention should be paid to the applicable legislation and its requirements when the worker is not in an employment relationship. For example, the Employment Contracts Act protects the status of temporary workers, requiring the user company to apply the same terms of the collective agreement as it does to its employees when no other collective agreement applies. Temporary workers are also entitled to certain benefits that are available to the user company’s employees. Furthermore, the Act on Posted Workers (1999/1146) lays down provisions on the minimum terms of employment of posted workers.

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The contingent workforce in France

As anyone familiar with French employment law knows, the complexity of the French Labor Code and case law makes management of employee-employer relationships difficult at times. In our fast-paced globalized economy, where flexibility and cost management have become king, the rigidity of French employment law has become too burdensome and costly for some employers. To obtain flexibility, employers are starting to use the contingent workforce in France.

Indeed, the one outstanding feature of the contingent workforce is that the French Labor Code does not apply to the relationship between the contingent worker and the user company. Indeed, no provision of the French Labor Code applies to non-employees, such as contingent workers. This is because the classic definition of “employment”, does not apply; the employer is required to provide the worker ongoing work; the employer pays the worker an ongoing salary; worker is under the subordination of the employer.

The contingent workforce can take a variety of forms yet they all share, or should share, one characteristic: they should make certain that the working relationship does not have the characteristics of employment. This requires attention to the following matter:

- refraining from giving instructions or orders to the worker on a regular basis;
- refraining from imposing a work schedule to the contingent worker;
- allowing free negotiation of fees which should be irregular over time and based only on actual work done;
- allowing the contingent worker to work wherever and whenever they want;
- giving the contingent worker the latitude to do the work as he/she sees fit.

In conclusion, companies should have policies and procedures in place on the use of external workers to ensure that the risks and costs associated are properly managed.

The benefits of using a contingent or external worker

Using a contingent worker provides businesses with numerous benefits, in addition to avoiding French employment laws, such as employee protections against dismissal.

It allows them to work with the right worker at the right time and in the right place with the right set of skills, and therefore tap key talent on an as-need basis.

Using a contingent worker is less costly for businesses for several reasons. There is no continued fixed HR cost for the business. Contingent workers use their own equipment, no employee benefits need to be given, thus reducing fixed HR costs.

Using a contingent worker also provides certain HR advantages. It saves management time on performance evaluation and salary discussions. It also reduces impact on works council issues.

All of these benefits provide business with increased flexibility and better competitiveness, since they are able to meet market needs faster, more easily and with reduced costs.

The benefits of using an employee or internal workforce

Using an employee ensures the creation of a community of workers which provides employers with several benefits.

Employees are always available to work on a continued and regular basis, allowing business to react immediately to client needs.

Employees have knowledge of the organization’s strategy, its goals, its history and its culture. This favors efficiency and creates corporate culture. This also creates loyalty to the brand, the organization and its leaders which increases efficiency and better protects confidential information, know-how and trade secrets. Employees work well in teams and retain the memory of the business.

Recent legal development in France

No one set of rules applies specifically to contingent workers and there is no current debate to specifically legislate on this issue, with the following exception: a draft bill, which is currently being discussed, would implement an account in which workers, employees and non-employees alike could accumulate rights, such as training rights, and benefit from them later. The main goal of the bill is to allow all types of workers, contingent workers included, to benefit from training rights and therefore ensure continued training throughout their working life.

Mitigating Tools and Dos and Don’ts

Companies in France with contingent workers should make certain that the working relationship does not have the characteristics of employment. This requires attention to the following matter:

- refraining from giving instructions or orders to the worker on a regular basis;
- refraining from imposing a work schedule to the contingent worker;
- allowing free negotiation of fees which should be irregular over time and based only on actual work done;
- allowing the contingent worker to work wherever and whenever they want;
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In conclusion, companies should have policies and procedures in place on the use of external workers to ensure that the risks and costs associated are properly managed.

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The contingent workforce in Germany

In Germany, there is a trend of using a contingent workforce to satisfy temporary employment needs. The most important groups are temporary agency workers and self-employed workers (freelancers). It is also possible to hire fixed-term employees or engage employees of contract companies, e.g., for non-core business functions. In this overview, this article will focus on temporary agency workers and self-employed workers, who represent a substantial portion of the German contingent workforce.

Self-employed workers

In contrast to employees, self-employed workers are not personally dependent in their activity. Therefore, they do not enjoy the protection of employment law and are not subject to compulsory German social insurance regulations. Whether an employment relationship or freelance work is involved, however, depends on the circumstances of the individual case. The decisive factor is the content of the contract and its practical execution. If they conflict with each other, the decisive factor is how the contract is put into practice. In the event that the relationship is qualified as an employment relationship, the pseudo-independent person will, in the future, be legally deemed an employee under employment and social security laws as of the date when the pseudo-independence was ascertained. This can lead to serious financial burdens. The “employer” will need to pay social insurance contributions for the current year as well as the past four years. This retroactive payment comprises both the employer’s and the employee’s contributions if a deduction from the employee’s remuneration cannot be performed out of the next three salary payments. Moreover, the German tax office may compel the employer to make up for unpaid withholding taxes and wrongfully deducted VAT within the typical four-year statute of limitations. The freelancer may also need to pay a higher amount of VAT retroactively.

Temporary agency work

The leasing of employees is a three-way deal in Germany. The agency and the worker have a conventional employment contract, but the agency worker works for a third party; the hirer. The employment agreement between the agency and the worker is distinct from the lease agreement between the hirer and the agency. Workers are “leased” if they are completely integrated into the hirer’s establishment and do not continue to work for their employer alone. Agencies that, as lessors, wish to lease out workers to third parties must have a governmental license. In addition, a leased agency worker has the right to demand equal pay. The hirer has the obligation to inform the agency about the reward for an equal employee.

The main risk of employee leasing is that the hirer leases workers from an unlicensed agency. This means that the workers concerned can claim to be employed by the hirer, with all employment law consequences, including termination protection from the hirer (instead of the agency), as well as possible hirer liability for back pay, tax withholding and social security contributions for fees paid to the employees. Both agency and hirer can be fined up to €30,000 or, in certain cases, up to €500,000.

In very exceptional cases, a violation can even constitute a criminal offense, resulting in imprisonment.

An agency’s violation of the equal pay principle can be deemed an administrative offense to be punished with a fine of up to €500,000, in addition to possible compensation for the employees’ financial losses. The hirer may also be directly liable to the social security authorities for contributions left unpaid by the agency.

A legislative amendment is currently planned. The most important issue will be the introduction of a maximum hire term of 18 months.

What companies should observe when engaging a contingent workforce in Germany

Companies wishing to engage contingent workers must determine the needs and the appropriate working arrangement to suit those needs.

With the leasing of employees, the hirer should verify that the agency is licensed and that both relationships (between the agency and the worker, and between the agency and the hirer) comply with the corresponding legal regulations. When using self-employed workers, the parties must also verify that the legal requirements are met, particularly that the contractor is not integrated into the company’s work organization or bound by individual- and procedure-related instructions. Should a German court decide that the facts indicate dependent employment, the relationship will be treated as such, irrespective of any written terms.

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The contingent workforce in Greece

From Greek case law and relevant employment law provisions, we can identify two basic categories of employees who fall under the concept of a contingent workforce.

