

# Labour Law

## Newsletter



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### News

## **Dear clients, dear business partners,**

This issue of our employment law newsletter again discusses many interesting topics – including labour law classics such as severance pay and temporary employment, but also hot topics concerning areas such as the German Minimum Wage Act. Just like in our previous newsletters, we have summarised the most relevant recent judgements for you in the case law review section, along with a comment on how these judgements will impact on employment law aspects of your day-to-day business.

In order to help you manage the challenges of international secondments efficiently and with legal certainty, we have also included “Global Mobility” as a special topic in this issue. Our employment law expert Dr. Manuela Rauch as well as the tax experts Dr. Stefan Diemer and Dr. Manuel Melzer will introduce you to this interdisciplinary and sometimes highly complex area. The renowned lawyer Mag. Silva Palzer from our Eversheds office in Austria has also contributed a commentary on this topic from a cross-border perspective.

In the section entitled “Political Developments”, we have included articles on the German Personnel Leasing Act in its second and now even third draft version, as well as on the draft bill to address the gender pay gap, which has triggered heated discussions in the media.

Finally, we would like to draw your attention to our newly launched annual programme of employment law seminars. We would be delighted to welcome you to one of our many employment law workshops or seminars at our office located in the heart of Munich, which, as always, promise to be not only informative but also entertaining. We have again listed the upcoming events on the back of this newsletter.

We hope you will enjoy reading this newsletter.

## **Your labour law team**

# Jurisdiction/decisions

1

**Decision 1: German Federal Labour Court (*Bundesarbeitsgericht, BAG*) of 17 December 2015 – 6 AZR 709/14**  
**Written form requirement when exercising a “sprinter clause”**

## The decision

The plaintiff had been working for the defendant, an out-patient care service, for 16 years. In the context of an action against unfair dismissal, the parties reached a settlement in which they agreed on a “sprinter clause” for the plaintiff. Such clauses offer a contractual party the possibility to prematurely withdraw from the contract. In turn, the withdrawing contractual party receives a higher severance payment. The respective party must observe a notice period, i.e. notify the other party in due time if it wishes to exercise its rights under the sprinter clause. The plaintiff’s legal counsel served the defendant with the respective notification in due time by fax. He did not send an original. The parties’ dispute ultimately concerned the question whether the notification letter of premature termination sent by fax had effectively terminated the employment relationship established between the parties.

The defendant argued that the plaintiff’s notification letter did not comply with the written form requirement for terminations. The transmitted declaration had thus been ineffective. Following two different judgements in the previous instances, the German Federal Labour Court ultimately decided in favour of the defendant. The court held that the form of transmission did not fulfil the formal requirements. Pursuant to Sec. 126 para. 1 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), the written form requirement is fulfilled specifically if the required declaration is signed by the issuer with his name in his own hand. According to the court, a fax did not fulfil this requirement as it only shows a photocopy of the original signature. The termination was thus null and void due to a defect of form.

## Practical consequences

A settlement agreement – which may have been concluded in the context of a general settlement – defines the conditions under which the employee may withdraw from the employment relationship. The settlement agreement as such is generally not subject to any formal requirements and thus does not require written form. The exercise of the sprinter clause, however, is to be classed as a (premature) termination. In order to effectively exercise the sprinter clause, the respective declaration thus requires written form pursuant to Sec. 623 BGB. The requirement of written form principally aims at creating legal certainty for both parties and is intended to facilitate the provision of evidence in case of litigation.

If the employee fails to observe the formal requirements when exercising the agreed sprinter clause, the employer can rightly claim that the employment relationship has not been terminated.



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## 2

## Decision 2: BAG of 23 September 2015 – 5 AZR 767/13 Burden of proof and evidence for overtime pay claim

### The decision

In this case, the parties were in dispute regarding a pay-out of working time credits. The plaintiff had been employed by the defendant as an office assistant. The employment relationship between the parties ultimately ended at the plaintiff's own request. Following the termination of the employment relationship, the plaintiff raised a claim for a pay-out of the time credits which had accumulated on her working time account.

