

Labour and Employment Law

Newsletter



Read all about it

Labour and employment law update

Topics

Jurisdiction/Decisions

1. Preliminary ruling procedure regarding the forfeiture of holiday claims
2. Co-determination regarding the employer's presence on Facebook
3. Continued payment of salary in case of in vitro fertilisation
4. Transfer of wording responsibility for reference letters is possible

In brief

1. Hitler salute justifies termination without notice
2. Delayed salary payment: lump-sum compensation of EUR 40.00
3. Mass dismissal protection for persons on parental leave
4. Working time of a works council member

Political developments

1. Reform of the Personnel Leasing Act entered into force on 01 April 2017
2. German Federal Cabinet introduces Act on Transparency of Pay for passage through Parliament
3. Act on Flexible Pensions to enable an individual start into retirement
4. Women's quota in supervisory boards – an interim conclusion
5. Wage tax treatment of meals for employees
6. Delay regarding the reform of the Maternity Protection Act
7. Changes to the law regarding severely disabled persons

Practical examples

Employment and social media – a practical overview

Social media and data protection in the context of employment

New mindfulness – part of a modern health management or more?

Pension promises in the low-interest environment

Column

It all ends with pensions

News

**Dear clients,
dear business partners,**

As the head of the German employment and labour law practice group, with the present edition of our newsletter, I would like to inform you in the name of all Partners and lawyers about the latest important employment and labour law decisions. This edition again covers the entire range of relevant topics – from employee co-determination to current decisions on holiday law.

The current edition of our newsletter focuses on the topic “Social media and employment”: In view of a constantly developing globalisation and digitalisation in the 21st century, social media have become an integral part of our everyday life. The unstoppable triumph of social networks does no longer spare employment relationships and plays a more and more important role in the relationship between employer and employee. Hence, not surprisingly, the local labour courts are also increasingly faced with Facebook and similar networks. We have compiled an informative overview about this topic in the middle of this newsletter, going into further detail on data protection law aspects.

In the section “Political developments”, we would like to inform you about different developments and current plans – just on time for the turn of the year, there have been a lot of relevant changes in employment and labour law as well as in social law. In this context, our special focus is on the new German Personnel Leasing Act (*Arbeitnehmerüberlassungsgesetz, AÜG*). As the reformed act enters into force on 01 April 2017, our expert Dr. Rolf Kowanz again briefly explains the most important changes as well as the impacts relevant in practice. In addition, we would like to give a current interim conclusion on the women’s quota following the Act on equal participation of women and men in executive positions.

I would like to thank you for your interest in our newsletter and hope that with the selected topics we can give you a sound overview of our daily work in our employment and labour law practice group. At this point, I would also like to draw your attention to our upcoming events – you can find all dates on the rear page of the present newsletter.

We hope you will enjoy reading this newsletter.



Dr. Stefan Kursawe
Partner
Eversheds Sutherland Munich
Lecturer at the University of Leipzig

Jurisdiction/Decisions

1

BAG decision of 13 December 2016 – 9 AZR 541/15 (A) Preliminary ruling procedure regarding the forfeiture of holiday claims

The decision

In the present case, the parties argued about the financial settlement of outstanding residual holiday claims. In the period between 01 August 2001 and 31 December 2013, the plaintiff was employed by the defendant as a scientist based on several fixed-term employment contracts. By letter dated 23 October 2013, the plaintiff was informed about the termination of the employment relationship and asked to take any outstanding residual holidays. Subsequently, the plaintiff took two days of holiday but at the time when the employment relationship was legally terminated, his undisputed outstanding residual holidays still amounted to a total of 51 days.

However, the employer refused the asserted financial settlement of the outstanding residual holiday claims stating that, in view of the termination of the employment relationship, the plaintiff would have had to take his holiday in due time. There was no obligation on the part of the employer to unilaterally and bindingly determine

the exact period of the holiday for the respective employee. Hence, any residual holiday claims had been forfeited without compensation. According to the plaintiff's opinion, the asserted claim for settlement of outstanding holiday claims is based on the fact that he could not take his holiday due to urgent operational needs. In addition, the employer was obliged to grant holiday in due time, irrespective of a previous request. Hence, the outstanding holiday claims could not have been forfeited without compensation. Due to the legal termination of the employment relationship, the original holiday claim had now changed to a financial claim for settlement.