**Temporary agencies**

The first category refers to employees working through temporary agencies. Greece incorporated the Directive on Temporary Agency Work (2008/104/EC, hereinafter referred to as the Temp Directive) by virtue of Law 4052/2012 and Law 4254/2014 (hereinafter referred to as the Temp Legislation).

The Temp Legislation guarantees a minimum level of protection to temporary workers and applies the principle of nondiscrimination so that the essential conditions of work and employment cannot differ from those afforded to workers recruited by the user company. The user company should keep temporary workers informed of any permanent vacancies.

The Temp Directive applies to the contracts or relations that connect a worker with a temporary agency.

The user company cannot hire temporary workers if it has concluded collective redundancies in the past three months, if it is replacing employees who are on strike or if the temporary workers would face hazardous working conditions.

Under the Temp Legislation, if the allocation of an employee by the user company exceeds 36 consecutive months (including renewals), the employee will be considered to have a direct employment relationship with the user company. This measure is meant to prevent misuse in applying the Temp Directive and, in particular, to prevent successive assignments. If the employee ceases to provide services to the user company for 23 consecutive days, then a new 36 month period starts.

A few court decisions (mainly of first instance) have upheld the idea that, if these time frames are respected, no direct employment relationship with the user company is established.

**Freelancers**

Based on the applicable legislation, the execution of an employment agreement is not a prerequisite for the establishment of an employment relationship.

The crucial issue, which is examined in case of litigation, is that a person directly provides their employment to another person or entity under the latter’s managerial right (Athens Supreme Court Judgment No. 1093/2001, No. 704/2002, No. 893/1996, etc.).

According to Article 1 of Law 3846/2010, if a person provides services on a freelance basis mainly to one employer for nine consecutive months, the presumption is that an employment relationship exists between the parties.

As a result, the freelancer may initiate litigation against the employer and ask to be treated as a dependent employee. That includes:

- Receiving 14 payments instead of 12 (employees in Greece their salary in 12 monthly payments, plus 1 month’s wages as a Christmas allowance and half a month’s wages as an Easter allowance, plus half a month’s wages as annual leave allowance)
- Receiving payment for overtime
- Being subject to minimum payment levels set by national laws
- Receiving termination indemnity in the event of termination

The employment of freelancers entails a substantial risk for employers. Greek case law includes numerous cases where a person providing freelance services was considered a “dependent” employee, eligible for full employment rights.

The risk for the employer in these cases does not end there. On top of being obliged to treat the freelancer as a dependent employee, the employer must make social security contributions and withhold taxes.
The hiring and use of independent contractors in Hong Kong, the Administrative Region (SAR) of China

Overview of legal categories of workers

Hiring different categories of workers has different consequences. This article analyzes the category of independent contractors, who are part of the contingent workforce. Independent contractors are workers to whom the Employment Ordinance (Cap 57 of the Laws of Hong Kong) does not apply. However, not all non-employees are independent contractors. Other possible legal categories include agent, partner and bailee.

Whether a person is an employee is a question of fact. The court would look at substance rather than form to determine whether an employment relationship exists, so parties cannot merely use a label on the contract to categorize their relationship.

Legal developments

In the past, the primary test at common law for determining whether a person is an employee or an independent contractor was the control test. An employer is viewed as “having control” if there are timetabled work hours, instructions on the method of performing the work, requirements for complying with a company’s internal rules, transportation provided by the employer and a requirement for workers to wear uniforms.

At present, the control test is only one factor. Another suggested test is whether the person was integrated into the enterprise or remained independent of it. However, this is also just another single factor. The court will examine all features of a relationship to decide whether, as a matter of overall impression, an employment relationship exists.

Pros and cons of using independent contractors

Besides the Employment Ordinance, other legislation in Hong Kong protects employees. Under the Employees’ Compensation Ordinance (Cap 282 of the Laws of Hong Kong), the employer is responsible for taking out proper insurance to compensate the employee for injury or death arising from employment. In the Mandatory Provident Fund Schemes Ordinance (Cap 485), the employer needs to take practicable steps to see that an employee enrolls in a registered Mandatory Provident Fund (MPF) for retirement savings. The Minimum Wage Ordinance (Cap 608) sets a statutory minimum wage, and employers need to pay the balance to employees whose wages fall below it.

From the employer’s point of view, hiring independent contractors has the benefit of decreased liability if the characteristics of the relationship are correct. This is because the Employment Ordinance, Employees’ Compensation Ordinance and Minimum Wage Ordinance are applicable only to employees. Independent contractors or self-employed people still need to enroll in an MPF, but they will contribute with their own funds.

Employers are generally not liable for the tort of an independent contractor. But in certain classes of cases, a personal duty exists at common law, such as when the work involves special danger or danger to others.

How to minimize the risks of using independent contractors

Although hiring workers as independent contractors appears to bring less liability, employers cannot unilaterally change an employee’s status to independent contractor. Employers risk criminal sanctions if they treat an employee as an independent contractor when, in fact, an employment relationship exists. No single legal test distinguishes an employee from an independent contractor. In light of this uncertainty, employers should regularly review their contracts with employees and independent contractors to see whether any reclassification is needed. When in doubt, employers should consider hiring workers on an employment basis to avoid the risks of noncompliance with labor law.
The contingent workforce in Italy

The use of contingent workers allows employers to achieve more flexibility in the structure of the workforce. On one hand, flexible forms of working have advanced in Italy, particularly because the consequential relationships bring lower contributory costs and fewer constraints. On the other hand, they have constantly drawn the eye of the Italian legislature, which recently implemented changes to the legislation related to this topic. Autonomous work is governed mainly by the Italian Civil Code, particularly Article 2222 and subsequent articles. They regulate the amount of compensation and its definition, the hypothesis of noncompliant or defective work, the client’s unilateral faculty of withdrawal from the contract, the consequences of the unforeseen impossibility of implementing the work, and the execution of services characterized by the absence of any bond of subordination. The contract for intellectual professions is regulated by Article 2229 and subsequent articles, and contemplates the performance of an intellectual endeavor with no subordination. For various intellectual professions (e.g., notaries, lawyers, architects), enrollment in a professional register or in specific lists may be required to guarantee to the community that the person possesses specific professional skills. The coordinated and continuous collaboration relations (the so-called “co.co.co.”) have similar characteristics to employment relationships, but they are included in the independent work area. Article 409 of the Italian Civil Procedure Code defines them as “types of collaboration that consist of continuous and coordinated work, personal even if not subordinate.” These relations are on the borderline between subordinate and autonomous employment; they are also known as “para-subordinate work.” Project-based work, introduced in 2003, was characterized by the necessary existence of a project to which the execution of work must be connected. This does not include “the simple re-proposition of the business purpose of the client” or “entail the performance of merely executive and repetitive tasks.” With Legislative Decree 81/2015, the legislature has once again intervened on the subject. Project work has been eliminated through the repeal of Articles from 61 to 69-bis of Legislative Decree 276/2003. Italy also has specific legislation for occasional and accessory work. Accessory work is a special kind of employment agreement in which the worker is used by the employer only as necessary and the salary is paid in vouchers (i.e., credit instruments obtainable and payable at post offices). Accessory work is allowed only if the employee does not earn more than €7,000 per year – €2,020 from each employer. In addition, legislature is currently trying to regulate smartworking (i.e., the possibility for employees to work from their homes), which remains a manner of execution of an employment contract, not a specific kind of contract. The smartworking regulation grants the employer lower costs for social security contributions, fewer administrative burdens, simplified management of worker relationships, and reduced obligations on health and safety in the workplace. Claims related to collaborations are frequent in Italy. A relationship may be reclassified into a subordinate one based on the manner of execution of the tasks. As a general rule, if the employer strictly organizes and manages the assignment of the worker, it could face a lawsuit from the worker seeking a judicial reclassification of the relationship. Italian case law has established criteria for distinguishing a subordinate employment relationship from a self-employed relationship. An employment relationship requires:

- The integration of the worker into the business organization of the employer or company
- The continuous and systematic performance of work, with a work schedule and relevant employer control
- The assumption of risk of business activities only by the employer
- The performance of work with the equipment and at the premises of the employer
- The periodic payment of salary (e.g., monthly)

The risk of requalification can be avoided only if collaborations are implemented and managed in compliance with the autonomy and independence requirements set forth for self-employed workers.

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The contingent workforce in Mexico
In Mexico, personnel services can be engaged through a civil contract for freelance personnel or a labor agreement for individuals who will be subordinated to an entity. Understanding how these schemes work is essential to decision-making when hiring someone, as the elements of a civil relationship are different not just from a labor and civil law standpoint, but also for the judicial and economic effects.

A labor relationship is configured under the following conditions:
- The employee performs the activity personally.
- The employee remains continuously subordinate to the employer.
- The employee receives a salary for the service.

If these three elements are present, the employment relationship exists, and it does not cease to exist simply because of the name or modalities given to it.

The Labor Ministry determines whether a labor relationship exists. It can be deemed to exist even in the absence of a formal contract between the individual and the entity. The mere fact that an individual working in Mexico is considered a subordinate is enough to characterize it as a labor relationship. This can also be deemed to exist irrespective of the length of time an individual was engaged to perform subordinated activities, whether it’s a few days or several years.

Labor relationships generate obligations that independent services (freelance work) do not, such as payment of minimum labor benefits (vacations, vacation premiums and Christmas bonuses). Employers also must register the employees with the Mexican Social Security Institute, paying the corresponding social security contributions of the employer and the employee. If the employer generates a profit during the fiscal year, 10% of it must be distributed among its employees.

Freelance services are valid when they are independent from a technical and financial standpoint, when they are irregular and when the payment is in the form of fees. Such an arrangement does not give rise to a labor relationship, so employers are not required to provide labor benefits. Mexican labor courts have stated that periodic payments in the form of fees do not determine the existence of a civil contract. What matter are the subjective and objective elements, including that the service provider is a professional and renders the service by their own means, with the temporal and professional freedom to do it.

Therefore, companies should not only know the particulars of each contract and its characteristics, but also understand the effects of potential misuse.

Determining the type of contract needed for a person seeking a position or performing a certain task is essential for companies. They must devote as much time and effort to it as they do to picking their products, as the economic and judicial consequences can be significant.

In a labor lawsuit, the defendant might deny the existence of an employment relationship by saying that it is an independent provision of professional services and offer a contract specifying that. Mexican jurisprudence has established that the document should be analyzed, along with the other evidence, to determine the nature of the relationship. If this analysis finds one of the characteristics of an employment relationship, such as subordination, it must be taken as proven, as the name given to a contract isn’t what determines the nature of the services.

If a freelancer is considered an employee, the entity would be exposed to the payment of labor benefits, the retroactive payment of social security contributions, surcharges and fines, and possibly, income and payroll taxes.

Cost optimization is one of the most pursued objectives of companies, and the use of civil contracts for freelance personnel could provide savings. Nevertheless, these contracts must attend to the nature of the services to be provided, because an error could trigger contingencies and elevate risk exposure, nullifying the apparent economic benefit.
The contingent workforce in the Netherlands

The number of freelance workers and self-employed professionals is rapidly increasing in the Netherlands. Each year, 120,000 to 140,000 people start their own business, and 95% of them will work as freelancers or self-employed professionals. At the end of 2014, the Netherlands had about 880,000 registered freelancers and self-employed professionals. Only 15% of them were on a payroll (hereafter in this article, the term “freelancer” will include self-employed professionals).

One reason for the trend toward freelancing is increased unemployment in the Netherlands due to the recession. Many people decide to change their perspectives and become freelancers because it is easier to find a job. The introduction of the Work and Security Act in 2015 made it harder to terminate an employment agreement, so employers favor hiring freelancers instead of employees.

Hiring a freelancer gives the employer more flexibility because the agreement can be terminated quite easily and adapted to the required working hours.

Because so many people are earning their livings as freelancers, the Government has decided that the system protecting both employers/clients and freelancers should be reorganized. This new situation will be effective from 1 May 2016. In this article, we will discuss the current situation and the future one.

Declaration of independent contractor status

Freelancers often work for clients on a contract basis, and it is not always clear when they can be considered employees. If the relationship is labeled an employment agreement, the employer is obliged to pay employer contributions and withhold taxes. That’s not the case in the absence of an employment agreement. In the current situation, the freelancer can apply for a VAR – a declaration of independent contractor status – from the Dutch tax authorities. The VAR warrants the client against claims related to payroll taxes and employee contributions.

This may seem like a proper system for determining when an employment agreement exists and when a contractor agreement exists, and thus, who pays taxes and contributions. However, the Government decided that a new system was needed to provide better balance between the client and the contractor. The VAR benefited only the client, who could not be held responsible in any way for payroll taxes. This was even the case when the tax authorities reassessed the situation and held the opinion that there was indeed an employment agreement.

Another reason for the new system is that the Government strives for better enforcement when it comes to freelancers. After much debate, it annulled the VAR and introduced model agreements.

The new situation

As of 1 May 2016, the VAR will be replaced by model agreements. Drafted by the tax authorities, these documents demonstrate what an agreement must contain to express the independent work relationship. There will be general and individual model agreements, as well as model agreements per sector and profession. The purpose is similar to the VAR: by concluding a model agreement, both client and contractor know who will be responsible for paying payroll taxes and contributions. The tax authorities can review the contracts beforehand, but this is not compulsory.

According to the tax authorities, the freelancer and client will have more certainty on who must pay the taxes. But the switch from the VAR to the model agreements has been severely criticized. The latter requires extensive administration and, as soon as the work or project changes, the agreement must be amended. Another frequent criticism is that the system creates a lot of uncertainty, placing more risk on the client/employer. If the tax authorities conduct a reassessment and taxes must be paid, the client is responsible. Employers’ associations believe employers will look for other opportunities to work with non-employees and potentially avoid the new system. On the other hand, freelancers are no longer solely liable for the taxes in a reassessment.

A transitional period will last until 1 May 2017, so that everyone can adjust to the new system. Until then, we will have to wait and see whether it actually accomplishes its goals. It is safe to say, however, that the new system will create a lot of uncertainty.
Independent contractors – the contingent workforce in New Zealand

New Zealand businesses commonly hire independent contractors for a number of reasons, including specific project work, specialized consultancies, flexibility and administrative ease. However, businesses must be accurate in identifying those who are contractors as opposed to employees. Misclassifying an employee as a contractor can lead to liability on a number of fronts, including PAYE (income tax) and social security liabilities and any damages associated with an unlawful termination of the relationship. It is therefore essential to categorize the relationship in a way that accurately reflects “reality.”