According to a timesheet which was also handed out by the employer, the plaintiff had reached a positive balance of 414 hours by the time the plaintiff introduced trust-based working hours. After the introduction of trust-based working hours, the employer no longer recorded the working hours. The plaintiff, however, kept her own record of her working hours after the introduction of trust-based working hours. For that period, the plaintiff recorded a credit of another 643 hours. However, the German Federal Labour Court decided that the plaintiff did not have a monetary claim for the self-recorded 643 hours which the employee had recorded on her own initiative after the introduction of the trust-based working hours.

### Practical consequences

The BAG fully recognised the plaintiff's claims for the 414 hours worked in the period before the introduction of trust-based working hours. A working time account is ultimately to be regarded as an indirect expression of potential remuneration claims of the employee. If an employee claims remuneration for a credit on his working time account, it is sufficient for the employee to prove that a working time account had been agreed upon and that it showed a credit at the time of the pay-out. In the present case, the plaintiff provided such proof by submitting her timesheet which she had received from the defendant. If the employer – as was the case here – does not present any arguments against the credit shown on the working time account to the court or if his arguments are not sufficiently substantiated, the credit shown on the account is deemed confirmed. As the working time credit was thus undisputed, no contractual or

standard preclusive periods had to be observed either.

In contrast, the claim regarding the further 643 hours was ultimately dismissed. The plaintiff could not fulfil her burden of proof and evidence in this respect. If the employee's claim is based on self-recorded timesheets, the requirements regarding the burden of proof and evidence are stricter than where the employer itself documented a time credit. As a first step, the employee must document the overtime hours worked. As a second step, the employee bringing the action must show and prove that the overtime hours worked had been requested, approved or tolerated by the employer or had been necessary to provide the services due under the employment contract. The mere fact that the employee was present at the employer's premises does not lead to the assumption that overtime hours were indeed required to provide the services due under the employment contract.

### Practical tip

Working time credits and the respective timesheets should always be checked for irregularities before they are signed or processed. Ideally, employment contracts should stipulate that overtime work specifically requires an express instruction or a subsequent approval by the employer in order to prevent any unauthorised actions by the employees as effectively as possible.



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## 3

## Decision 3: Berlin-Brandenburg Regional Labour Court (*Landesarbeitsgericht, LAG*) of 14 January 2016 – 5 Sa 657/15 Evidence gained from browsing history information is admissible

### The decision

During a routine inspection, the employer detected a data volume on the computer of an individual employee which far exceeded the average. The data volume attributable to the employee's work computer was of a magnitude normally only associated with servers. A detailed analysis ultimately showed an excessive private use of the work Internet access. In a period of 30 working days, the plaintiff – although private Internet use was only allowed during breaks – surfed the Internet for non-work purposes for almost 40 hours during his working hours. Based on this misconduct, the employer terminated the employment relationship for cause without notice.

The plaintiff challenged the validity of the termination in court. One of the arguments was that the information obtained from the analysis of the browsing history should not have been used in the unfair dismissal proceedings. The plaintiff argued that the analysis of the browsing history data constituted an infringement of his personal rights. Consequently, the evidence should have been excluded from the proceedings. The LAG, however, did not share this opinion and ruled – also on the basis of the information obtained from the browsing history – that the termination for cause was valid.

### Practical consequences

The outcome of the decision is in keeping with previous labour court decisions regarding private Internet use as a cause for dismissal.

A private use of the Internet during working hours without a respective permission generally constituted a breach of the employee's duty to provide his work services. The severity of such breach of duty depends on the extent to which the employee fails to observe his duties in terms of time and work completed. An excessive private Internet use amounting to almost 40 hours during working hours is thus to be regarded as a significant breach of duty and thus as a cause for dismissal.

The judgement is interesting from a data protection perspective: The court ruled that the information gained from the browsing history was admissible as evidence before court. In principle, the German Code of Civil Procedure (*Zivilprozessordnung, ZPO*) does not provide for an exclusion of evidence in case of improperly obtained knowledge or information. An exclusion of evidence might be considered in certain exceptional cases following a balancing of the interests of both parties to the litigation. However, if the employer is not in a position to provide conclusive evidence for a misuse of the work Internet access in any other way, the use also of data which may have been obtained unlawfully is to be tolerated. In this respect, case law holds the interest in the use of the data to be more important than the respective personal rights of the employee.

