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Protection of temporary agency worker in connection with maternity in Polish law

Ochrona pracownicy tymczasowej w ciąży w prawie polskim

Abstract
This article present status of a temporary agency employee in Polish law in relation to maternity. Temporary agency work is classified as one of the atypical forms of employment which are characterized by a lower standard of employee protection. In principle, a temporary agency worker is subject to the same protective standards as those applicable to employees employed on the basis of a fixed-term contract without the participation of an employment agency. However, some differences can be found in the scope of extending the fixed-term contract of employment until the day of childbirth (Article 177 para. 3 of the Labour Code). This rule applies to female employees who were employed on the basis of a fixed-term contract of employment, which would be terminated after the third month of pregnancy. In Poland, however, this rule did not apply to temporary agency workers until 1 June 2017, when the legislature also protected temporary agency workers who have a total of at least 2 months of assignment to perform temporary agency work by a given temporary employment agency on the basis of an employment contract. The Polish legislator decided to introduce protection for pregnant temporary agency workers, as the previous solutions were contradictory to the EU directive on temporary agency work. The current solution is criticized because, as it is pointed out, it is in conflict with the purpose of temporary agency work, which is assumed to be flexible and short-term employment.

Keywords
temporary agency work, maternity, fixed-term contract

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Streszczenie
Przedmiotem artykułu jest status pracownicy tymczasowej w związku z macierzyństwem. Praca tymczasowa jest zaliczana do nietypowych form zatrudnienia, które charakteryzuje niższy standard ochrony pracownika. W zasadzie pracownica tymczasowa podlega tym samym normom ochronnym, które obowiązują w przypadku pracowników zatrudnianych bez udziału agencji zatrudnienia na podstawie umów terminowych. Chodzi głównie o zakaz wypowiedzenia umowy o pracę w czasie ciąży i macierzyństwa, a także prawo do urlopu macierzyńskiego. Warto jednak zwrócić uwagę, że praca tymczasowa nie gwarantuje w pełni ochrony macierzyństwa. Pewne odrębności można odnaleźć w zakresie przedłużenia terminowej umowy o pracę do dnia porodu (art. 177 § 3 k.p.). Ta zasada obejmuje pracownice, które zostały zatrudnione na podstawie terminowych umów o pracę, które to umowy uległyby rozwiązaniu po upływie trzeciego miesiąca ciąży. W Polsce zasada ta nie miała jednak zastosowania do pracownic tymczasowych do 1 czerwca 2017 r., kiedy to ustawodawca również objął ochroną pracownice tymczasowe, które mają łączny co najmniej 2-miesięczny okres skierowania do wykonywania pracy tymczasowej przez daną agencję pracy tymczasowej na podstawie umowy o pracę. Ustawodawca polski postanowił wprowadzić ochronę pracownicy tymczasowej w ciąży, ponieważ dotychczasowe rozwiązania były sprzeczne z uregulowaniem unijnej dyrektywy w zakresie pracy tymczasowej. Obecne rozwiązanie jest jednak krytykowane, ponieważ — jak się wskazuje — jest sprzeczne z celem pracy tymczasowej, która z założenia ma być zatrudnieniem elastycznym i krótkotrwałym.

Słowa kluczowe
praca tymczasowa, macierzyństwo, terminowe umowy o pracę

Introductory remarks

Work through temporary employment agencies is a new and atypical form of employment, which both EU and Polish legislators have covered by labour law regulations in order to protect the employee. Due to the structure of temporary agency work, however, labour law norms with respect to temporary agency employees show certain distinctness, and guarantee them a lower standard of legal protection.

Due to the three-party structure of employment through temporary employment agencies, the protection to which an employee is entitled under a traditional employment relationship is waived or modified. It is not possible to guarantee the agency employee the same level of protection as in a traditional bilateral employment relationship. Working through a temporary employment agency gives the user employer the flexibility to terminate the temporary employee's employment at any time. The temporary employment agency as the employer will then terminate the employment contract with the temporary agency employee. However, this will not be possible if the temporary agency employee is pregnant. Since 2017, the Polish law provides for the protection of the temporary agency employee in this regard. However, before the protective regulation is discussed, it is worth noting the legal regulation of the temporary agency work model and maternity protection in Polish law.