The legal definition of a contractor

The Employment Relations Act 2000 (ERA) defines an independent contractor as “a person engaged to perform work under an agreement that is not an employment agreement.” The definition of an “employee” is more illuminating. It requires agreement.” The definition of an agreement that is not an employment relationship to determine the “real nature” of a “employee” definition in the ERA. The legal definition of a contractor accurately reflects “reality.”

○ Integration test – are the individual’s services an integral part of the hiring entity’s business? Does the individual fill a role usually filled by an employee? Does the individual appear on the organizational chart, wear a uniform, lead a team, receive training and attend social functions? The greater the degree of integration, the more likely the individual is to be a contractor.

○ Fundamental test – is the individual in business of their own account? Does the person hold insurance, serve multiple clients, advertise services, provide their own equipment, hire employees? If so, these are factors in favor of a contractor.

○ Intention test – do the contractual documents and the way the parties are treating the relationship indicate an employment or contractor relationship? What does the contract say? Is PAYE deducted? Are payments processed through payroll? Does the contractor invoice, and charge goods and services tax (GST)?

By using these tests, the courts determine whether the real nature of the relationship is employer-employee or independent contractor.

Tripartite relationships

The issue of tripartite employment relationships arises very rarely in New Zealand. The Employment Court confirmed in 2010 that, in theory, such relationships could exist if this reflected the reality of the relationship under the “employee” definition in the ERA. The court emphasized, however, that each case would be determined on its individual circumstances.

Legal developments: the ‘Hobbit’ law

In 2010, the Government passed the Employment Relations (Film Production Work) Amendment Act to clarify the law on the employment status of contractors in the film industry. The act was precipitated by a dispute between an actors’ union and the company responsible for producing the film The Hobbit. The act amended section 6 of the ERA, which now states that those engaged in film production work are excluded from the definition of “employee” unless they are party to, or covered by, a written employment agreement that states that they are an employee.

The Minimum Wage (Contractor Remuneration) Amendment Bill is currently before Parliament and requires certain contractors to be paid at least the equivalent of the statutory minimum wage for employees (NZ$15.25 as of 1 April 2016). Although the bill passed its first reading, it is unlikely to be enacted in the near future, because it is sponsored by a member of the opposition party and does not have the current Government’s support.

Do’s and don’ts for businesses

Entities engaging contractors should:

○ Assess the relationship from the outset against the four tests to determine its true nature

○ Verify that contractual documentation reflects the intention of the parties (provides for invoicing, insurance, the ability to work for other parties, warranties on the quality of work, etc.)

○ Monitor the way the relationship works in practice to keep “employment-like” practices from creeping in

○ Regularly reassess whether the nature of the relationship has changed from contracting to employment; individuals who are initially engaged as contractors can become employees later
The contingent workforce in Poland

In Poland, the contingent workforce is becoming more and more recognizable, and is increasingly used as a business practice in various sectors of the economy. Contingent workers are often programmers, specialists in computer graphics, specialists in marketing and advertising, photographers, journalists, translators, legal advisors and other professionals associated with creative work.

They usually work independently, without arbitrarily imposed fixed working hours, at a workplace that’s not determined by the employer. They would rather provide services for different entities and have the possibility of choosing their co-workers. The contingent workforce is also becoming more common because, in certain circumstances, it corresponds to the labor market’s needs better than the traditional employment contract. Companies are particularly interested in this type of relationship because it can provide benefits for the principal and reduce business costs.

The contingent workforce is regulated by laws other than the Labor Code. The most common form is a civil contract, such as a contract for services, a contract for performance of a specific task or a contract of agency. Contingent workforce employment may also prove useful when a legal relationship is established with an independent manager or a consultant. A proper form for that could be a managerial contract or self-employment (sole proprietorship).

From a legal standpoint, the most important distinction between a civil contract and an employment relationship is that the contractor works outside the supervision of a principal. As a rule, services are performed at a place and time specified by the contractor, often away from the principal’s premises (e.g., a home office). This model can be advantageous for the principal because it reduces the company’s costs. The principal is not obliged to provide workspace and equipment, and does not incur costs associated with coordinating and supervising work. Moreover, in contrast with the liability of the employee, the liability of the contractor toward the principal is not limited by the generally applicable provisions and is subject to the contractual arrangements.

A downside of this model is the lack of control of ongoing work. According to the general rules, the contractor does not have to render the services personally (it is possible, however, to include a relevant stipulation in the contract). That means the principal has no control over who actually provides the services.

The rules for burden of risk under the Labor Code also differ from those under civil law. According to the Labor Code, work is always performed at the employer’s risk, and it is generally not possible to transfer the risk to the employee. In most cases with civil contracts, the contractor is responsible for damages resulting from a lack of performance or from improper performance. Moreover, contractors are usually obliged to obtain, at their own expense, civil liability insurance that covers damages that might result from their services.

The provisions should reflect the basic features of the relationship — equality of the parties, independence, lack of supervision and the burden of risk. The actual manner of performing services is also important: factual circumstances indicating that the legal relationship with a contingent worker is actually an employment relationship may lead to requalification of the civil contract. The Polish National Labor Inspectorate recently contemplated tightening the controls over employee outsourcing and clamping down on the abuse of civil agreements. Moreover, the judicial system has started to notice the problem, and courts have called for requalifications in several cases.
The contingent workforce in Romania

In Romania, the use of a contingent workforce is not as extensive as in other European countries, mainly because of restrictions established by law. As a general rule, employment contracts must have an unlimited term. Any other type of employment contract can be concluded only if it meets the restrictive terms set by the Labor Code (specific situations, limited term, etc.).

According to the latest figures in the Romania Country Report for 2016, Romania has the lowest proportion of employees with fixed-term employment contracts among EU Member States – just 1.5% of employed individuals. The country also ranks low on part-time employment – 10.1% of employed individuals.

Factual overview and structure of the contingent workforce

The contingent workforce in Romania may take these forms:

- An employment relationship governed by the Romanian Labor Code, namely temporary workers employed by temporary employment agencies, and fixed-term and part-time employees
- A commercial relationship governed by the Romanian Civil Code and secondary legislation, namely self-employed persons, freelancers and independent contractors

According to information published in recent years by the Romanian Association for Temporary Work Agents (RATWA), the temporary workers segment is on the rise, especially in sectors such as manufacturing and services. The market for supplying temporary workers is constantly increasing and developing. The number of undertakings acting on this market increased about 30% from 2014 to 2015. In previous years, much of the temporary workforce (42%) consisted of unskilled workers and those with elementary studies. Currently, however, almost 90% of temporary workers are either secondary education or university graduates.

According to the latest figures published by the Romanian Commercial Register, 389,447 self-employed persons and family enterprises were active at the country level in January 2016. This category reflects a small decrease of about 1% from the previous year.

Legal framework and recent legal developments

The Romanian Labor Code was harmonized in 2011 with the provisions of EU Directive 2008/104/CE regarding temporary agency workers. These amendments brought new opportunities to the temporary workforce market by extending the cases when a temporary workforce can be used, as well as the maximum duration of temporary work (36 months).