*"This decision is truly positive for employers: In order to avoid legal uncertainties, is it thus recommendable to implement clear rules regarding private Internet use (e.g. total ban on private Internet use) as well as to obtain a specific consent of the employee in particular regarding the storage and analysis of the (connection) data saved as part of the browsing history."*



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## 4

## Decision 4: BAG of 25 May 2016 - 5 AZR 135/16

### Do extra payments count towards the minimum wage?

#### The decision

The decision by LAG Berlin-Brandenburg, recently confirmed by the BAG, concerns the question whether holiday pay and a bonus payment count towards the minimum wage. The plaintiff had initially been employed by the defendant as a cafeteria staff member. The employment contract between the parties also provided for payment of holiday pay and a bonus payment (Christmas bonus) in the amount of half a monthly salary each. An applicable company agreement furthermore stipulated that extra payments under the employment contract become due for payment in the amount of 1/12 for each calendar month.

The employer consequently paid 1/12 of the extra payments agreed pursuant to the employment contract each month. The plaintiff argued that the resulting amounts did not count towards the minimum wage. Specifically, the extra payments had been agreed as an addition to her wage and were paid due to the increased financial requirement during holidays and were also a reward for company loyalty. The employer as the defendant claimed that the German Minimum Wage Act (*Mindestlohngesetz, MiLoG*) did not generally prohibit considering contractually agreed allowances and/or bonuses in the calculation of the minimum wage. Ultimately, the LAG Berlin-Brandenburg specifically confirmed the view that agreed extra payments (holiday pay and Christmas bonus) count towards the minimum wage. The LAG thus rejected the employee's payment claim in most respects. The BAG has recently confirmed this decision.

Due to the legally valid company agreement, the employee could dispose of 1/12 of the contractually agreed extra payments on the relevant due date in each month. Additionally, both extra payments – although they were referred to as holiday pay and Christmas bonus – were not intended to cover extra holiday spending or to reward company loyalty. The deciding court held that it was the specific contract wording with respect to the two extra payments in particular which pointed towards a mere remuneration character of the two extra

payments. Neither was the entitlement to the two extra payments dependent upon a certain waiting period, nor was there a potential requirement to repay the amount depending on the employment relationship remaining in place untermiated up until a certain point in time. In particular, however, the decisive factor was that both extra payments were paid on a pro-rata basis each month.

#### Practical consequences

Pursuant to the legislative concept, benefits such as a Christmas bonus or additional holiday pay may thus also qualify as a minimum wage component. According to the courts, this applies in any case if the employee can freely and irrevocably dispose of the amount on each date on which the minimum wage falls due. The courts further held that another important factor in order to decide whether a payment counts towards the minimum wage was whether the purpose of the payment owed by the employer was to remunerate the employee for his or her work or not. If the payment is intended to remunerate the employee for his or her usual work, it can be taken into account when calculating the minimum wage.

#### Practical tip

When drafting employment contracts and company agreements, employers should anticipate these issues to ensure that such extra payments can be counted towards the minimum wage. In any case, it is essential that the payments are made pro-rata on a monthly basis.



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## 5

## Decision 5: LAG Rheinland-Pfalz of 17 February 2016 – 4 Sa 202/15 “Unique nature of the work performance” as an objective reason for a chain of fixed-term contracts in professional football

### The decision

The plaintiff is a licensed football player and has been employed by the club (i.e. the defendant) since 01 July 2009. The plaintiff's employment contract was last renewed on 01 July 2012 and extended by another two years until 30 June 2014. The plaintiff played in ten of the first eleven top league (*Bundesliga*) games of the 2013/2014 season. From the 17th match day, the defendant allocated the plaintiff exclusively to the training and match schedule of the 2nd team (regional league - *Regionalliga*). At the end of the 2013/2014 season, the club then made a final decision not to renew the employment contract any more. The continuation clause contained in the contract which provided for an automatic contract renewal in case of a certain amount of appearances in the Bundesliga did not apply either. The Plaintiff had not played in enough Bundesliga games.

