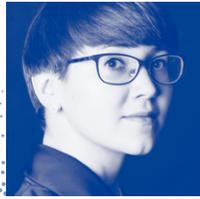




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If not temporary work, maybe “external workbench”?

One of the biggest challenges for Polish businesses in the reality of the pandemic and rising inflation is to recruit qualified staff. It doesn't help when they have limited budgets with which to seek out talent to fill growing job vacancies. For this reason, one solution gaining popularity is outsourcing of employees—or indeed a whole panoply of forms of employee outsourcing.

Hiring immediately—but there's no one to hire

The shortage of workers is particularly hurting companies from the sectors of IT, trade, manufacturing and construction. According to various estimates, across the European Union there is a shortfall of about 600,000 programmers, and in Poland alone about 50,000 IT specialists. With this number of unfilled vacancies, the Polish economy cannot achieve the growth it is capable of, and companies cannot unleash their full potential. There are examples, also in Poland, where to find skilled staff, entities (mainly foreign ones) have acquired entire companies suiting their desired operating profile.

But at the same time, the increasing instability of the economic situation and constant changes in law, causing uncertainty as to the scale of increases in operating costs, discourage even optimistic businesses from increasing their rolls of regular employees. Particularly in an age of pandemic, a more and more commonly applied solution is outsourcing of personnel—in all of its forms.

HR outsourcing under Polish law

On the HR market, outsourcing occurs under various mysterious names, such as employee or staff leasing, “employer-of-record,” “external workbench,” “resource sourcing,” “pooling of experts,” simply “staffing,” or more generally, “consulting services” in the given field. The key feature for all these arrangements is that one firm (the recipient of the services) manages the work of “borrowed” staff and benefits from the results of their labour, while formally these individuals are employed by another entity, which >>

bears all the legal and administrative (payroll) duties associated with employment (i.e. there is no direct contractual relationship between the beneficiary of the services and the borrowed workers).

In this respect, we don't believe that Polish law is keeping pace with what is already a common market practice. The only arrangement regulated under Polish labour law which provides for benefitting from the work of employees or contractors formally employed by another company is "temporary work," governed by the Act on Employment of Temporary Workers of 9 July 2003. From the perspective of the labour market, this is a somewhat outdated law. The statutory notion of "temporary work" is characterised by apparently excessive time restrictions (the employer-user can use the work of a given temporary worker, as a rule, only for a total of 18 months within a period of 36 consecutive months), as well as burdensome formalities on the part of employer-users associated with the use of temps.

Advantages of outsourcing

Unlike temporary work, HR outsourcing is attractive for businesses. The reasons include the following:

- There are no time restrictions on use of services performed by the borrowed staff.
 - Services are settled between the companies based on payments for working hours and any costs incurred (time and material basis), which allows for better planning and monitoring of the budget for each project.
 - Within outsourcing, companies can lend persons having individual businesses (freelancers or independent contractors), which is particularly relevant in the IT sector, where this is currently the predominant model for cooperation.
 - The rules of cooperation between the beneficiary of the services and the entity lending its staff are the subject of negotiations between the parties, and the law does not impose minimum conditions or content for their contract. Unlike temporary work, which is highly regulated, companies lending their staff are not restricted to work agencies, or even entities whose business model (principal operating profile) involves lending qualified staff. (There are already internet platforms facilitating contacts between firms seeking specialists for specific projects and other businesses interested in lending their personnel.)
- Businesses using external staffing support point out that another advantage of outsourcing is the possibility of drawing from a larger, more diverse pool of talent (for example, IT specialists are sceptical of working as temps, and the most sought-after specialists often reject out of hand the notion of being tied to a single employer by a traditional employment contract). This fosters knowledge-sharing and contributes to the creation of innovative solutions. On top of this, users can obtain higher-quality services at lower cost, and the available services and organisational solutions can be more narrowly tailored to the needs of the specific customer or project, particularly projects closely tied to local conditions.
- There are already entities operating on the Polish market relying mainly on personnel borrowed from other entities. This obviously gives rise to a risk that if the cooperation breaks down (e.g. because the lender of staff is acquired by a competitor of the service recipient), the beneficiary of the services might not be able to continue its business as before, or to meet its obligations to its own customers.
- When advising our clients, we see how diverse models of cooperation function in Poland. Often this is not just one-off

cooperation solely for the needs of one project, but an economic bond running over many years, with a carefully planned strategy, where staff outsourcing is a key element for the service recipient to quickly enter the Polish market and gain a competitive advantage.

