

Contractor's Obligations and Liability when Work is Contracted Out



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Introduction

There are many ways of combating the negative effects caused to enterprises by the “grey” or undeclared economy and unhealthy competition. The Act on the Contractor’s Obligations and Liability when Work is Contracted Out (1233/2006, Contractor’s Liability Act) is applied in situations where temporary agency workers or subcontracting are used. The ordering party is under the obligation to check a contracting partner’s ability to discharge their statutory obligations. At the same time is ensured that the subcontractors and agencies hiring out workers discharge their obligations as employers. The obligations laid down are also intended to ensure that the minimum terms of the employment relationship are fulfilled, also in the case of subcontracted and temporary agency workers.

1 What or who is a contractor?

The contractor is a trader that uses temporary agency workers or subcontracted workers.

The contractor means any trader obliged to submit a start-up notification under the Trade Register Act. These include general or limited partnerships, limited companies, cooperatives, housing companies, mutual insurance companies, cooperatives, savings banks, state enterprises, non-profit associations and foundations and private traders that have permanent premises for carrying on their operations or have in their service at least one employee. The contractor may also be a foreign foundation or organisation that establishes a branch in Finland or a European Company (SE).

The state, municipalities, joint municipal authorities, parishes and other juridical bodies may also be contractors. The contractor may also be a similar foreign enterprise when operating in Finland. As a general rule, the Contractor's Liability Act does not apply to those engaged in agriculture or fishing or to private households.

2 When is the Act applied?

The Act is applied to work done in Finland. In addition it is applied to work done on board vessels sailing under the Finnish flag, even when the vessel is not in Finnish waters when the employee accompanies the vessel.

The Act applies to a contractor, *who uses temporary agency workers*. A temporary agency worker refers to an employee who has signed an employment contract with an employer who has assigned the employee with his or her consent for the use of another employer. The employer of temporary agency workers may operate in Finland or abroad.

The Act will be applied to a contractor *in certain employment situations based on a subcontract* provided that

- The contractor and the contracting party have a subcontract on an agreed work outcome against compensation.
- Employees in the service of a contracting party that has signed a subcontract are working for the contractor. Although the contractor need not be an employer, the other contracting party who has signed a subcontract with them is required to be an employer.
- The work is performed at the contractor's premises or work site. Normally the contractor's own employees also work at the contractor's premises. Subcontract work in which separate parts or materials or programmes are produced at the premises of the employer who has signed the subcontract, to be further assembled or processed at the contractor's premises, do not come under the scope of the Act. The contractor's work site may, however, be located elsewhere than at their premises. There are work sites of this kind in the construction, transport and haulage industries and in services where the service is produced at the premises of the service buyer or user.
- The work to be performed under a subcontract relates to the work tasks normally carried out in the course of contractor's operations. For this reason the tasks such as subcontracting of legal, educational, advertising and catering services remain outside the scope of application of the Act, unless

the companies concerned themselves operate in these sectors. Workplace catering, occupational health care and security services do not usually relate to the contractor's own sector. On the other hand, cleaning and generally also servicing and maintenance of equipment and premises can be regarded as being related to the jobs normally performed by the contractor enterprise.

The Act applies to all construction activities, including, besides housing construction, maintenance and repair of buildings and civil engineering. In construction activities, the Act applies to all contractors for the work that operate in a common workplace. It also applies to all those contracting out part of the work, regardless of whether the contracting party is an employer or not.

Small subcontracts and contracts on the use of temporary agency workers are excluded from the scope of application of the Act by setting limit values.

The Act is not applied if

- The total duration of the work for which a temporary agency worker or workers are hired does not exceed 10 working days.
- The value of compensation in the case of a subcontract, excluding VAT, is less than EUR 9,000.

The obligations to check cannot be avoided by breaking the contract up into parts that remain below the given limit values. The work is considered to have continued without interruption if the work or work outcome performed for the contractor is made up of successive, uninterrupted fixed-term contracts or with only short breaks between the contracts.

3 Content of the contractor's obligations to check

The aim of the contractor's obligation to check is to give the contractor as accurate information as possible on whether the contracting party is reliable and whether it intends to act in compliance with the law.