Temporary agency work model in Poland

Countries that introduce legal regulations concerning temporary agency work may adopt their own model of temporary agency employment. The Polish model of temporary agency work is classified as detailed and restrictive, in contrast to the liberal model in the UK or Ireland (De Graaf-Zijl & Berkhout, 2007, p. 5). The shape of individual national regulations on temporary agency work varies. In the law of the Member States of the European Union, there are several models of regulating temporary agency work (see Makowski, 2003, p. 25).

In Poland, temporary agency work is comprehensively regulated in the Act of 9 July 2003 on the employment of temporary agency workers (Journal of Laws 2019.1563, i.e. of 2019.08.20, hereinafter the Act). The model that the Polish legislator adopts consists of various elements, including the so-called positive prerequisites for the provision of temporary agency work (see Article 2(3) of the Act), the (negative) prerequisites excluding the provision of temporary agency work for certain types of work (see Article 8 of the Act) and the definition of a maximum period for the provision of temporary agency work of up to 18 or 36 months (Article 20 of the Act). Finally, it should be noted that the only permissible basis for employing a temporary agency worker is a fixed-term employment contract. The possibility of employing a temporary agency worker for an indefinite period is excluded.

Polish legislator adopted the definition of temporary agency work in Article 2 point 3 of the Act. According to this definition, temporary agency work is performing for a given user employer, for a period not longer than specified in the act, tasks: a) of seasonal, periodic, ad hoc nature, or b) whose timely performance by employees hired by the user employer would not be possible, or c) whose performance is the responsibility of an absent employee hired by the user employer. The catalog of tasks has been limited to only three cases. A temporary agency employee may not perform any type of work for the user employer, but only work of a specific type indicated in the act. These are the so-called positive prerequisites of temporary agency work.

Next, it is necessary to point out the so-called negative prerequisites for providing temporary agency work. A temporary agency employee cannot be entrusted with every type of work. A temporary employee cannot be entrusted with performing for the user employer work that is: 1) particularly dangerous within the meaning of the regulations issued on the basis of Article 237^{15} of the Labour Code; 2) in the workplace where the user employer's employee is employed, during the participation of that employee in a strike; 3) of the same type as work performed by the user employer's employee with whom the employment relationship was terminated for reasons not related to the employees within the last 3 months preceding the expected date of commencement of temporary work by the temporary employee, if such work would be performed in any organisational unit of the user employer located in the municipality where the organisational unit in which the dismissed employee was employed is or was located; 4) requiring arming a security guard with combat firearms or objects designed to incapacitate persons with the use of electric power, the possession of which requires a permit referred to in the Act of 21 May 1999 on arms and ammunition (Journal of Laws of 2019, item 284 and 1214).

Article 20 of the Act also assumes the so-called maximum period of temporary agency work. The Polish act assumes that the basis for hiring a temporary agency employee will be a term contract of employment, which is concluded for a maximum of 18 or 36 months, depending on the premise of performing temporary agency work. If the temporary agency employee replaces an absent employee of the user employer, the period of temporary agency employment may be longer. In other cases the period of employment is shorter, i.e. 18 months.

It follows from the Act's provisions that the intention of the Polish legislator is not to make temporary agency work permanent and indefinite. The nonpermanent and time-limited nature of temporary agency employment is also indicated by the type of employment contract adopted in Article 7 of the Act, which constitutes the basis for the employment of a temporary agency employee. Currently, the employment of a temporary agency employee is possible only on the basis of an employment contract for a definite period of time. The statutory restriction, both as to the type of employment contract concluded and the determination of its maximum duration,

constitutes an interference in the contractual freedom of the parties to the employment relationship aimed at strengthening the protection of the weaker party to the employment relationship (Paluszkiewicz, 2015, p. 574).

Both Polish and EU standards on temporary agency work assume that temporary agency work should be a transitional employment leading to permanent employment. The reports submitted by employment agencies show that temporary agency work is most often simple, ad hoc, uncomplicated and for a short period of time (as much as 58% of people are employed for a period up to 3 months).[1] To sum up, working as a temporary agency employee should lead to finding permanent employment of good quality. Temporary agency work is supposed to be an idea for inactive people to get out of the period of inactivity and lead them to finding permanent employment without the mediation of an employment agency. Temporary employment agency as an institution of the labour market is supposed to improve the situation on the labour market. The positive role of temporary agency work in bringing people into work and reducing unemployment.