During an enterprise's growth phase, outsourcing can allow it to quickly obtain personnel with the qualifications needed to expand operations, and then to train the best of the borrowed staff to suit its own needs. As an example, one of our law firm's clients, together with an external HR outsourcer, even created a special training programme in which, through outsourcing, the enterprise could identify the best candidates and then, at a later stage of its development, offer them permanent employment directly with the enterprise.

Outsourcing and temporary work

The services of firms offering staff outsourcing typically meet the criteria for regarding them as "temporary work" under the statutory definition. But outsourcing firms consistently reject this term, and classify what they offer as outsourcing of services.

The realities of the pandemic, including less-frequent inspections by state authorities (particularly the overburdened State Labour Inspectorate) and the spread of remote work, as well as the more and more refined models for cooperation between businesses, have contributed to a further increase in the popularity of outsourcing. But this does not mean that entities offering or using outsourcing can feel completely safe. We are aware of instances where as a result of an inspection, or more often, a complaint by a disgruntled (most often former) outsourced worker, businesses using outsourcing services have been held responsible for infringing the regulations

on temporary work, or have had to admit that there is an immediate employment relationship between them and the workers previously borrowed.

Outsourcing of services is not expressly regulated in Polish law. It differs from temporary work primarily in that the subject of the contract between the businesses is not delivery of workers with the requested qualifications and experience, but delivery of specific services performed only by qualified employees of the given entity.

Thus, in many instances the line between temporary work and outsourcing of services is thin indeed. The criteria usually considered in determining whether a given service may be regarded as outsourcing of services, and not temporary work, include in particular:

- **Subject of contract.** In the case of outsourcing of services, the borrowed staff should be, as it were, “invisible” in the contract. That is, the contractual provisions and the practical method of performing the contract should not directly refer to external personnel or their professional skills, experience, or other personal attributes, and the manner of settling payment for the services should not be based on working time (person-hours) by a specific number of persons at specific positions. In simple terms, it should appear from the contract for performance of outsourcing of services that the beneficiary of the services is interested only in performance of services in compliance with certain quantitative, qualitative or technological parameters, and not in who actually performs the services for the supplier. This does not prevent specifying requirements in the

contract as to the quality and scope of the services which indirectly (in practice often very effectively) requires the involvement of persons with relevant qualifications or even certain specific individuals (although in that case the parties are entering a zone of increased risk). Appropriately drafting the provisions of an outsourcing contract and the practices applied can enable the parties to achieve a result similar to temporary work, but with a limited risk that the cooperation model will be found to constitute temporary work.

- **Management of borrowed personnel.** In the case of outsourcing, the workers supplied remain under the exclusive supervision of the entity formally employing them, and not the beneficiary of the services. Thus in the outsourcing model, the recipient of the services should generally refrain from issuing instructions to the borrowed workers or managing their work on an ongoing basis. But in many instances this approach will not meet the needs of the enterprise using external staff. One solution functioning on the market is for the entity lending its personnel to designate a contact or coordination manager devoted to the specific client, who, on a day-to-day basis, at the client’s location, will direct the work of the borrowed staff and serve as the contact person for the client.

The future of outsourcing

It is apparent from the example of the IT sector how rapidly the market for HR outsourcing is growing. This is a result of progressing digitalisation (which has accelerated even faster during the pandemic),

and demand for IT services combined with a limited number of specialised professionals.

The model of temporary work does not meet the challenges of the market or the needs of businesses. This portends further growth of outsourcing and the development of new, more refined models for cooperation between firms, including cooperation involving the use of work by persons provided by an outsourcer (agency), where those persons may even be located on a different continent, and the results of their work are delivered via cloud solutions. In that arrangement, the insourcer (customer) has no physical, legal or even email contact with the persons performing the work for the customer.

Aggregation and anonymisation of data can even make it impossible to tie the results of the work to any specific worker. This obviously creates a highly complex landscape, the full assessment of which would require analysis across such areas as conflict-of-law rules (private international law), taxation, and data protection. In such complicated sets of facts, it may pose a major challenge for the labour inspectors (for example) to reach a correct assessment, and depending on the approach adopted could mitigate or elevate the risk for the customer and the agency—but that would be a topic for another article.

If lawmakers decide to regulate outsourcing, it can only be hoped that the legislative solutions adopted, while maintaining essential protections for workers, do not limit the ability of businesses to quickly source personnel with specific qualifications. Otherwise, efforts at regulation might throw out the baby with the bathwater. ●