The contractor must obtain the information mentioned in the Act before concluding the contract. The employer of temporary agency workers and the other contracting party to a subcontract are under an obligation to provide the contractor with this information. If the contractor does not obtain the information until later, the contractor has neglected the obligation to check, unless the contract has an escape clause in case the contractor would not have signed the contract on the basis of the information subsequently provided.

The obligation to check concerns the following information:

- Information on whether the enterprise is entered in the Prepayment Register under the Prepayment Act, the Employer Register and the VAT Register under the Value Added Tax Act.
- An extract from the Trade Register, or similar information obtained from the Trade Register, showing the date on which the company was registered, its line of business, board of directors, other management, authorised signatories, auditors, personal details of responsible persons, and information on whether the last final accounts were submitted to the registration authority in compliance with the law.
- An account showing that the company has no tax debt entered in the public Tax Debt Register, or an account of the amount of tax debt provided by the authorities.
- Certificates of pension insurances taken out for employees and of pension insurance premiums paid, or an account that a payment agreement on outstanding pension insurance premiums has been made. These certificates are issued by pension institutions. From the employees' point of view, payment of employment pension contributions is crucial

evidence that the employer is able and willing to take the responsibilities relating to the work, such as paying social security contributions. Here, too, the situation of an enterprise that has defaulted on payments is taken into consideration. If the enterprise intends to pay the arrears, it can prove its intention by arranging a payment plan and observing it.

- An account of the applicable collective agreement or the principal terms applicable to the work. An applicable collective agreement may be a collective agreement binding on the employer, a generally applicable collective agreement or another collective agreement applied by the employer in practice. The account of the principal terms of the employment covers, among other things, the employee's main tasks, the wage payment period, regular working hours, determination of annual leave and period of notice of dismissal. As regards information on wages, it is sufficient that the information describes how the wages and the different components are determined. It is not the intention to disclose personal details of wages to the contractor.
- An account of the provision of occupational health care. The obligation may be discharged by submitting to the contractor an agreement on the provision of occupational health care services, or a written account by the contracting party showing that statutory occupational health care services are provided. This account must state at least where the workers will be provided with the agreed occupational health care services. If at the moment of concluding the contract the contracting party was not yet under an obligation to provide occupational health care services, it must give to the contractor an account of how it intends to provide them.
- A certificate of employment accident insurance. Under the Employment Accidents Insurance Act, employers must take out accident insurance for workers who have a contractual employment relationship with them. In construction activities, the contractor must obtain information showing that the contracting party has a valid insurance policy for its workers. Certificates of insurance policies and their content are issued by insurance companies.

Foreign contracting parties must provide the contractor, in a way that is understandable to the contractor, with information similar to that in the accounts and certificates mentioned above. Information to be checked pri-

marily includes an extract from a register complying with the legislation of the country where the enterprise is established, or a declaration or certificate on oath that the party is engaged in trade or business.

If in the state where the foreign company is based there is no reliable information available that is similar to a tax debt certificate, for example, or if the company is not obliged to take out pension insurance for its workers, it must provide the contractor with a reliable account of this. Similarly, information relating to social security provision by the foreign company must be presented in some generally accepted way, such as by providing an account of insurances taken out by the company.

If the accounts or certificates mentioned above cannot be submitted because they do not exist, the contractor has the right to accept and the contracting party to provide the information in some other way that can be generally considered sufficient.

Foreign contracting parties with a Finnish business ID must also provide the information entered in the Prepayment Register, the Employer Register and the VAT Register, and the information on tax debt described above.

If the foreign contracting party posts workers to Finland, the contractor must obtain information on the posted workers' social security cover before starting the work under the contract at the latest. For EU and EEA Member States, foreign employers posting workers may be requested to provide an A1 or E101 certificate. When concluding the contract, the contractor must require that, for workers posted after the work under the contract has been started, the contracting party submit certificates of social security before the posted workers start the work.

- In construction activities, the contractor is under a constant obligation to ensure that the workers have social security cover.

Provisions on the obligations of the contractor and the contracting party in situations where workers are posted to Finland by a company established in another country are laid down in the Posted Workers Act (1146/1999).

Examples of these include tilaajavastuu.fi, the ePortti Internet service, Suomen Asiakastieto Oy and the Construction Quality Association (Rakentamisen Laatu RALA ry).

