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Outsourcing in Hospitals

For many reasons, it often makes greater sense to have certain hospital functions performed externally rather than leaving these tasks to the hospital itself. Such reasons include greater flexibility, the ability to draw upon professional know-how, the effects of synergies or cooperations, or the adoption of different compensation systems. Furthermore, departments requiring expensive machinery, such as laboratories or radiology, are only able to function cost-effectively if a partial ambulatory utilisation is also possible. Moreover, outsourcing plans are also driven by a trend towards small entities that focus on their core activities. Supplementary activities are merely binding resources that are desperately needed for the hospital's core business: medical care and treatment.

General Remarks

No standard solution exists under German employment and labour law with respect to the outsourcing of measures. The specific circumstances of the hospital, the goal of outsourcing services or certain parts of the business, as well as the type of the division affected, all lead to a broad range of possibilities for the appropriate course of action, e.g. the outsourcing of such services to an external service provider, to a newly founded company owned by the hospital, or to a joint venture between the external service provider and the hospital.

Regardless of the chosen method, the outsourcing of services or parts of a business will in any case raise several employment and labour law related questions, including matters concerning the transfer of business and participation rights of employee representative bodies, i.e. the Works Council (Betriebsrat) or Staff Council (Personalrat).

Transfer of Business

The mere outsourcing of functions will not necessarily lead to what is legally known as a transfer of business (Betriebsübergang). However, in many cases the hospital will also transfer material assets, such as buildings or machinery, and parts of the work force.

1. Definition

A transfer of business requires the transfer of a (complete) business unit to a new owner. The new owner must acquire an economic business unit that maintains its identity after the transfer. The workforce and the assets of a business unit, which share the common purpose of performing an economic activity, determine the identity of a business unit. The German Federal Labour Court (Bundesarbeitsgericht) considers several aspects to be relevant in determining whether a complete business unit has been transferred, and whether such a unit has maintained its identity. These factors include a transfer of the most material assets (both tangible and intangible); the continuation of the work organisation; the similarity of work performed at the business before and after the transfer; a transfer of the main workforce; the type of industry concerned; and the period of time for which the operation of the business has ceased (if applicable).

Whether outsourcing services or parts of a business constitutes a transfer of business can only be determined by a comprehensive evaluation of the deal and the state of the target's business. This was confirmed in a ruling by the European Court of Justice. The Court lately held that taking over a hospital cafeteria without taking over any personnel nevertheless led to a transfer of business, since the company acquiring the cafeteria also acquired the right to work with the heavy and expensive kitchen equipment.

Hence, under certain circumstances, even mere successions in function may result in a transfer of business. Furthermore, supplementary activities of hospitals (such as laundry services or security operations) depend heavily on the personnel and less so on the assets. Consequently, the taking over of activities and parts of the workforce may also lead to a transfer of business.

2. Legal Consequences

If a transfer of business has occurred, the employment contracts of all employees connected to the business unit will be transferred to the new owner by operation of law. Provisions of collective bargaining agreements with works councils and unions may be incorporated into individual employment contracts. Furthermore, the employment contracts may not be terminated for reasons of the transfer within one year of it taking place.

Moreover, all employees affected must be informed about the transfer of business in writing. Each employee can object to the transfer of the

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employment contract in writing within one month of receiving the notification letter. The employees' right to object will expire after one month only if the information provided was complete and accurate. If, however, the letter contained incomplete or inaccurate information, the employees' right to object would not lapse. The German Federal Labour Court has recently tightened the requirements for such notification letters.

Participation Rights of Works Council/ Staff Council

Outsourcing may also trigger participation rights of the works council or staff council, ranging from information rights through to co-determination rights. Whether a staff council or a works council exists depends on the form of organisation. Staff councils are established in hospitals belonging to the public (i.e. state) administration, whereas works councils are formed in hospitals that are organised in a private legal entity, e.g. a company with limited liability (GmbH).

While such employee representative bodies may not prevent an outsourcing measure, they may delay it considerably.

1. Staff Council

The participation rights of staff councils differ considerably from federal state to federal state, and may range from extensive co-determination rights to the mere hearing of the staff council's opinion. Where a codetermination right does exist, the administrative body may only initiate outsourcing measures if the staff council has agreed to the outsourcing proposal. In case the staff council does not agree, an arbitration committee is formed with a view to negotiating the outsourcing measure.

But even in federal states that grant such co-determination rights, it is the highest administrative body that has the final say on the outsourcing proposal, since the decision of the arbitration committee is not binding. However, the co-determination procedure may be both time consuming and costly.

In certain federal states, the staff council merely has to be informed (albeit thoroughly and in good time) about the outsourcing plans and is entitled to be heard by the administrative body, including for negotiations regarding the proposed measures. If no agreement can be reached, the decision on the proposed measure is taken by the administrative body next up in the hierarchy.

In addition, the staff council may also have co-determination rights where the outsourcing plan requires the transfer or delegation of employees within the hospital or to the external service provider (or joint venture).

2. Works Council

In private legal entities, the hospital may have to negotiate a conciliation of interests (Interessenausgleich) and a social compensation plan (Sozialplan) in the event that the outsourcing leads to a change of business (Betriebsänderung) in accordance with Section 111 of the German Works Constitution Act (Betriebsverfassungsgesetz). As a general rule, it is unlikely that the outsourcing of mere supplementary activities, such as laundry services, will lead to a change of business, since the external procurement of minor services has no general impact on the business as a whole.

By contrast, the outsourcing of primary functions, such as laboratory, radiology or nursing services, is highly likely to result in a change of business, thereby establishing co-determination rights in favour of the works council. In such case, if the hospital attempts to outsource measures without first negotiating with the works council, the latter may be entitled to seek an interim injunction against the measures, and affected employees may have compensation claims.

In case the hospital management is unable to reach an agreement with the works council, an arbitration board will issue a binding decision on the social compensation plan. The board may not, however, decide on the outsourcing itself, but may only determine whether the management has taken all necessary steps to find an amicable solution. Thus, while the works council may delay the process, ultimately it will not be able to prevent an outsourcing measure.

Conclusion

Outsourcing may lead to a multitude of employment and labour law related problems. In order to establish what rights will be afforded to the individual employee, it is essential to determine whether the proposal will result in a transfer of business.

Furthermore, consideration must also be given to the rights of a works council or staff council, so as to prevent time-consuming delays as well as cost-intensive claims. The careful and thorough legal preparation of outsourcing plans can therefore prevent many problems and, ultimately, save both time and money.

Author:

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Thilo Ullrich, *Attorney and certified*

lawyer for employment law (Fachanwalt

für Arbeitsrecht), Berlin, Germany

Email: ullrich@wegnerpartner.de

www.wegnerpartner.de

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