The two previous instances decided in favour of the plaintiff, i.e. the financial settlement of the holiday claims. In the appeal proceedings, the German Federal Labour Court (*Bundesarbeitsgericht, BAG*) decided for a preliminary ruling procedure before the European Court of Justice (ECJ) due to several questions regarding the interpretation of provisions under European law.



Practical consequences

The decision of the ECJ will considerably impact court decisions on claims for financial settlement of holidays, which are often controversial in practice. The central starting point of the initiated preliminary ruling procedure were specific questions regarding the interpretation of individual provisions under Art. 7 of the Directive 2003/88/EC concerning certain aspects of the organisation of working time as well as Art. 31 of the Charter of Fundamental Rights of the European Union.

According to the judges of the BAG based in Erfurt, it was in particular not sufficiently clear to which extent the central regulation of the national holiday law pursuant to Sec. 7 of the German Federal Leave Act (*Bundesurlaubs-gesetz, BUrlG*) (still) complies with these European regulations. On the one hand, the question whether the employer is obliged to unilaterally determine the respective holiday also without a prior application or request of the employee was relevant for the decision. On the other hand, it was relevant whether, pursuant to the provisions under European law, a forfeiture of the statutory (minimum) holiday claims can also be excluded if the employee was in the position to actually take his holiday.

Practical tip

We would recommend employers to keep an eye on or to avoid the adding up of holiday claims (i.e. by using electronic time recording systems and including respective provisions in employment contracts) and to proactively initiate and instruct (if necessary) the using up of residual holidays. In this respect, particular attention should be paid to (chains of) fixed-term employment contracts.



Coconina Langer

Associate

coconinalanger
@eversheds-sutherland.de
+49 89 54565 193

2

BAG decision of 13 December 2016 – 1 ABR 7/15 Co-determination regarding the employer's presence on Facebook

The decision

The employer – an operator of transfusion centres and blood donation services with approx. 1,300 employees throughout the entire group – maintained a publicly accessible Facebook account. The management of the Facebook presence, i.e. the general care of the account as well as the uploading of relevant information, was performed by a total of ca. 10 employees using a general administrator access.

On the Facebook page, the users of the social network were also able to add their own postings which could be seen, shared or liked by other users. Some of the users posted comments on Facebook which criticised the performance and behaviour of individual employees during blood donation appointments. The medical staff was partly accused of not having properly carried out the required medical examinations as well as the blood sampling. During the blood donation appointments, the medical staff – in general at least one physician and up to seven other employees – wore name plates.

Subsequently, the group works council of the employer claimed that the creation and operation of the Facebook page were subject to co-determination. The BAG shared this opinion to a great extent. It agreed to a co-determination right of the group works council when the employer decides to directly publish any postings.

Practical consequences

If an employer allows the users of social networks to publish comments on the company's Facebook page, the design of this function and/or the decision regarding a direct publication of the comments may generally be subject to the works council's co-determination. If the respective comments of the Facebook users refer to the behaviour or performance of employees this, according to the opinion of the deciding court, constitutes a supervision of employees by a technical system pursuant to Sec. 87 para. 1 no. 6 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*).

The specific practical consequences are not yet foreseeable with sufficient certainty. At first sight,

an obvious solution to avoid a co-determination right of the works council would be to no longer offer a comment function. However, this possibility to interact constitutes a major factor of the success of social networks.

Practical tip

In the future, the specific design of a company's Facebook presence should not only be based on marketing aspects. As a direct consequence of the court's decision, works constitution law aspects must also be considered now. It should thus be considered very carefully whether a company ultimately "accepts" a co-determination right of the works council in return for a more catchy or particularly interactive Facebook presence.



Bernd Pirpamer
Partner

berndpirpamer
@eversheds-sutherland.de
+49 89 54565 141

3

BAG decision of 26 October 2016 – 5 AZR 167/16 Continued payment of salary in case of in vitro fertilisation

The decision

The BAG had to decide upon claims for continued payment of salary of an employee. The plaintiff – born in 1972 – worked as a kindergarten teacher in a day care centre for children. Due to the limited fertility of her partner, the woman underwent an in vitro fertilisation in order to fulfil her desire to have a child. In this context, she presented several certificates of incapacity for work to her employer for different periods lasting several weeks in 2014. The employer thus made continued salary payments.