Starting on 1 January 2016, the Romanian Fiscal Code underwent significant changes, including new criteria for passing the independent contractor test, as well as a different tax treatment. The adjustments came after more and more undertakings were falsely concealing employment relationships as independent relationships to enhance their business fiscally and avoid the tax burden arising from employment relationships.

Contingent workforce – pros and cons

From a business perspective, an external workforce (i.e., temporary workers, self-employed persons and independent contractors) appears to be the most time- and cost-effective option. It simplifies internal HR procedures, such as recruitment and employment paperwork, payroll operations, and fiscal registration and statements. However, self-employed persons, freelancers and independent contractors must be used within the independence criteria established by the Fiscal Code. For example, the individual can choose where, when and how to perform the work, and has the freedom to take on other customers.

From a social perspective, one advantage of the contingent workforce is a reduced unemployment rate. According to the information provided by RATWA representatives, more than half of Romanian employees contracted for the first time by a temporary work agency were unemployed. Among all contracted employees, only 14% returned to unemployed status after their temporary work contract was terminated.

At the same time, the excessive use of temporary and fixed-term arrangements may lead to job instability and reduced social security protection. For example, unemployment benefits may be granted only if the applicant contributed to the unemployment state budget for 12 continuous months within the last 24 months calculated from the application date. Independent contractors and the self-employed lack protection against dismissal and other rights granted by the Romanian Labor Code.

Projections for the future

In light of the recent fiscal amendments, undertakings that use a significant number of self-employed persons, freelancers and independent contractors are expected to re-evaluate their contingent workforce structure to manage the labor law and fiscal risks that may arise from inappropriate uses.

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The contingent workforce in Russia

General overview
Although Russian legislation does not define a contingent workforce, the notion could apply to:
- Employees hired for a fixed term
- Individuals contracted under civil agreements
- Personnel provided under provision of personnel (secondment) agreements

The state closely monitors these three categories and generally aims to decrease usage of the contingent workforce by companies, favoring traditional employment relationships. But that does not mean businesses should abolish the use of the contingent workforce. They can avoid or minimize risks through proper compliance practices. In this article, we comment on each category separately, indicating the main challenges, and discuss mitigating strategies.

Fixed-term employment
Among the three categories, fixed-term employment is the only one that was not subject to legislative refinement in the past few years. The rules for hiring an individual for a fixed term can be reduced to two basic requirements:
- Refer in the agreement to a valid reason for fixed-term employment from a closed list of grounds set out in the Labor Code
- Provide notification three days in advance of expiration

As simple as these two rules may seem, employers often neglect them, compromising the temporary nature of employment. The notification requirement is perhaps the main cause of transforming a fixed-term arrangement into a continuous one: employers simply forget to notify in due course.

Civil contractors
Civil contractors enjoy a history of legislative regulation that is longer than the life of the Labor Code (enacted in 2002). In 1997, the Russian Social Insurance Fund issued a letter with a set of criteria for separating real contractor relationships from fake ones. These criteria include treatment of a civil contractor as a staff member, performance by a contractor of a certain work function instead of delivery of an agreed-upon product, regular payments to the individual not connected to output and a requirement to abide by company policies. These criteria evolved in numerous legislative acts and continue to be used by courts. In 2014, they were reinforced by a new basic principle inscribed in the Labor Code: if there are doubts about the nature of the relationship, the courts shall rule in favor of employment.

Provision of personnel
Until 1 January 2016, provision of personnel was not regulated, except for a short reference in the Tax Code. Starting this year, the following basic rules are enacted:
- The employer must obtain the consent of employees being provided to the recipient entity. Without consent, the provision of employees is called “leasing of personnel,” which is explicitly forbidden.
- The terms of remuneration for the provided personnel should not be worse than those for employees of the recipient who perform the same functions and have the same qualifications.
- Agreements must contain the recipient’s undertaking to ensure labor safety.
- Personnel may be provided by recruiting agencies accredited with the Federal Labor and Employment Service, and between certain categories of affiliated legal entities.

More detailed rules on the provision of personnel between “normal” legal entities (i.e., not specialized recruiting agencies) will be introduced in a separate law, expected to be passed by the end of the year.

Practical recommendations
The strategy for mitigating risks related to fixed-term employees and civil contractors is fairly straightforward. First and foremost, businesses should use these arrangements only when the real-life situation clearly suggests that the employee’s assignment will be temporary or the nature of work will be that of a civil contractor. In other words, the company cannot deliberately choose one instrument or another – the real-life situation dictates the choice. To abide by this principle, HR workers should be trained to differentiate various types of relationships to apply the correct contractual mechanisms. Once the correct agreement is identified, it should be properly documented – a rather technical task. The contract must also be monitored during its life cycle to avoid unfortunate mistakes, such as failure to notify in due course.

The situation is more complex with agreements on provision of personnel. As a minimum, we recommend reviewing all currently concluded agreements (including the popular intragroup secondments) for compliance with the newly enacted rules. Depending on the type of noncompliance identified, mitigating actions may range from a simple update of the contract text to a more complex redesign of the personnel provision structure. Unfortunately, the expected additional law regulating the provision of personnel between legal entities adds uncertainty to the situation, as it is likely to trigger another round of revision.

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The contingent workforce in Serbia

**Factual overview**
Companies sometimes need specialized services, especially when they are starting their business or working on a big project. In those cases, it is more efficient to hire a specialized professional specifically for that project than to hire additional full-time employees.

Hiring professionals outside traditional employment agreements provides flexibility to the employer and allows professionals to keep their independence. Such arrangements are common with IT workers, independent professionals and artists.

On the other side, employers often use alternative forms of employment to avoid tax and social payments, which are mandatory with traditional employment agreements. Under Serbian legislation, taxes on salary and mandatory contributions are very high, usually amounting to one-third of the employee’s income.

**Legal framework**
The Serbian Labor Law acknowledges the need for contracting workers outside the scope of traditional employment agreements. One whole section of the law is dedicated to “work outside the scope of employment.” In practice, employers commonly use service agreements and agreements on performing temporary and periodic work.

However, the Labor Law sets limits on these agreements to prevent employers from evading mandatory contributions, especially if the job is essentially the same as one performed by a full-time employee.

**Agreement on temporary and periodic work**
The Labor Law states that a person can be contracted under this kind of agreement if the job is temporary or seasonal (for example, construction or agricultural work). The duration of the agreement cannot exceed 120 days.

**Service agreement**
An employer can conclude a service agreement for jobs outside its core business activity to manufacture or repair a particular item independently, or to carry out particular physical or intellectual work. The main limitation is that the services must be outside the scope of the employer’s core business activity.

A service agreement is not considered an employment agreement, so the worker enjoys no rights granted by the Labor Law, including annual vacation, sick leave and limitation of overtime work.

The Labor Law prescribes only general sanctions for employers that do not use the appropriate type of agreement with a natural person — a fine of up to RSD2million (approximately €16,5000).

The Labor Inspectorate strictly enforces these limitations. An employer can be ordered to conclude the employment agreement and can face misdemeanor proceedings if an inspection finds that:
- The employer has used a service agreement for a job within its core business activity.
- The contract on performing temporary and periodic jobs lasts more than 120 days, or the jobs are not of such nature.