In court, the plaintiff claimed that his employment contract had not been validly agreed as a fixed-term contract. According to the plaintiff, there was no objective reason for the fixed-term contract as required pursuant to Sec. 14 para. 1 of the German Act on Part-Time Work and Fixed-Term Employment Contracts (*Teilzeit- und Befristungsgesetz, TzBfG*). Additionally, due to the previous fixed-term employment contract, the prohibition of a prior fixed-term employment pursuant to Sec. 14 para. 2 TzBfG also applied. The plaintiff was thus of the opinion that a permanent employment relationship was in place between him and the defendant. In addition, the plaintiff also asserted a claim for damages. As he had been allocated to the match and training schedule of the 2nd team, he had lost out on bonuses and on the chance to an automatic renewal of the contract. In contrast to the previous instance court, Rheinland-Pfalz regional labour court (LAG Rheinland-Pfalz) rejected the claim in all aspects.

In deviation from the opinion held by the previous court, LAG Rheinland-Pfalz accepted the “unique nature of the work performance” as an objective reason. The LAG held that the unique nature of the performance due under an employment contract as a professional footballer made the

fix-term nature of the contract legally admissible in this specific case. The defendant's decision to allocate the plaintiff to the match and training schedule of the 2nd team was also legally sound. Within the framework of the right to give instructions, the defendant was free to decide not to let the plaintiff participate in the active training and match schedule of the *Bundesliga* team and thus effectively deny him the chance to have his contract automatically renewed and to earn bonuses.

### Practical consequences

Pursuant to the legislative concept, fixed-term contracts should be an exception. A fixed-term employment must thus be based on an objective reason or, if no such reason exists, is only admissible under very strict conditions. The main intention behind the requirement of an objective reason is to avoid chains of fixed-term contracts where the employee is employed on the basis of subsequent fixed-term contracts over a long period of time. The objective reason must be present at the time when the contract is concluded. If there is no objective reason, the fixed-term contract will be subject to the strict rules of Sec. 14 para. 2 TzBfG for fixed-term contracts without objective reasons.

The LAG's decision means that for the time being, there will be no dramatic consequences for transfers of professional footballers. Otherwise, it would have become almost impossible for clubs to reduce their squads which grow with every new signing. At the same time, players – just like “normal” employees – could have left their employer and joined another club at any time observing the statutory notice periods. Football has dodged that bullet... for now. The case will go to extra time. The plaintiff has filed an appeal with the German Federal Labour Court (*Bundesarbeitsgericht*).



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## 6

## Decision 6: Düsseldorf labour court (*Arbeitsgericht, ArbG*) of 17 December 2015 – 7 Ca 4616/15

### Dismissal based on obesity is inadmissible

#### The decision

The plaintiff, who had been working for the defendant as a landscape gardener for 30 years, was 1,94 m (6' 4") tall and weighed about 200 kg (31st 7lb). The defendant had asked the plaintiff in several personal appraisal meetings to permanently and significantly lose weight in order to be able to perform his work. Consequently, the plaintiff participated in a patient training once a week to reduce his weight. The defendant released the plaintiff from his work duties on these occasions to enable him to participate.

When it turned out that there was no improvement also after the plaintiff had completed the training, the defendant terminated the employment relationship with the plaintiff observing the contractual notice period. The dismissal was partly based on the assertion that the plaintiff was no longer able to properly perform his duties under the employment contract due to his body weight. The defendant claimed that due to his significant body volume, that plaintiff had been unable to operate the steering wheel of the small truck used for his work safely in traffic. Additionally, some of the work machines were only approved for a maximum weight of 130 kg (20st 7lb) and the protective clothing required for the plaintiff's work did not exist in his size. According to the defendant, the fact that the plaintiff worked slowly had also led to customer complaints and deductions from invoices. However, the plaintiff successfully challenged the contractual notice of dismissal (*ordentliche Kündigung*) with his action against unfair dismissal. In the proceedings, the employer neither succeeded in providing evidence of a substandard work performance, nor could the employer prove that the plaintiff was unfit and/or incapable to provide the services due under his employment contract. The plaintiff's other claim for a compensation payment pursuant to the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) for discrimination due to a disability was dismissed by the court.

#### Practical consequences

A person-related dismissal on grounds of underperformance or poor performance is only admissible if the employee cannot fulfil the requirements of his job or if the employee does not have the qualification or capabilities (any more) to provide his work services due under the contract in the future. The dismissal is socially justified if it must be assumed that there will be a massive imbalance between the service provided and the consideration received in return, which will significantly compromise the interests of the company and imposes an unacceptable burden on the employer.