Maternity protection for temporary workes and temporary agency workers

Referring to maternity protection in the case of all employment contracts, the employer may not terminate or dissolve an employment contract with a pregnant employee and during maternity leave, regardless of the type of employment contract concluded (see Article 177 of the Labour Code). The Labour Code introduces a prohibition to terminate an employment contract by notice in such a situation. It will not be permissible to terminate both permanent and fixed-term employment contracts. The prohibition of termination of employment contracts also applies when the employee becomes pregnant during the notice period (Supreme Court judgment of 30 May 2017, I PK 174/16). Thus, the employee remains in employment and on the day of delivery she will be entitled to maternity leave and maternity benefit.

The legislator agrees to terminate the employment contract with the employee during pregnancy and maternity leave if there are reasons justifying termination of the contract without notice due to the employee's fault and the company trade union organization representing the employee has agreed to the termination. The reasons justifying the termination of the employment contract without notice due to the employee's fault are indicated by the legislator in Article 52 of the Labour Code and include three situations: 1. grave breach of basic employment duties, 2. a crime committed by the employee in the course of employment, if it is obvious or confirmed by a final court judgment, 3. in the case of a culpable loss of qualifications necessary to perform work. Additionally, the consent of the company trade union organization is required, provided such organization is active at the employer's company. If the employee is not protected by a trade union, the employer's discretion is not limited.

The employment contract with a pregnant employee and during maternity leave can also be terminated with notice in case of bankruptcy or liquidation of the employer. In such case, the employer is obligated to agree with the trade union organization representing the employee on the termination of the employment contract. If, during the period remaining until the termination of the employment relationship, the employer cannot provide the employee with other employment, the employee is entitled, until the day of confinement, to a benefit in the amount of maternity benefit pursuant to Article 30.3 of the Act on Social Insurance Pecuniary Benefits (Article 177.4 of the Labour Code). In this case, the functions of safeguarding the employee's financial situation are taken over by the Social Insurance Institution. Pursuant to Article 30, para. 1 point 1 of the Act, if social insurance ceased during pregnancy due to the declaration of bankruptcy or liquidation of the employer, the employee is entitled to a maternity benefit.

The protection provided for in Article 177 of the Labour Code is also weakened in the event of occurrence of the so-called "reasons not related to the employee". Pursuant to the Act on Special Rules for Termination of Employment Relations with Employees for Reasons not Concerning the Employees, employees who are subject to the protection provided for in Article 177 of the Labour Code cannot be given a definite termination of their employment contracts, however it is permissible to give a changing notice. In case of a reduction of remuneration, the employee is then entitled to a compensatory allowance until the end of the period covered by the protection (i.e. the period of pregnancy and maternity leave).

Therefore, female employees are protected against termination of their employment contract and against its termination without notice by the employer. During the protection period, it is also not permissible to terminate the terms and conditions of employment or to unilaterally change the terms and conditions of employment of an employee by the employer by way of a so-called changing notice (Article 42 para. 1 in conjunction with Article 177 of the Labour Code).

In the case of fixed-term employment contracts, however, maternity protection is weaker and depends on the stage of pregnancy and the employee's period of employment. The provision of Article 177 para. 3 of the Labour Code interferes with the duration of term employment contracts by automatically extending them until the day of delivery. In case of fixed-term employment contracts, the rule is that a fixed-term contract is extended until the day of delivery by law if it is terminated after the third month of pregnancy

(Article 177 para. 3 of the Labour Code). It follows from the wording of the provision that in such a case no legal action should be taken, as the change occurs by law. The day of delivery should be understood as the day of birth of the child. This rule, however, does not apply to all employment contracts, it does not apply to the employment contract for replacement and employment contracts for a trial period not exceeding one month.

An extended term contract terminates on the date of confinement. Since the employment relationship does not exist after that date, the employee is not entitled to maternity or parental leave. However, in accordance with Article 30 para. 4 of the Act on Social Insurance Benefits, she is entitled to receive maternity benefit in the same amount as the maternity leave.