**Engaging entrepreneurs**
Serbian companies also engage entrepreneurs under service agreements or similar arrangements.

According to the Serbian Company Act, entrepreneurs are legally capable natural persons performing business activities and are registered as such with the Serbian Business Registers Agency. They can perform their business activities under different types of agreements, including service agreements.

Contracting entrepreneurs is attractive because the company is not obliged to pay mandatory taxes or make pension and insurance contributions (entrepreneurs are usually taxed on a lump-sum amount).

However, entrepreneurs cannot be employed; thus, they don’t have the protections granted under the Labor Law. The authorities have no established practice in these situations because they are seen as contractual relations between two business entities, not employment relations.

**Do’s and don’ts**
Serbian legislation recognizes the need for employers to contract a workforce outside of employment for exceptional and specialized jobs. In these cases, employers are free to engage persons or entrepreneurs under service agreements.

The main focus of Serbian labor and employment legislation is to prevent employers from avoiding their obligations toward employees, tax authorities and social security. The Labor Inspectorate pays attention to the conditions under which workers are engaged outside employment agreements.

Employers should be fully aware of the restrictions when hiring persons or entrepreneurs under service agreements.

An employer should not hire someone under a service agreement to perform a job if a permanent employee is performing the same job. Also, employers should pay attention if an entrepreneur is exclusively engaged for them, in which case an employment agreement is preferable.

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The contingent workforce is expected to keep increasing in Singapore

Employers are increasingly hiring temporary and other fixed-term contract workers. According to a study undertaken in the preparation of the 2016 Hays Asia Salary Guide, 54% of employers in Singapore have used flexible staffing arrangements—an 8% increase from the previous year. The same study found that 18% of organizations plan to increase their use of temporary and other fixed-term contract employees this year. Nearly a quarter (22%) of the employers surveyed use temporary/fixed-term contract staffers on an ongoing basis, and 36% use temporary and fixed-term contract staff on special projects when needed.

No laws deal specifically with temporary/fixed-term contract employees. The Employment Act, which spells out the minimum terms and conditions of employment in Singapore, makes no distinction among temporary employees, contract employees, daily rated employees and employees on tenured employment. Temporary/contract employees who work less than 35 hours a week are covered under the regulations for part-time employees.

There have been no legislative developments on temporary/fixed-term contract employees.

For employers, these relationships offer flexibility because a temporary worker can fill both long- and short-term needs, and can be engaged and released on short notice, as long as employers abide by the Employment Act (if applicable) and the terms of employment. Employers can engage temporary staff to provide specialized expertise or support a permanent workforce during workload peaks.

For employees, temporary assignments offer a chance to gain exposure to different industries with a relatively low commitment. In our experience, the use of temporary workers is especially common when full-time employees are on maternity leave. They also routinely work in the food and beverage industry—usually students who work during the school holidays or while they are in between educational institutions awaiting their results or admission.

Because a sizable percentage of temporary workers are students, one important consideration for employers is whether these children can enter into a legally binding contract. Subject to certain restrictions, children above the age of 13 can be employed in light work. But people can enter into a contract only if they are at least 18 years old. In certain situations, however, a contract may be enforceable against younger people if it is for their benefit. Various laws also regulate matters such as how many hours a minor can work and where they can be employed, resulting in a minefield of regulations that must be navigated carefully by those looking to employ minors.
The contingent workforce in Slovakia

Slovak law prefers traditional employment arrangements and prohibits the performance of any dependent work on the basis of contracts under the Civil Code or the Commercial Code. “Dependent work” is defined as work carried out personally by the employee for the employer – with the employee as subordinate – according to the employer’s instructions, in the employer’s name and during working time determined by the employer, for wages or other remuneration.

According to the Slovak Labor Code, dependent work can be performed only under employment or a similar labor relationship. Performance of dependent work based on contractual arrangements other than those recognized by the Labor Code is considered illegal work, subject to a penalty of up to €200,000. In other words, contracts with independent contractors are not considered equivalent to employment contracts and could be seen as an effort to circumvent the law.

For the purposes of this article, we can consider the contingent workforce to be composed of workers who are in a relationship with an employer, but not one based on an employment contract for an indefinite time. Contingent workers can be:

- Workers active for an employer based on a temporary assignment by another employer or agency
- Part-time workers
- Those performing work under specific agreements recognized by the Labor Code

Legal developments

The use of contingent workers has grown considerably over the last few years. However, legislators consider permanent employees to be the preferred type of workforce. The last amendment to the Labor Code, effective from March 2015, exemplifies the effort to restrict the contingent workforce. The amendment introduced various limits on the employment of workers through agencies and the temporary assignment of employees. For example, the temporary assignment of an employee by a Slovak employer to another employer cannot exceed two years. After two years, an employment relationship is automatically created between the assigned employee and the user employer. On the other hand, the Labor Code provides various legal instruments that, to a certain extent, allow flexibility for employers to react to work demands such as job sharing, home office, telework and the use of a working time account.

Pros and cons

The use of the contingent workforce is a response to legal regulations that often do not fit the operational needs of a business and its variable demand for a workforce. As in other countries, a contingent workforce is more cost-effective and flexible than a permanent one. Significant cost savings can be found in a different tax regime, as well as social and health insurance premiums.

The Labor Code strictly limits the number of termination reasons, and the chaining of employment for a limited time is also restricted. Employers did not welcome recently introduced restrictions on the employment of assigned workers or agency workers.

Companies concluding agreements with independent contractors are exposed to a certain level of risk and uncertainty. The highest risk is the possibility that such a contractual arrangement will be reclassified from a commercial relationship to an employment relationship. The employer may then have to pay additional tax, make social and health insurance payments, and face significant fines and litigation costs for illegal employment. In recent years, Slovak tax authorities and labor inspectorates have increased inspections aimed at uncovering prohibited performance of dependent work.

Mitigating tools and do’s and don’ts

- Do not use employment arrangements other than those allowed under the Labor Code in the case of dependent work
- Carefully consider the legal restrictions for assignment of employees, agency workers, part-time jobs, job sharing, home office, telework and use of a working time account
- Mitigate the risk of misclassification by analyzing the basic characteristics of the work to be performed by independent contractors
- Do not use independent workers if there are any doubts about the character of the relationship or if the work can be considered dependent work

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The contingent workforce in South Korea

After the International Monetary Fund (IMF) crisis in 1997, reconstruction of companies became generalized and the ratio of temporary employment increased. To stabilize temporary employment and eliminate discrimination against workers, South Korea established the Act on the Protection, Etc., of Temporary Agency Workers (the Temporary Agency Workers Act) in 1998 and enacted the Act on the Protection, Etc., of Fixed-Term and Part-Time Workers (the Fixed-Term Act) in 2006.

Legal developments

Temporary Agency Workers Act

Before this came into effect, the employment of a worker through a service company was prohibited by the Employment Security Act and the Labor Standards Act (LSA). In reality, however, the temporary placement of workers was widespread, with no legal protection for dispatched labor. The Temporary Agency Workers Act made the process legal by listing the scope of Jobs Permitted for Temporary Placement of Workers.