The obesity of an employee as such does not constitute a reason for dismissal. It can only serve as a reason for dismissal if, due to the obesity and in view of a negative prognosis in this respect, the employee will not be able to provide the services due under his employment contract again in the future. If this has a significant negative impact on the interests of the company which the employer cannot reasonably be expected to accept, a person-related dismissal may be justified.

A person is disabled under the AGG inter alia if they have a physical impairment that has a long-term negative effect and substantially limits their ability to do normal daily activities. Pursuant to a ruling of the ECJ, obesity can be considered a disability if the employee is prevented from fully and effectively participating in professional life. The plaintiff, bearing the burden of proof and evidence in this respect, was unable to prove this as he had himself declared in the course of the proceedings that he was very well able to provide the performance due under his employment contract.



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# In brief

1

## BAG decision of 10 May 2016 – 9 AZR 347/15 Entitlement to a smoke-free workplace in a gambling casino

Very recently, the BAG has decided that the – general – entitlement to a smoke-free workplace may be limited. The plaintiff works as a croupier in a casino. In that casino, he works two days a week in a separate smoking area which is physically separated from the other areas of the casino and equipped with a ventilation system. On the other days, he works in the non-smoking area. The judges denied the plaintiff an exclusively smoke-free workplace. Due to an exemption granted by the Hessian Non-Smokers' Protection Act (*Hessisches Nichtrauchererschutzgesetz*) which allows smoking in casinos, the defendant was entitled to create a smoking area. The defendant must nevertheless ensure that the health hazard is kept to a minimum. The defendant complied with this requirement by separating the smoking area as described above and by only having the plaintiff work in the smoking area on two days per week.

2

## BAG decision of 22 March 2016 – 1 ABR 14/14 Corporate integration management (CIM) and co-determination

In a recent decision, the BAG looked at the co-determination rights of the works council in the context of corporate integration management (CIM). Pursuant to the legislative concept behind Sec. 84 of the German Social Security Code IX (*Sozialgesetzbuch Teil IX, SGB IX*), CIM is to be carried out if an employee is incapacitated for work for more than six weeks within one year. Corporate integration management principally aims at overcoming the incapacity for work and preventing future periods of incapacity. According to the BAG, pursuant to Sec. 84 para. 2 SGB the works council only has a co-determination right regarding the CIM during the process of devising procedural principles. The works council has no co-determination right regarding the measures taken to implement the CIM in the specific case. The specific implementation of such measures is entirely the responsibility of the employer. If – as in the case decided by the BAG – a conciliation committee decides that the works council is also to be involved in the implementation of specific measures, this is not covered by the statutory co-determination right. The employer thus ultimately successfully challenged the validity of the conciliation committee's decision.

3

## LAG Hamm decision of 21 January 2016 – 18 Sa 1409/15 The employer is not liable in case of theft of luxury items kept at the workplace

LAG Hamm was presented with a particularly peculiar case. An employee raised a claim for damages in the amount of EUR 20,000 against his employer. The employer explained that he had "temporarily stored" a jewellery case – which he intended to take to a safe-deposit box in a bank – for several days in a mobile pedestal in his office. Shortly afterwards, the pedestal was broken into at night and the jewellery stolen. Although criminal investigation showed that a master key had been stolen from another employee a few days earlier which meant that the perpetrators could easily open the employee's office, the claim for damages for the lost jewellery was nevertheless unsuccessful. The employer was not obliged to provide any protection against loss or damage for items which are not related to the employment relationship and which were brought to the office without the employer's consent and/or knowledge..

4

## BAG decision of 20 April 2016 – 7 ABR 50/14 The works council is not entitled to a separate internet and telephone access

The BAG held that the works council is generally not entitled to a separate telephone and internet access. Pursuant to the provision of Sec. 40 para. 2 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), the employer had initially provided the works council with a telephone line and internet access. The telephone line – just like all other lines at the employer's premises – was connected to the central phone system. That system in particular also enabled a person- and connection-based data analysis. The internet access at the employer's premises was also provided via a central server whose filter automatically blocked objectionable websites and enabled the protocoling and analysis of browser access. Due to this abstract possibility to exert control, the works council felt that it was impaired in its freedom to perform its tasks pursuant to the works constitution provisions. The works council therefore demanded the installation of a separate telephone and internet access without such control possibilities. In line with the rulings of the two previous instances, the BAG dismissed this claim. A purely abstract risk of a misuse of control possibilities by the employer did not lead to a requirement of a separate telephone and internet connection for the works council.

