

SENTENCE ANALYSIS

TRADITIONAL OUTSOURCING MODEL IS FLATERING IN SPAIN, OPENING THE DOOR TO NEW FORMULAS SUCH AS EMPLOYER OF RECORD

November 6th, 2024

WITH REGARDS TO THE COURT OF JUSTICE OF THE EUROPEAN UNION'S RULING (OCTOBER 24TH 2024)

The Court of Justice of the European Union (CJEU) has issued a ruling addressing 3 of 5 preliminary rulings referred by the High Court of Justice of Madrid **concerning illegal loan of employees.**

New Concerns

Questions arise with regard to:

1. **Whether the current model limiting the legal assignment of employees to third parties currently restricted to Temporary Employment Agencies may be broadened to include service and project contracting companies** without requiring administrative authorization.
2. Whether the subcontracting model will, in certain activities, will face an increase in costs due to the requirement **to apply the working conditions of the main hiring company.**

Legal Background

Microsoft notified Leadmarket the termination of the provision contract between the two companies, effective as of September 30th, 2020.

Subsequently, after starting a period of temporary incapacity on September 22nd due to childbirth, as well as a maternity leave for breastfeeding and pending vacation days, the worker was dismissed by Leadmarket on April 29th, 2021, based on objective reasons.

CJEU's Response

The High Court of Justice of Madrid raised the following questions to the Court of Justice of the European Union related to Directive 2008/104 and Directive 2006/54:

1. **The applicability of Directive 2008/104 to a company that assigns a worker to another company, even though national legislation does not recognize the former as a temporary employment agency due to the lack of an administrative authorization.**

The CJEU concludes that the **Directive applies to any natural or legal person who enters into an employment contract** with a worker with the aim of assigning them to a user company to work there temporarily under its directives and control, and who makes that worker available to the company **even if that person is not recognized by national law as a temporary employment agency due to the lack of an administrative authorization.**

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2. **Consideration of “working through “temporary employment agency” for a company that national legislation does not recognized as such, but which assigns one of its employees (from whom it receives a monthly activity report and manages her holidays) to another company so that the employee works under the direction and control of the latter.**

The CJEU establishes that the concept of “work through a temporary employment agency includes the situation in which a company’s activity involves **entering into employment contracts with workers with the aim of assigning them to a user company for a specific period**, when the worker is **under the directives and control of the latter company**, which defines the tasks to be performed and exercises supervision and control over the execution of their duties.

3. **Whether a worker assigned by a temporary employment agency to a user company must receive the same salary as they would have if they had been hired directly by that company.**

The CJEU concludes that **“assigned” workers must, during their assignment at a user company, enjoy equal working and employment conditions to those they would have received if they had been directly hired** by that company for the same position.

Conclusions with business impact by our expert

Blanca Liñán Hernández – Labor Lawyer and Partner in the labor department -

The traditional mode of Temporary Employment Agency reserved only for those who obtain administrative authorization, seems to be expanding to include other contracting companies. We may be witnessing an overcoming of the limitation on companies being set up for the sole purpose of assigning labour, allowing the inclusion of other trending models in Europe, such as the **Employer of Record (EOR)**.

However, the subcontracting model is **expected to become more expensive as it must be governed by the conditions of the main company**, rather than those of the subcontracted activity, as has been required since the 2021 Reform.

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#50AñosEstiloCeca

info@cecamagan.com





info@cecamagan.com
www.cecamagan.com

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