The Act states that “jobs permitted for temporary work agency business shall be deemed appropriate for that purpose in consideration of professional knowledge, skills or experience or the nature of duties and prescribed by Presidential Decree, except for those directly related to production in the manufacturing industry.”

The Act further provides that a user company must directly employ the relevant temporary agency worker in the event of illegal temporary placements of workers, such as:

- When the company uses the temporary agency worker in jobs that do not fall within those permitted for temporary placement
- When the company continues to use the temporary agency worker in excess of two years

Pros and cons of these relationships (co-employer)

Under the Temporary Agency Workers Act, the relationship between a company and a temporary work agency is described as follows.

An agency holds the employer’s liability for its temporary worker. However, since the company directs and leads the worker on attendance, breaks, and overtime and holiday work, the company holds the employer’s liability for such matters.

If a company and an agency have entered into a temporary employment agreement that violates the LSA and they have a temporary agency worker comply with it, both the employer and the agency will be punished.

Moreover, even though a temporary employment agreement itself is not a breach of the LSA, if a company uses a worker in violation of the LSA, a temporary work agency may suspend the use of employees or terminate the temporary employment agreement.

If a temporary agency worker causes damage to a third party or commits an illegal act in relation to the job, the agency shall be liable, because there is no employment relationship between the company and the worker.

However, if the worker commits an illegal act while performing work specifically directed and supervised by the company, the company shall be held responsible, provided that the agency fulfilled its duties in selecting and generally supervising the worker.

Mitigating tools and do’s and don’ts

An employer tries to avoid direct employment by entering into fixed-term employment, temporary employment or a subcontract. Even so, if an employee provides wage labor to an employer at the place of business under a superior-subordinate relationship, such employee shall be deemed a worker under the LSA.

The following elements determine whether a superior-subordinate relationship exists:

- An employee is subject to the rules of employment or the code of conduct, and receives individual direction and supervision from an employer.
- An employee is bound by the time and place of work as defined by the employer.
- An employee is allowed to employ a third party or their own equipment, raw materials and working tools.
- The nature of the wage is reward for the labor itself – basic pay or fixed pay is defined; and the income tax is withheld.
- The relationship of labor is continuous, and an employee works exclusively for an employer.
- The status of the worker is acknowledged by other laws, such as those related to the social security system.
- The social and economic conditions of each party.
The contingent workforce in Spain

The crisis in Spain has forced employers to try to reduce workforce costs in many ways, with the goal of optimizing human resources. Although redundancies have played the biggest role, the contingent workforce has also contributed to labor flexibility and cost reduction.

The term “contingent workforce” can refer either to an external workforce (outsourcing companies, self-employed workers or workers leased from temporary employment agencies) or to employees hired on fixed-term contracts (mainly temporary contracts for specific projects or causal contracts for backlogs).

The use of fixed-term employees and an external workforce has been a trend in Spain during recent years. Both forms help businesses adapt to changing tendencies in the demand for goods and services and reduce labor costs, namely the severance payable upon termination. Despite these advantages, both forms of contingent workforce carry risks and limitations for employers.

There have been no major legal developments recently, and the conditions for ordinary indefinite-term employment have not varied substantially. Despite that, the contingent workforce has always been in the political spotlight, so it is no surprise that Spanish labor inspectors have been especially aggressive lately in fighting fraud. Therefore, employers must design and implement company policies that minimize risks associated with the contingent workforce.

The aim of this article is to identify these risks and provide guidelines for designing policies intended to reduce them.

1. Fixed-term employees

As a general rule, Spanish labor legislation foresees that employment contracts shall have an indefinite nature. The employer must justify fixed-term contracts with a written explanation of the temporary grounds in the employment contract. The justification must involve either a specific project that will be limited in time (fixed-term contracts for the performance of a specific project) or a need to meet peaks in demand for goods and services offered by the company (causal contracts for backlogs). If a justification is absent, or the company is found to be covering a permanent need through a fixed-term contract, the affected employee would be entitled to an indefinite-term contract. The company would be exposed to fines for infringing on legislation on temporary contracts.

2. Outsourcing

When a company outsources activities related to its core business, it must clearly differentiate the working conditions of the external workforce from those of its regular employees to avoid the risk of “illegal transfer of employees.” Such transfers carry fines for the company, and joint and several liabilities on labor and social security obligations concerning the affected employees. The workers would also have the choice of remaining in their company or joining the client company as ordinary employees.

Two good examples of measures that may mitigate these risks are establishing a clear physical separation between the work posts of company employees and those of external workers, and identifying the latter with “visitor” badges.

3. Self-employed workers

Self-employed workers must perform their activities independently and assume the associated risks. If a rendering of services is found to have a labor nature, the self-employed worker could have a legitimate claim to be reclassified as an ordinary employee. Reclassification would most likely entail the payment of fines for infringing of the labor and social security legislation, and the involved company would also have to pay retroactively the social security contributions (including surcharges) of the self-employed worker.

Reclassification can occur when circumstances reveal that self-employed workers are dependent on the employer and that the professional relationship has a labor nature. In practice, this happens when their working conditions resemble those of regular employees. For example, they have fixed work posts in the company’s premises and fixed remuneration; they are subject to timetables and orders from the employer; and the employer provides the necessary working materials.

4. Workers leased from temporary employment agencies

Companies may appoint employees from temporary employment agencies when there are temporary grounds as described above for fixed-term employees. To avoid an illegal transfer of employees, the client company must verify that the agency is duly licensed in Spain.

If leased employees are still enrolled in the client company upon expiration of the term, they shall be entitled to an indefinite-term contract.

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The contingent workforce in Sweden

Overview

The two main contingent workforce categories in Sweden are individuals hired by temporary work agencies (temporary workers) and self-employed individuals (contractors) engaged as independent contractors.

After Sweden deregulated private employment agencies in 1993, the number of temporary workers soared from a mere 5,000 in 1994 to almost 40,000 just six years later. Industry revenue has increased from SEK2 billion in 1998 to SEK24.9 billion in 2014.¹

Even though companies have long engaged contractors, a rather new phenomenon in the Swedish labor market is the use of so-called freelancing agencies as intermediaries. The contractor performs a specific engagement for the engaging company (the principal), while the freelancing agency handles billing and pays a net salary to the contractor, deducting taxes, social security costs and a commission. Under this arrangement, the contractor does not need to register a company for tax purposes. This new market engages relatively few people but is expanding.²

Legal developments

In 1993, the Government removed restrictions on temporary workers in Sweden. The temporary workforce market is regulated by the Agency Work Act, an implementation of EC Directive 2008/104/EC on temporary agency work. Apart from a few statutory regulations, the implementation of the directive has upheld the Swedish tradition of letting the parties in the labor market – employers’ associations and trade unions – agree on other regulations and employment conditions through collective bargaining agreements.

With contractors, the primary question is whether the worker is actually a contractor or is dependent on the principal and in an employment relationship. Because of the protective characteristics of the Swedish Employment Protection Act, the parties cannot decide themselves how the contractual relationship shall be construed. Accordingly, if the nature of the relationship is too similar to an employment relationship, a court may find that the contractor is an employee of the principal.