5

## BAG decision of 17 March 2016 – 8 AZR 501/14 Preliminary ruling concerning the interpretation of the AGG in line with EU law

It was not so long ago that the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) came into force causing enormous political controversy – its area of application might now see a drastic expansion. In the present case, the defendant, a social welfare organisation of the Protestant Church in Germany, had specified a protestant confession as a hiring criterion for a job vacancy. An applicant without religious affiliation, who had not been invited for a job interview regarding the advertised vacancy, consequently claimed financial compensation based on a violation of the principle of non-discrimination. The BAG, addressed as the final instance, used a preliminary ruling procedure to submit a number of questions to the European Court of Justice (ECJ), including the question whether national provisions (in this case Sec. 9 para. 1 alt. 1 AGG), pursuant to which a unequal treatment due to religion or secular beliefs may be admissible within narrow limits, must remain inapplicable in the individual case. If national provisions allowing for an unequal treatment in exceptional cases are declared inapplicable by the ECJ, this is likely to lead to a fundamental paradigm shift which would ultimately also result in an increased liability risk for employers.







DEM DEUTSCHEN VOLKE

# Political developments

## 1

### Here we go again: Second draft bill amending the German Personnel Leasing Act (*Arbeitnehmerüberlassungsgesetz, AÜG*)

After the first draft bill amending the German Personnel Leasing Act as well as other statutes met with harsh criticism – particularly from the employers' associations – the German Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*) now seems to have recognised the concerns.

The second and the third draft bill at least take some account of the concerns of businesses regarding the alleged over-regulation of temporary employment and of contracts for work and services (*Werkverträge*). Specifically, the intended amendment in the newly to be introduced Sec. 611a of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) – a catalogue of criteria to differentiate between employment contracts on the one hand and service contracts/contracts for work and services on the other – has been abandoned completely. Only the definition of the term "employee" as developed by the courts is to be maintained.

The complete deletion of the catalogue of criteria again offers companies some freedom regarding the use of external staff – a freedom which had seemed lost. The lack of a statutory catalogue of criteria is likely to make it harder in general to justify the assumption of a misuse of contracts for work and services.

## 2

### Increased pay equality between women and men – draft bill to close the gender pay gap

Last December, the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (*Bundesministerium für Familie, Senioren, Frauen und Jugend*) published a draft bill to achieve more pay equality between women and men. The draft bill principally aims at sustainably closing the gender pay gap amounting to an average of 22% which statistics show to exist in Germany between women and men. The intention is to promote effective equality and to achieve equal pay between women and men.

The main cornerstones of the draft bill are as follows:

- Introduction of a statutory right to equal pay
- Introduction of individual rights to obtain information for employees
- Duty to specify the minimum salary offered in job advertisements
- Introduction of statutory provisions which render contractual clauses banning employees from disclosing their own salary null and void
- Duty to carry out procedures to monitor and create equal pay within the company to be imposed upon businesses with more than 500 employees
- Introduction of a special reporting duty for such businesses to promote women and equal pay

The act is intended to come into force at the end of 2016. In view of the ambitious goals and massive consequences in some areas, this schedule might be quite a challenge.

# Global Mobility

## Secondments to and from Germany



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Adidas, BMW, Deutsche Bank, Munich Re, Siemens – some of the most renowned companies in the areas of production, industry and financial services, which are known to consumers and companies throughout the world. All these companies were founded in Germany and are now operating on a global scale. But not only DAX companies are operating globally; also German small and medium-sized companies are increasingly affected by the internationalisation.

Specifically from a legal perspective, there are more and more questions which have a cross-border background, and this not only in connection with company sales and acquisitions.

The cross-border exchange of goods and services entails a variety of other legal issues; the increasing number of secondments of employees is particularly striking. The reason is not only the implementation of projects in other countries, but also the transfer of know-how and expertise as well as the further development of executives by gaining experience in a foreign country. The duration of the secondments varies from a couple of weeks up to several years.

If an employee is seconded from or to Germany, this involves a number of additional questions relating to labour law, residence-related issues as well as tax and social security law matters which each concern at least two countries.