Accounts need not be requested when trust is based on the fact that

- The contracting party is a state, a municipality, a joint municipal authority, a parish, a parish union, the Social Insurance Institution of Finland, the Bank of Finland or some other public body mentioned in the Act.
- The contracting party is a public limited company (plc) under the Limited Liability Companies Act, a state enterprise, a company under private law wholly owned by a municipality, or a similar foreign organisation or enterprise.
- The operations of the contracting party are established. The primary condition to be fulfilled in this, too, is that the contractor has good reason to rely on the contracting party. The established nature of the operations is considered a factor contributing to trust when the enterprise has factually been engaged in business for at least three years.
 - In construction activities, the obligation to check must be discharged regardless of whether the operations of the contracting party are well established or not.
- The contractor's and the contracting party's contractual relationship can be considered established. Earlier experiences of operations subject to contract between the parties are factors that increase trust. An established contractual relationship between the contractor and the contracting party is not required to be quite as long in duration as in the case of established operations, because it is easier during a contractual relationship to establish that other party discharges their obligations. A contractual relationship can be considered established after about two years, if during the said period the contractor and the contracting party have in practice concluded contracts.
 - In construction activities, the obligation to check must be discharged regardless of whether the operations of the contracting party are well established or not.
- Other equivalent reason. Here too, the general criteria for applying the law must be met and equivalent reason must be interpreted in a narrow sense. Another equivalent reason may, for example, be the size of the enterprise, if on that basis, the public reliability of the contracting partner could be compared to that of the enterprises referred to above.

If a contract in force for more than 12 months has been signed between the contractor and contracting parties, the contracting party must provide the contractor at 12 month intervals, also during the contractual relationship, with certificates of taxes and pension insurances. Failure to comply with this provision will not result in the consequence imposed for negligence of the obligation to check. This is due to the fact that contracts do not usually include escape clauses in case one of the contracting parties is no longer eligible for registration with an authority or has failed to pay employer's contributions.

In order to ensure that the information describes the current state of an enterprise as well as possible, it may not be *more than three months old*. The contractor must ensure that they have all the information and accounts referred to above at their disposal before signing a contract, when the contract is being concluded for the first time. However, such information and accounts are not needed if the contractor signs a new contract with the same contracting party during the period that the information is still valid.

If the contractor concludes a new contract with the same contracting party before 12 months has elapsed from the date of discharging their obligation to check for the first time, the contractor is not obliged to check the information again. Contractors who are committed to a contractual relationship do not always have the same opportunities to withdraw from a contract as those considering a new contract. For this reason, contractors still have an obligation to check if they have reason to believe that changes requiring a review have taken place in the circumstances of the contracting party. Such reasons may include, for example, the fact that an owner or responsible person in the enterprise has been barred from conducting business, a criminal investigation that has become public, or reasonable doubts presented by a personnel representative that the contracting party has violated their obligations as an employer.

The contractor must keep the information concerned for *at least two years* from the date on which the work referred to in the contract has been completed.

Some of the information that falls within the scope of the obligation to check is not in the public domain. From the perspective of continuing business operations, it is important that information concerning on enter-

prises does not spread wider than the intent of the law. For this reason the contractor or any person in their service may not disclose non-public information they have received to an outsider. Information of this kind includes information on tax payments and tax debt and on taking out pension insurances and paying pension premiums. The information may be disclosed if the contracting party him- or herself or a pertinent authority has disclosed it by virtue of law, or a pension institution has notified a credit information register.

The duty of non-disclosure also applies to non-public information that has been acquired from records where other information is kept. The party responsible for maintaining records of information can always disclose information to a contractor, provided the contractor has received consent from the party in question.

As regards non-disclosure obligation of a civil servant or other official, the provisions of the Act on the Openness of Government Activities is nevertheless applicable.

Information subject to the non-disclosure obligation may not be disclosed even after the entrepreneur or a person in their service ceases to perform the task in the course of which they have received the information. Penal provisions have been laid down for breach of the non-disclosure obligation.