It was not until spring 2015 that the employer expressed its suspicion that the employee's periods of absence were culpably caused by the employee herself due to her in vitro fertilisations and that thus there was no obligation to make continued payments of salary. The employer corrected this by setting the continued salary payments off against the plaintiff's salary claims. The plaintiff, however, considered these deductions to be unjustified and filed an action for settlement of her unpaid salary claims. With respect to the continued payment of salary, it also had to be considered that the physicians in charge, due to medical interventions within the framework of in vitro fertilisations and in order to protect unborn life, provably issued the plaintiff respective certificates of incapacity for work.

The plaintiff mainly succeeded with her action for payment in both previous instances. However, the employer's appeal led to the annulment of the disadvantageous judgement and the case was referred back to the regional labour court for a new hearing and decision due to insufficiently established facts.

Practical consequences

The primary aim and purpose of the statutory claim for continued salary payment is the financial protection of employees in case of incapacity for work due to an illness for which the employee is not responsible. Pursuant to Sec. 3 para. 1 sent. 1 of the German Continued Payment of Wages and Salaries Act (*Entgeltfortzahlungsgesetz, EFZG*), a claim for continued payment of salary is thus excluded if the employee was responsible for the incapacity for work.

Within the meaning of Sec. 3 para. 1 sent. 1 EFZG, an employee generally acts wrongfully if he or she considerably deviates from a behaviour which could be expected of a person with the usual amount of common sense in his or her own interest. In this respect, the own interest exclusively refers to the employee's interest to maintain his or her health and to avoid illnesses which could lead to an incapacity for work – the fulfilment of the desire to have a child solely concerns one's personal life planning and is thus not subject to the own interest within the meaning of the EFZG.

According to these principles, in case of an in vitro fertilisation, a wrongful act of the employee generally is to be assumed if an illness leading to an incapacity for work intentionally and foreseeably occurs exclusively due to such fertilisation or if there is a risk of illness because the interventions within the framework of the in vitro fertilisation were not made by a physician in accordance with recognised medical standards or not as instructed by a physician.

Practical tip

If the employer receives detailed information about an employee's incapacity for work due to an illness, it is recommended to carefully check whether the incapacity is based on the employee's own fault. A wrongful act which excludes a claim is possible, for example also in case of an incapacity for work as a result of an accident of an employee who was under the influence of alcohol.



Dr. Susanne Giesecke
Partner

susannegiesecke
@eversheds-sutherland.de
+49 89 54565 210

4

Hamm Regional Labour Court, decision of 14 November 2016 – 12 Ta 475/16

Transfer of wording responsibility for reference letters is possible

The decision

In a previous legal dispute, the two parties to an employment contract agreed in a court settlement *inter alia* on the granting of a reference letter. The employee was entitled to submit a draft reference from which the employer was only allowed to deviate for good cause.

Subsequently, the employee submitted a draft reference he had drawn up. However, the employer made considerable changes to this draft. In addition to the use of synonyms (e.g. “at all times” instead of “always”), the wording of the employee was also exaggerated in terms of content (e.g. “tasks with very exemplary commitment” instead of “tasks with exemplary commitment”). Furthermore, the employer completely changed the performance assessment: Instead of the grade “very good”, the employer wrote “If there was a grade better than very good, we would assess him with such grade”. The intended statement of regret due to the employee leaving the company, however, was deleted by the employer without substitution.

In the employee’s opinion, the changes to the draft created a mocking and ironic undertone and thus ridiculed the entire reference letter. Hamm Regional Labour Court also agreed with this argumentation and confirmed the decision of the previous instance court which had imposed a coercive fine on the employer in compulsory enforcement proceedings or, alternatively, the imprisonment of the employer’s managing director.

Practical consequences

In a court settlement, the responsibility for the wording of a reference letter can generally be effectively transferred to the employee. Depending on the specific wording of the provision agreed in the court settlement, in the individual case this may mean that the employer cannot deviate from the submitted draft reference at all or only for good cause.

When using synonyms or other additions without changing the semantic content, it will be difficult to prove the existence of such a good cause. Any “upward” deviations – which are allegedly made

to the advantage of the employee – are not easily possible either. This applies in particular if an impartial reader can recognise an ironic and unserious character due to the overall impression of the reference letter as well as the variety of exaggerated wording. In this case, the obligation to provide a reference letter pursuant to the court settlement is not fulfilled (anymore). In the worst case, the employer will be subject to compulsory execution resulting from the court settlement.