When reviewing the relationship, the court makes an overall assessment, taking into account various factors, including the scope of the services and the type of compensation, as well as whether the contractor is engaged by several different companies, bears any economic risk in the assignment and is under the direct supervision of the principal. Characteristics and customs within a specific line of business may also affect the outcome. Should a self-employed individual be regarded as an employee, they may raise claims for, e.g., vacation pay and notice period. If the consultancy contract has been terminated, the employee may claim damages for wrongful dismissal. A reclassification may also mean that the principal must pay taxes and social security contributions on top of the consultancy fee. This type of exposure may cause a rise in court disputes involving contractors engaged through freelancing agencies, as this market seems to grow every day.

Pros and cons

As for temporary workers, the major advantage for the engaging company (the client company) is that it can adapt the workforce to its fluctuating needs, on relatively short notice, without having to go through termination processes or rely on fixed-term employment. These issues will be transferred from the client company to the temporary work agency.

On the other hand, certain regulations governing the temporary work industry must be followed. The Agency Work Act imposes obligations on the client company, such as giving temporary workers the same access as regular employees to all common facilities. Furthermore, a principle of equal treatment applies to the temporary work agency, which must provide the same basic employment terms to temporary workers as permanent employees of the client company. As with regular employees, the client company is responsible for the work environment of temporary workers.

Mitigating tools and do’s and don’ts

A company should not engage contractors just to avoid establishing an employment relationship. The contractor should really be an independent consultant, engaged on conditions adjusted to the market and with a certain degree of independence.

If a company needs a regular workforce, it should instead consider using traditional employment or engaging a temporary work agency.

The contingent workforce in the Ukrainian labor market

The demand for a contingent workforce has grown rapidly in recent years as more and more Ukrainian companies seek to optimize personnel costs and engage workers with specific skill sets. That said, current labor law does not comprehensively address the use of contingent workers, because the Labor Code was developed during the Soviet era and thus does not reflect modern labor trends. Nevertheless, Ukrainian employers may use several traditional options stipulated by labor law to arrange relations with contingent workers.

Fixed-term employment agreements

A fixed-term employment agreement governs employment relations that, because of the nature of the work, cannot be established permanently. The term usually coincides with the planned duration of a specific project. Such agreements may be a good option for employers to establish relations with seasonal workers or those engaged to perform a specific task. Temporary employees enjoy a complete range of social guarantees set by the labor law, while employers can sever relations once the agreement expires.

However, Ukrainian employers may face several obstacles while using temporary workers under fixed-term arrangements. If the agreement expires and the parties decide to renew it, the next agreement automatically has an indefinite term. This may pose a huge problem for employers who engaged temporary workers on a specific project that was later extended. Moreover, if employment relations de facto continue after the fixed-term agreement expires, they are considered extended for an indefinite term.

Civil law contracts

The parties of civil law contracts are equal in their rights and can agree on conditions of cooperation that are convenient for them. Generally, the company is not burdened by the range of labor guarantees, and the contractor is not limited by the company’s work schedule or policies. The contract focuses on the terms of performance of agreed-upon services, and payment is usually made when the work is complete.

Moreover, individuals who are engaged to perform certain work for different companies are usually registered as private entrepreneurs, allowing them to benefit from favorable tax regimes. The income of private entrepreneurs may be taxed at 4%, compared with 19.5% for employees.

Even though some Ukrainian companies, especially in the IT sector, are widely using this kind of arrangement, it may present certain obstacles and risks. For example, labor authorities may perform a labor audit and claim that the company is using private entrepreneurs to avoid taxes and that they are, in fact, its employees. This may lead to significant tax and labor law sanctions for the company.

A draft Labor Code is currently under consideration by Parliament and may be adopted soon. It aims to address current realities in the labor market, introduces rules for work from home and flexible working hours, and presents the possibility of extending a fixed-term agreement if it becomes obvious that the work cannot be performed within the specified time. The draft Labor Code also provides a wider range of legal grounds for fixed-term contracts, and clearly differentiates employment and civil law relations.
Is the contingent workforce here to stay?

The UK, like many other countries, has experienced the rise of the “gig” economy, with an increase in flexible working and the use of a contingent workforce. UK companies have capitalized on the flexibility provided by casual workers, such as agency workers, consultants, contractors and zero-hour contract workers, in order to adapt to changing market conditions and the challenges of the recent financial crisis.

In addition to the obvious benefits for the company, individuals often relish the ability to take on work to suit their lifestyle. Within certain sectors, such as the construction industry, part of the attraction is moving between major projects rather than being permanently employed by one company. As the baby boomer generation nears retirement, many are joining the contingent workforce by taking on ad hoc work as a transition from five-days-a-week permanent employment to full-time retirement. And businesses are benefiting from retaining the skills and know-how of experienced employees for longer.

The rules for agency workers and zero-hour contract workers have been, or potentially will be, subject to change. We look at these in more detail below.

Zero-hour contracts

Zero-hour contracts, under which the person is not guaranteed work but is obliged to be available for any work offered, have received negative press over the past couple of years. A particular target was the use of exclusivity clauses, which prevent people from working for other companies despite having no guaranteed work from their employer. As a result, the Small Business, Enterprise and Employment Act 2015 was introduced, making such clauses unenforceable.

Notwithstanding this, zero-hour contracts are effective at allowing companies to meet seasonal and other fluctuating demands, particularly in the retail and agricultural sector, and their use is likely to continue. 

Agency workers

The Agency Worker Regulations 2010 (AWR), introduced in Great Britain to give effect to the Temporary Agency Workers Directive, apply to agency workers who are assigned to provide temporary work for hirers through temporary work agencies. One advantage of using agency workers is that it saves money in recruiting, screening and interviewing candidates because the temporary work agency carries out much of that activity on the company’s behalf.

The AWR does not confer employment status on the agency worker, but does provide a number of rights. From day one, thehirer must provide the agency worker with access to its collective facilities and amenities, and details of job vacancies. After 12 weeks, agency workers are also entitled to the same “basic working and employment conditions” as if the hirer had directly recruited them. These “day-one” and “12-week rights” may reduce the benefits gained by the company in using agency workers rather than permanent employees.

As the UK prepares for a referendum on whether it should remain in or exit EU, some commentators have noted that, should the UK withdraw, one of the most obvious areas for amendment would be the repeal of the AWR. These regulations are often seen as complex and unpopular with businesses. Because of their relatively recent implementation, they may be easier to repeal than more established areas of employment law.

Status check

Whatever method is chosen for retaining the services of a casual worker, the status of the relationship should be established from the beginning. This will determine the legal rights and protections and the tax status of the individual.

Misclassifying a casual worker can inadvertently create tax and employment law risks, potentially negating the benefits of adopting a contingent workforce. Indeed, Uber, one of the best-known companies for utilizing a contingent workforce, currently faces a challenge from the trade union GMB on the employment status of Uber’s drivers and their employment rights.

Day one

To protect itself, the company must have robust contractual arrangements with casual workers. They should include terms on confidentiality and intellectual property to minimize the chance of losing trade secrets and intellectual property, a risk inherent in engaging a short-term and changing workforce. Depending on the type of arrangement, terms on tax status and liability may also be important.

On a practical day-to-day level, having a solid onboarding and training process for casual workers is critical so they can hit the ground running, with expectations around quality set from the start.

With companies and individuals both looking for flexibility, and the technology supporting this kind of work continuing to improve, the use of a contingent workforce in the UK seems set to continue.
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