Until June 2017, a female employee hired through a temporary employment agency also did not benefit from Code protection. Since June 2017, this rule in a modified version has been applied to term employment contracts concluded with temporary agency employees. Until the 2017 amendment, upon the arrival of the term by which the contract was concluded, the contract was terminated. As a result, in the case of pregnant temporary agency employees, there was no extension of the employment contract until the date of confinement, as provided for in the Labour Code, from which it follows that a fixed-term contract that would terminate after the end of the third month of pregnancy is extended until the date of confinement.

Currently, the same rule applies for temporary agency employees under the Act on the Employment of Temporary Agency Employees. Pursuant to Section 13(3) of the Act, Section 177(3) of the Labour Code applies to a temporary agency employee who has a cumulative period of at least 2 months of being directed to perform temporary work by a given temporary employment agency under an employment contract. The total period of at least 2 months includes:

1) a period or periods of being directed to perform temporary work falling within a period covering 36 consecutive months preceding the conclusion of an employment contract to which Article 177 para. 3 of the Labour Code would apply, or

2) the period from the date of the conclusion of the agency work employment contract referred to in subsection 1 to the date on which the temporary agency worker has accumulated a total of at least two months' duration of the agency work assignment.

From the Explanatory Memorandum to the 2017 amendment we can learn that also a pregnant temporary agency employee should be entitled to maternity protection and she should receive maternity benefit and the purpose of this solution is to equalise the legal situation of pregnant employees employed under fixed-term contracts and employees performing temporary agency work (Explanatory Memorandum to draft VIII.1274).

The extension of the temporary employee's employment contract with the temporary employment agency will exclude the prohibition on the temporary employee's assignment to perform work for one user employer for a period exceeding a total of 18 months during 36 consecutive months, as well as the prohibition on the user employer's use of the same temporary employee's work for the aforementioned periods. This circumstance will also exclude the prohibition on directing a temporary employee to perform temporary work on a continuous basis for one user employer, involving tasks the performance of which is the responsibility of an absent employee employed by a given user employer for a period exceeding 36 months (Article 20(9) of the Act).

Before the amendment of the Act on the employment of temporary workers, the Supreme Court (I PKN 203/14) considered the permissibility of applying Article 177 para. 3 of the Labour Code to female employees hired through temporary agencies work and the exclusion of the application of the time limitation in Article 20 of the Act. In the case that was the subject of the analysis, the maximum period of temporary work specified in Article 20 of the Act was exceeded and this issue did not raise any doubts. A pregnant employee hired through a temporary employment agency requested that, in connection with this exceeding, a finding be made that the fixed-term employment contract with the temporary employment agency had been converted into an employment contract for an indefinite term. It was not disputed in the case that this maximum period of temporary agency employment was exceeded. Both the District Court and the Regional Court held that exceeding the maximum period of temporary agency employment set forth in Article 20 of the Act would result in the need to apply the generally applicable provisions, i.e. the provisions of the Labour Code without the limitations and exceptions arising from the Act on the Employment of Temporary Agency Employees. Therefore, Article 177 para. 3 of the Labour Code will apply, according to which an employment contract concluded for a definite period of time or for the time of performance of specific work or for a trial period exceeding one month, which would be terminated after the third month of pregnancy, shall be extended until the day of delivery. Unfortunately, this interpretation was not shared by the Supreme Court, which held that even if the maximum period of employment for the benefit of one user employer, as set forth in Article 20(1) of the Act, is exceeded (in a period covering 36 consecutive months the temporary employment agency employing a temporary employee may direct that employee to perform temporary work for the benefit of one user employer for a period not exceeding 18 months in total), the employment of a temporary employee does not lose such character.

The direct recipient of the employee's work is still the entity for which he performs the work and not the temporary employment agency. This excludes the possibility of stating the establishment of an employment relationship on principles, as the Regional Court put it, universally binding between the temporary employment agency and the temporary employee. He added that the temporary employment agency is a special employer, as it hires temporary employees exclusively for the needs of another entity — the user employer. By performing work for and under the direction of this user employer, the temporary employee commits himself to the agency as his employer (Section 2(2) of the Act). Thus, two entities are involved in the execution of this employment relationship on the employer's side — the temporary employment agency and the user employer.

Thus, the June 2017 amendment provided adequate protection for a pregnant temporary agency employee and introduced the application of the Code rule on the extension of a term employment contract to a temporary employee as well.