Practical tip

A court settlement regularly also contains regulations regarding a reference letter. If the employer effectively transfers its responsibility for the wording of the reference letter to the employee, a deviation from the submitted draft reference – if at all – is only possible to a very limited extent or if a good cause exists. If no such good cause exists, the employer may risk partly draconic penalties if it deviates from the submitted wording.



Frank Achilles
Partner

frankachilles
@eversheds-sutherland.de
+49 89 54565 275

In brief

1

Hamburg Labour Court, decision of 20 October 2016 – 12 Ca 348/15

Hitler salute justifies termination without notice

After a verbal dispute, an employee of Turkish origin greeted the chairman of the works council with the Hitler salute and said to him “*You are a Heil, you Nazi*”. The employer subsequently terminated the employment relationship with the employee of Turkish origin without notice. In the subsequent unfair dismissal proceedings, Hamburg Labour Court confirmed the legal validity of the dismissal: The Hitler salute by raising the out-stretched arm constitutes a good cause for a dismissal. Such a gesture constitutes a severe insult towards the respective recipient which is not acceptable. The court considered the employee’s argument that he could not be accused of German-nationalistic thoughts due to his Turkish origin to be irrelevant.

2

Cologne Regional Labour Court, decision of 22 November 2016 – 12 Sa 524/16

Delayed salary payment: lump-sum compensation of EUR 40€

According to Cologne Regional Labour Court, the newly introduced regulation of Sec. 288 para. 5 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) shall apply without any restrictions also with respect to the relationship between employer and employee and generally with respect to claims for payment of salary. If an employer pays the salary late or not the full amount, it is generally obliged vis-à-vis the employee to pay a lump-sum compensation in the amount of EUR 40.00.

3

BAG decision of 26 January 2017 – 6 AZR 442/16

Mass dismissal protection for persons on parental leave

The German Federal Labour Court made a new decision in connection with the statutory mass dismissal protection pursuant to Sec. 17 of the German Protection Against Dismissal Act (*Kündigungsschutzgesetz, KSchG*) and a resulting possible discrimination of persons on parental leave. According to the extended definition of dismissal in case of mass dismissals which has been created by case law, the following has to be considered: The 30-day period pursuant to Sec. 17 KSchG shall also be deemed adhered to with respect to persons on parental leave if, within this period, merely an application for the statutorily required consent to the dismissal for persons on parental leave is submitted to the competent authority. Under this precondition, employees on parental leave are subject to the protective regulations regarding a mass dismissal even if the dismissal was declared only after expiry of the 30-day period as a result of the required official approval.

4

BAG decision of 18 January 2017 – 7 AZR 224/15 Working time of a works council member

In the present case, a works council meeting was to take place at 1:00 pm. In order to comply with the rest period of eleven hours prescribed by Sec. 5 of the German Working Time Act (*Arbeitszeitgesetz, ArbZG*), the works council member who worked on the previous night shift terminated his work earlier on his own authority. Hence, the working hours were initially only credited to the working time account until the (earlier) end of the working time. In the opinion of the BAG, the works council member, however, was entitled to obtain a full credit on his working time account until the regular end of the night shift. Pursuant to Sec. 37 para. 2 BetrVG, works council members may be entitled to be released from their professional activity without a reduction of the salary. This also applies if a required works council activity outside the member's working time makes the performance of the work within the usual working time impossible or unacceptable.

Political developments

1

Reform of the Personnel Leasing Act entered into force on 01 April 2017

A variety of new regulations regarding the use of external staff in companies has entered into force with effect from 01 April 2017.

Identification obligation with effect from 01 April 2017

The supply of temporary workers must be expressly identified as employee leasing in contracts between the hiring company and the supplying company with effect from 01 April 2017 without a transition period. Prior to the supply, the person of the temporary worker must be specified. The supplying company must inform the temporary worker that he or she will perform activities as a temporary worker. In practice, this means that with effect from 01 April 2017, a "provisional blanket permission" of the supplying company to (also) supply temporary workers no longer constitutes a protection. In the future, "bogus contracts for work and services" will lead to fictitious employment relationships with the customer and may result in considerable fines. Companies using external staff under service agreements and contracts for work and services in their own operation thus now have to carefully review their current contractual relationships with their contractual partners.