A proper planning and contractual design are thus of particular importance, so that the secondment becomes a success both for the employer and for the employee. Some of the questions which may arise in this respect are for example:

- How does the secondment have to be structured from a contractual perspective? Does the existing employment relationship continue to exist and/or does an (additional) contract have to be concluded with the foreign company?
- Can the employee remain in the German social security system?
- Does the employee have to pay taxes on his entire earnings in the country of the foreign company? What additional tax burdens or tax savings should the employee expect?
- Where and in which amount does wage tax have to be paid and who bears possibly higher tax expenses?
- Which company can deduct which amounts of the costs of the employee as operating expenditure?
- Does the employee need a residence/employment permit? Can the employee take his family with him?
- How can the employee be supported in practical terms, e.g. assisting him with the income tax return or finding accommodation, but also with preparing for cultural differences?

In addition, time and again, there are problems in connection with the end of the secondment and the return of the employee, e.g. if no equal position is available or if the secondment has to be terminated prematurely (be it due to difficulties with the employee or for reasons related to the business).

All these issues should be taken into account when preparing the secondment of an employee.



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In order to support our clients specifically with respect to secondments, Eversheds compiled a team of experts from our entire global network who provide advice on all relevant local and cross-border questions, i.e. on labour law, tax and social security law or residence-related matters. This helps us to offer quick and uncomplicated advice to our clients and enables us to ensure from the outset that we will find the perfect solution for your company.

Also in financial terms, we offer different models specifically tailored to our clients' needs, e.g. a fixed price for the provision of first advice or a helpline which can be easily used by persons in charge or persons responsible in the company.

Please contact us for any further information on this topic.

For further information, please visit one of our Eversheds trainings regarding this topic:

**Munich** 05 October 2016

**Hamburg** 03 November 2016

**Berlin** 23 November 2016

**Time:** 09:00 a.m. – 01:00 p.m.

**Cost:** 249 € + VAT

You can find more detailed information under [eversheds.de/veranstaltungen](http://eversheds.de/veranstaltungen).



# Labour law in practice



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Eversheds Munich

## Tax treatment of short-term group-internal employee secondments between Germany and Austria

As regards the tax treatment of cross-border employee secondments between Germany and Austria, it must be distinguished between short-term group-internal employee secondments and the commercial posting of personnel. The background is a conflict between the two countries regarding the interpretation of the double tax treaty between Germany and Austria.

### 1. Secondment from Germany to Austria

In case of a short-term group-internal secondment of employees from Germany to Austria and continuance of the place of residence in Germany, a double taxation can only be avoided – in the current legal situation – if a mutual agreement procedure takes place between the competent German and Austrian tax offices. The mutual agreement procedure serves the purpose of defining tax claims between two countries in the individual case.

This is necessary due to the fact that the interpretation of the double tax treaty between Germany and Austria by the Austrian tax authorities contradicts the understanding of the German tax authorities. Pursuant to the German tax authorities, a simplification rule applies to the effect that employee secondment periods not exceeding three months are subject to a rebuttable presumption that, as the employee will not be fully integrated, the receiving company is not to be regarded as the economic employer. Accordingly, the taxation of wages has to be effected in Germany.

The Austrian Federal Ministry of Finance, on the contrary, is of the opinion that secondments of employees within a group

to Austria always constitute a change of employer. As a result, an immediate taxation right applies in Austria. From this point of view, the domestic Austrian user company always is the economic employer in case of group-internal secondments of employees. Hence, as regards group-internal secondments of employees to Austria, a voluntary payroll tax deduction must generally be made in Austria. If payroll tax is not deducted on a voluntary basis, a tax deduction of 20% applies to the portion of the salary relevant for the calculation of the secondment fee. Austria does not provide for an exemption regulation, e.g. with respect to short-term secondments of employees. In these cases, however, Germany still assumes that the German company seconding the employee remains the employer and that wage tax therefore has to be withheld in Germany. Hence, a double taxation can only be avoided if a mutual agreement procedure takes place between the competent German and Austrian tax offices, in order to resolve this conflict in the individual case.