4 Providing information to personnel representatives

In order to fulfil the intent of the law and promote more efficient supervision it is important that representatives of personnel also have information on the use of outside labour. For this reason, the contractor is under an obligation to notify a shop steward elected on the basis of a collective agreement or, if no such representative has been elected, an elected representative under the Employment Contracts Act of any contract concerning temporary agency or subcontracted workers. Corresponding information must also be given to an occupational safety and health representative. The representatives of personnel are to request the information from the contractor, their employer.

The contractor must clarify the reason of using temporary agency work, the number of workers to be used, the identifying details of the enterprise hiring out workers or signing a subcontract, the work site, the tasks involved, the duration of the contract relating to the work, the collective agreement applicable to the employees working as temporary agency workers or under subcontract, or if there is no such agreement the principal terms of employment.

Said information does not have to be submitted if the Act is not applied due to a general provision on derogation from the scope of application. However, said information shall be provided in situations in which work conducted by a temporary agency or subcontracted workers as such falls within the scope of the Act, but a contractor does not have to request said information, for instance, in cases where the contracting party is a state or municipality or if the contractor's and the contracting party's contractual relationship can be considered established.

Notwithstanding any limitation provisions concerning the Act's scope of application, a personnel representative in a user company must always be provided with the necessary information in cases pertaining to the resolution of any disputes concerning acts or agreements relating to the temporary agency worker's wages or employment relationship. Obtaining said information is subject to the employee's authorisation.

5 Failure to discharge the obligation to check

The consequence of failure to discharge the obligation to check is a *negligence fee*, payable by the contractor. The negligence fee is paid to the state.

The negligence fee will be charged,

- If the contractor has neglected their obligation to check.
- If the contractor has signed a contract with an entrepreneur who has been barred from conducting business under the Act on Business Injunctions or with an enterprise in which a partner, member of the Board of Directors, Managing Director, or other person in a comparable position has been barred from conducting business. The Legal Register Centre keeps a register of business injunctions, and the information is also sent to the National Board of Patents and Registration of Finland by virtue of office. The register information is public and can be seen in the Extract from the Trade Register.
- If the contractor has signed a contract, despite the fact that they should have understood that the other contracting party had no intention of discharging their statutory obligations as a contracting party and as an employer. The provision applies mainly to cases where the contractor shows an indifference that is clear and easily discernible on the basis of general experience to the fact that their contracting partner does not discharge their obligations.

The minimum amount of the negligence fee is EUR 2,000 and the maximum is EUR 20,000. If the contractor has concluded a contract with a trader who has been prohibited from engaging in business, or if the contractor has entered into contract even though the contractor must have realised that the other contracting party had no intention of discharging its statutory obligations as a contracting party or as an employer, the minimum amount of the negligence fee is EUR 20,000 and the maximum EUR 65,000.

In determining the amount of the negligence fee, the factors taken into account are the degree, type and extent of the negligence, and the value of

the contract between the contractor and the contracting party. Factors to be considered for lowering the negligence fee are the contractor's effort to prevent or eliminate the effects of the negligence, and those for raising the fee comprise the repeated or systematic nature of the negligence by the contractor, and other circumstances. If the negligence can be considered minor and it is reasonable considering the circumstances, the negligence fee may not be prescribed.

The amount of the negligence fee is determined by the local office of the Regional State Administrative. Before the negligence fee is imposed, the contractor must always be heard, in which case they can present the reasons that have contributed to the negligence and other factors that have influenced the matter. The Occupational Safety and Health Authority is entitled to receive the documents relating to the obligation to check from the contractor, and if necessary, a copy of these. The documents include the contract regarding subcontracting or temporary agency workers. The contractor may apply for amendment of the decision by appealing to an Administrative Court.

The right to give a decision on a negligence fee expires in two years. The date of expiry is counted from the date when the work concerned in the contract referred to in the Act has been completed. If it is suspected that the obligation to check has been violated, the matter must be dealt with urgently by the local office of the Regional State Administrative Agency.

6 Supervision of compliance with the Act

Occupational safety and health authorities are responsible for supervising compliance with the Act in accordance with the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (44/2006). The occupational safety and health authorities have the right under the Act on the Supervision of Occupational Safety and Health to enter workplaces and receive the information they need for supervision. According to the Contractor's Liability Act, the right to supervise also concerns those contractors who are not employers.

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MEE brochure 1/2016 (web-brochure)

Layout: MEE
February 2016