Limitation of the maximum duration of the supply

In the future, temporary workers will be allowed to work for the same hiring company for a period of maximum 18 months only. However, any periods of supply prior to 01 April 2017 will not be considered – the companies are thus effectively granted a transition period. If the maximum duration of the supply is exceeded, an employment relationship is automatically established between the temporary worker and the hiring company. The temporary worker, however, has the possibility to object in writing to a transfer of his or her employment relationship to the hiring company. However, an objection made

"as a precaution", i.e. already at the beginning of the supply, is deemed ineffective.

Same working conditions as the permanent staff

Another core element is the step-by-step introduction of a claim for equal pay and equal treatment in case of longer assignments of temporary workers. In general, the principle of equal treatment must be mandatorily applied after 9 months following the commencement of the activity of the temporary worker in the hiring company. An exception is provided for collective bargaining agreements with industry supplements which regulate a step-by-step adjustment of the remuneration: In this case, the same amount of pay must be reached after a period of 15 months at the latest.

Our expert Dr. Rolf Kowanz is always available to answer your questions regarding the reformed Personnel Leasing Act.

You will find further information about the essential changes of the Personnel Leasing Act in the special edition "*Brave new (temporary) employment world*" which we already published in autumn 2016 (available online under http://www.eversheds.com/documents/global/germany/de/Arbeitsrecht_Newsletter_Sonderausgabe.pdf).



Dr. Rolf Kowanz
Partner

rolfkowanz
@eversheds-sutherland.de
+49 40 808094 213

2

German Federal Cabinet introduces Act on Transparency of Pay for passage through Parliament

On 11 January 2017, the German Federal Cabinet decided upon a draft bill for the Act on Transparency of Pay (*Entgelttransparenzgesetz, EntgTranspG*). This Act is intended to resolve the empirically established pay disparity between men and women. After the first draft bill of 09 December 2015 met with harsh criticism from business representatives, it was again fundamentally revised and now brought for passage through Parliament in a "milder" version.

A considerable facilitation for companies is that the mandatory operational audit procedure when a certain threshold of regular employees is exceeded, which was provided for in the first draft bill, has been cancelled and that now there will merely be a facultative audit procedure starting from a threshold of 500 employees.

In addition, the works council no longer has an own review entitlement. Instead, in case of the assertion of an individual entitlement to information (which exists from a threshold of 200 employees) the works council will be involved in the information proceedings. The individual information proceedings can now be specified by the employer at its own discretion. Moreover, employers that are bound to or apply collective bargaining agreements can decide in case of an employee's request for information whether the "contact persons for the compliance with the principle of equal pay" indicated by the parties to the collective bargaining agreement carry out such audit procedure.

The employer now has three months (instead of previously one month) to provide the information and it does no longer have to indicate the statutory or tariff-related minimum pay in job advertisements. Finally, in case the company applies pay regulations under a collective bargaining agreement, an assumption of appropriateness exists with respect to the different remuneration.

However, companies which regularly employ more than 500 employees and which are obliged to submit a management report, will still have to provide a report on the equal treatment and equality of pay within the framework of their annual report. This report has to describe measures for the promotion of the equal treatment of women and men and the respective impacts, measures for ensuring equality of pay for women and men and the fundamental pay regulations and work assessment procedures of the respective companies. Companies not bound to or applying a collective bargaining agreement and companies in which the works council has not declared in writing or in text form that the employer applies pay regulations under a collective bargaining agreement have to submit such a report every three years. All other employers only have to do so every five years.

Despite the milder version of the original draft bill, the adoption of the Act will thus impose a clearly higher administrative burden on companies. It has to be expected that the Act will be adopted still in this legislative period.



Stephan Dunkhorst
Counsel

stephandunkhorst
@eversheds-sutherland.de
+49 89 54565 104

3

Act on Flexible Pensions to enable an individual start into retirement

With the new Act on Flexible Pensions, employees shall have the opportunity of a more flexible start into retirement from 2017. The company can thereby effectively benefit longer from the know-how of older employees and their far-reaching experience. In this context, the act creates a partial pension which can be flexibly and individually combined with part-time work. In order to create an incentive for employees to work longer than until the date when they reach the statutory retirement age, the annual supplementary income threshold (which is exempt from taxation) shall also be significantly increased. At the same time, mechanisms will be created to secure a possible earlier start into retirement.

Employing older employees should also be worthwhile for employers: The separate employer's contribution to unemployment insurance which previously had to be paid for employees who have reached the statutory retirement age and who are thus exempted from insurance contributions shall no longer exist – at least for a limited term until 31 December 2021.