### 2. Secondment from Austria to Germany

In the reverse case, i.e. in case of a secondment from Austria to Germany – irrespective of whether group-internal or commercial –, a change of employer to the German employer, from the Austrian perspective, automatically takes place with effect from the first working day, but only insofar as the German company can also be regarded as the employer from a German perspective. This, however, is not the case regarding a group-internal secondment of employees since also in this respect a simplification rule applies to the effect that employee secondment periods not

exceeding three months are subject to a rebuttable presumption that, as the employee will not be fully integrated, the receiving company is not to be regarded as the economic employer. Austria thus taxes the employee seconded from Austria since he is not taxed in Germany.

### 3. Commercial posting of personnel

The situation is different for the commercial posting of personnel. In this respect, Art. 15 para. 3 of the DTT Germany-Austria (double tax treaty) applies. According to this Article, the 183-days rule of the double tax treaty continues to apply. Pursuant to this rule, the right to levy tax on the wage depends on the duration of the secondment. If the 183-days deadline is exceeded, the right of taxation is generally conferred to the country to which the employee was seconded; up to that point in time, it remains with the country from which an employee was seconded.



# A look across the border



**Mag. Silva Palzer**  
Partner  
Eversheds Vienna

## Interview with Silva Palzer, Partner in the Eversheds office in Vienna

### Where do you live?

Gießhübl near Vienna

### What was your first job?

Tutoring kids in English

### For how long have you been working at Eversheds?

Since 2003

### How did you come to work in the field of labour law?

A keen interest and enthusiasm for the job.

### What makes labour law and working in Austria so special?

It is always a challenge to protect and advise employers as best as possible within an employee-friendly work environment.

### Which advice would you give to a German entrepreneur who wants to conduct business in Austria for the first time?

Please do not rely on the jurisdictions being quite similar; there are indeed significant differences.

### Which topics currently dominate Austrian labour law?

In 2016, there were numerous changes, such as more transparency of all-in contracts, stronger limitations regarding competition clauses, alterations regarding the reimbursement of training costs as well as improvements regarding maternity and paternity leave. A major topic is, however, the fight against wage and social dumping and the associated liability traps.



## Cross-border use of personnel between Germany and Austria

In a globalised world, international business relations are the order of the day. The economic inter-relations within the European Union are a prime example for this – not only due to the economic freedoms guaranteed by the EU. Within the context of international business relations, the cross-border use of personnel is a particularly relevant topic. In due consideration of the legal situation in Austria, the legal bases and challenges will be shown concisely in the following.

According to Austrian law, a distinction must be made in general between two different forms of cross-border use of personnel.

If the cross-border use of personnel takes place temporarily and within the framework of the fulfilment of a contract between a company having its head office in Germany (as the contractor) and a company having its head office in Austria (as the principal), this is regarded as a secondment. The relationship between the companies involved will mostly concern the fulfilment of contracts for work and services.

However, the cross-border use of personnel can also take place in the form of employee leasing. This can specifically be the case if the employees used are – in contrast to a mere secondment – integrated into the operations of the Austrian company. Accordingly, the employees would for example have to submit to the instructions given by the “hiring company” and/or would be subject to the latter’s right to give instructions.

It is characteristic for both forms that, for the duration of the cross-border use of personnel, an employment relationship is in place between the company that seconds and/or leases an employee and the respective employee, and that the employee returns to the country from which he was seconded after a certain period of time.

In order to be able to assess which form of cross-border personnel use exists, the designation of the contract between the companies involved is not relevant. The true economic content of the respective use of personnel alone is relevant and decisive. This distinction is so important because the leasing of personnel – in contrast to a secondment – is subject to the strict labour-law provisions of the Austrian Personnel Leasing Act (*Arbeitskräfteüberlassungsgesetz, AÜG*).

In addition, with respect to the employees used, it must also be distinguished between residents of an EU member state and residents of third countries. Furthermore, all parties involved have to comply with and observe a number of trade law regulations and reporting duties. However, in the area of trade law, there are exceptions regarding group-internal cross-border employee leasing.

Due to the different legal provisions of at least two countries, the cross-border use of employees creates a complex situation under labour law. Moreover, there are other legal obligations which influence secondments and personnel leasing in practice. From a company perspective, it is thus advisable in any case to seek competent legal advice in due time.

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22.09.2016 (Munich)  
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## Upcoming Breakfast Seminars

22.06.2016  
07:30 - 09:00 a.m.  
(Munich)

14.09.2016  
07:30 - 09:00 a.m.  
(Munich)

07.12.2016  
07:30 - 09:00 a.m.  
(Munich)

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