Temporary employee's maternity protection vs. user employer's right to terminate temporary employment

A characteristic feature of temporary agency work is that the user employer may resign from the temporary agency employee at any time. Pursuant to article 18 section 1 of the Act, a user employer who intends to resign from the performance of work by a temporary agency employee before the expiry of the period of performance of temporary work agreed with the temporary employment agency, shall notify the temporary employment agency in writing of the expected date of termination of temporary work by the temporary employee, possibly in advance, taking into account the period of notice of termination of this agreement binding on the parties to the employment agreement.

The user employer's right to resign from the temporary employee exacerbates the instability of temporary employment. A user employer intending to resign from employing an employee before the expiry of the period for which an agreement has been made shall notify the temporary employment agency in writing, stating the expected date of termination of work (Article 18(2) of the Act). The user employer does not have to give a reason for this decision. In principle, this leads to a free, unlimited resignation of the temporary employee. The Act does not address how this affects the contract between the employee and the agency. The private employment agency is responsible for terminating the employment contract with the temporary agency worker. The employment contract is terminated at the end of the period agreed upon by the parties (Article 18 para. 1 of the Act).

The user employer's power to resign a temporary employee at any time conflicts with the rule that the legislature extended to pregnant temporary employees in 2017. Although the user employer will exercise its power in such a situation, the temporary employment agency will be prohibited from terminating the employment contract with the pregnant temporary employee. The term employment contract will also be extended until the date of delivery so that the employee will be entitled to maternity benefit after the birth of the child. The legislator imposes an obligation on the temporary employment agency to maintain the employment of the pregnant employee.

Already during legislative work it was pointed out that this solution is not appropriate due to instability and untypical character of temporary employment. Application of the code principle of Article 177 para. 3 of the Labour Code reduces the flexibility of this form of employment on the part of the temporary work agency, which is the employer within this tripartite structure.

Pursuant to Article 5 of the Act, the provisions of the Labour Law relating to the employer and employee respectively shall apply to the temporary employment agency, the temporary employee and the user employer. It will also be possible to apply Article 179 of the Labour Code to a pregnant temporary employee. which stipulates that an employer employing a pregnant employee or breastfeeding a child for work that is forbidden to such employee regardless of the degree of exposure to factors that are harmful to health or dangerous, is obligated to transfer the employee to other work, and if that is impossible, release her from the obligation to perform work for the time necessary. It seems that transferring an employee to another job will be quite difficult to achieve due to the fact that a temporary employee is hired to perform a specific job for a specific user employer. In the case of health contraindications, the employee will be able to take sick leave.

Summary

Temporary work through a temporary work agency is a flexible form of employment, which has been covered by both EU and Polish legislators. It should be recognized that the current Polish regulations on the protection of pregnant temporary agency workers are compliant with EU Directive 2008/104/EC. Pursuant to Article 5(1) of the said directive, the basic working and employment conditions of temporary agency workers during the period of assignment to a user employer are at least equal to those that would apply if they were directly employed by the user employer in the same position. Thus the Polish legislature introduced solutions ensuring effective protection for temporary workers.

However, extending code protection to the temporary worker can be seen as contrary to the nature of temporary work. Especially the user employer's right to resign from the temporary

employee's employment at any time makes the temporary employment agency bear the burden of implementing protective solutions. Therefore, it can be concluded that the solution introduced by the Polish legislator could have been shaped differently. The legislator decided, however, that the temporary employment agency, as the employer, should execute these protective solutions.

Notes/Przypisy

[1] The information on the activity of employment agencies for 2019 shows that as many as 58% of people employed by temporary employment agencies have a total period of employment not exceeding 3 months.

References/Bibliografia

De Graaf-Zijl, M. & Berkhout, E. E. (2007). Temporary agency work and the business cycle. *International Journal of Manpower*, *1*0(23).

Makowski, D. (2003). Zatrudnianie pracowników tymczasowych. *Praca i Zabezpieczenie Społeczne*, (12).

Paluszkiewicz, M. (2015). Problem kwalifikacji prawnej pracy wykonywanej po upływie terminu określonego w ustawie o zatrudnianiu pracowników tymczasowych. *Monitor Prawa Pracy*, (11).

Supreme Court judgment of 30 May 2017, I PK 174/16, OSNP 2018/6/74.

Supreme Court judgment of 1 April 2015, I PK 203/14, OSNP 2017/2/15.

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