4

Women's quota in supervisory boards – an interim conclusion

The statutory women's quota which was introduced with effect from 01 January 2016 brought the first results: In 2016, the proportion of women in supervisory boards of listed companies subject to full co-determination increased by four percentage points to roughly 27 percent. The statutory requirement of 30 percent was thus almost reached by these companies.

By contrast, the proportion of women in the supervisory boards of the approximately 3,500 companies which are not subject to the mandatory quota increased less significantly. The expected signalling effect of the quota for management boards which are not covered by the act largely failed to materialise. Moreover, some companies appear to take the act very literally: When the 30-percent mark is achieved, the proportion of women comes to a halt.

5

Wage tax treatment of meals for employees

Meals given to employees on working days free of charge or at a reduced price generally have to be assessed, from a tax perspective, with the pro-rated official value of benefits in kind pursuant to the German Social Security Compensation Directive (*Sozialversicherungsentgeltverordnung, SvEV*). The following must be considered with respect to the wage tax treatment of meals for employees with effect from calendar year 2017: Pursuant to the Ninth Regulation for the Amendment of the German Social Security Compensation Directive, the real value for meals granted with effect from calendar year 2017 now amounts to EUR 3.17 for lunch or dinner or EUR 1.70 for breakfast.

6

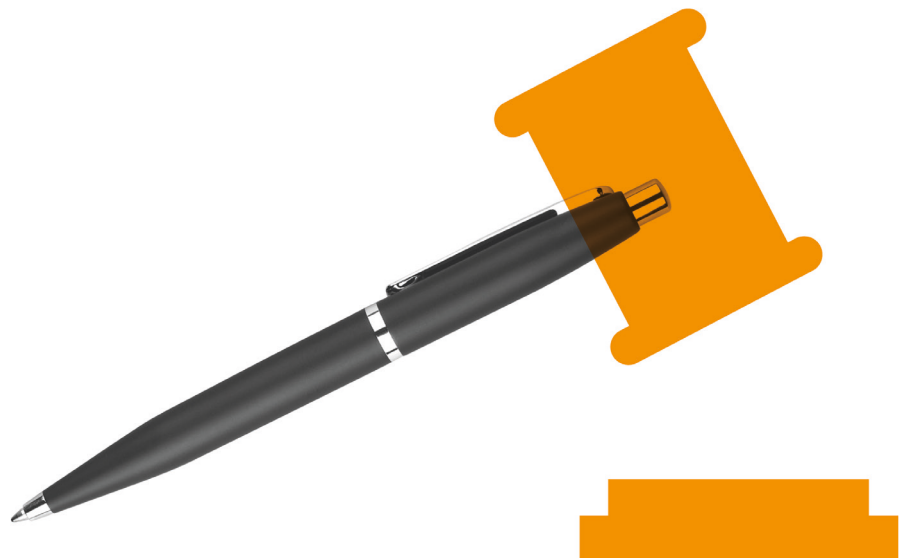
Delay regarding the reform of the Maternity Protection Act

The reform of the Maternity Protection Act – which was to enter into force already with effect from 01 January 2017 – is further delayed. The reform inter alia concerns new regulations regarding the protection against dismissal in case of a miscarriage after the twelfth week of pregnancy, exceptions from the general prohibition of work on Sundays and public holidays for all pregnant and breastfeeding women as well as various notification and interpretation obligations. Furthermore, it is planned to directly integrate the Regulation on the Protection of Mothers at the Workplace (*Verordnung zum Schutze der Mütter am Arbeitsplatz, MuSchArbV*) into the Act.

7

Changes to the law regarding severely disabled persons

With effect as of 01 January 2017, there are relevant changes to the law regarding severely disabled persons in the course of the implementation of the Federal Act on the Integration of People with Disabilities (*Bundesteilhabegesetz, BTHG*). In particular, there will be a reduction of the threshold for the release from work of the person of trust as well as an obligation of the employer to bear the costs for an office assistant of the representative for severely disabled employees to the extent required. **Also the dismissal of a severely disabled employee declared by the employer without a participation of the representative for severely disabled employees will be invalid in the future.** Furthermore, there will be changes to collective employment and labour law: A transitional mandate for the representative of the severely disabled employees will be established in case of a transfer of business – comparable to the regulation regarding the works council pursuant to Sec. 21a BetrVG.



Practical example

Employment and social media – a practical overview

A quick tweet on a current topic, a like for the profile picture of a social contact or a comment on a new status: For many people, the casual or permanent use of social media has become part of everyday life. It is often the case that the boundaries between one's private and professional life become blurred, e.g. because colleagues are friends in social networks or the employer is actively included in the employees' own digital activities. The local labour courts are increasingly busy with the various facets of social media. In the following, we would like to give a brief overview of particularly relevant aspects:

General use of social media by employees

Within the framework of the assessment from an employment law perspective, it is necessary to differentiate between business and private use of social media.

A business use of social media generally exists if the employer instructs e.g. employees from the marketing department to post certain information on the company's own Facebook profile (e.g. particularly interesting company news for marketing purposes) or to digitally organise an event (e.g. open house day). In these cases, the employer is generally entitled, based on its right to give instructions pursuant to Sec. 106 of the German Industrial Code (*Gewerbeordnung, GewO*), to give employees in the marketing or PR department detailed instructions regarding the content.

With respect to the purely private use of social media by employees, it has to be noted that the employer cannot require its employees to register with social networks (e.g. Facebook or the professional network xing.de). In addition, the employer is not entitled to limit, prohibit or sanction a

private use of social media. An exception to this applies, if the private use has an impact on the employment relationship.

Use of company resources or during the working time

In existing employment relationships, solely the employer decides upon the specific type of use of the resources provided (computer, smartphone, Internet access etc.). This also includes in particular the question whether Internet private use during the working hours is permitted or not. If a private use of the Internet or of the respective company hardware is not permitted, the unauthorised use by the employee generally constitutes a violation of obligations under the employment contract..

Such a violation of obligations may entitle the employer to issue a warning letter. In case of a repeated violation or in case of an excessive private use of the Internet during the working time, the employer may also be entitled to terminate the employment relationship (cf. BAG, decision of 31 May 2007 - 2 AZR 200/06).

Conduct-related grounds for dismissal

Prohibited Internet use is not the only reason which may justify a dismissal. Other types of misconduct of employees in social networks may also lead to sanctions under employment law which may even include a dismissal for cause. The (perceived) anonymity of social media sometimes leads trainees or employees to make defamatory remarks about superiors or colleagues.

Referring to one's employer as a "tyrant & exploiter, slave driver" and describing



Manfred Hack

Partner

Eversheds Sutherland Berlin

one's job as *"doing stupid shit for a minimum wage - 20%"* constitute gross insults capable of justifying a termination without notice of a training contract (cf. Hamm Regional Labour Court, decision of 10 October 2012 – 3 Sa 644/12). The same applies in general to even worse insults of e.g. superiors such as *"little pile of shit"*, *"lazy pig who has never done a lick of work in his entire crappy life"* and *"dirty pig"* posted on a public Facebook profile (cf. Hagen Labour Court, decision of 16 May 2012 – 3 Ca 2597/11).

Racist and contemptuous comments made by an employee on his private Facebook user account can justify a dismissal for cause by the employer at least if the Facebook user account also discloses the respective employer and the comment is capable of harming the employer's reputation or business (cf. Mannheim Labour Court, decision of 19 February 2016 – 6 Ca 190/15). In this specific case, an employee had posted a photo of the Auschwitz concentration camp with the heading *"Poland is ready to take in refugees"*.

Even emoticons, i.e. individual symbols or sequences of symbols used to express moods and feelings in written communication (e.g. smiley), can carry strong messages. Insulting a superior via the comment function in a colleague's Facebook timeline using emoticons can thus also justify the termination of the employment relationship (cf. Baden-Württemberg Regional Labour Court, decision of 22 June 2016 – 4 Sa 5/16).

However, a termination may be valid even if the insulting comments were made by a third person rather than the employee himself. Even clicking the "Like"-button on Facebook to confirm a comment which insults the employer is generally sufficient to justify the termination of the employment relationship (cf. Dessau-Roßlau Labour Court, decision of 21 March 2012 – 1 Ca 148/11).

Even in the absence of insulting comments, activities in social networks can lead to consequences under labour law: For instance, if a hospital employee unauthorisedly posts photos of a patient, this may also justify a termination without notice of the employment relationship in certain cases (cf. Berlin-Brandenburg Regional Labour Court, decision of 11 April 2014 – 17 Sa 2200/13).

However, there is no legal clarity yet regarding the extent to which data from social media can be used in the context of court proceedings such as actions for protection against unfair dismissal. In general, the

question whether such data can be used in court will depend on whether the data was obtained in compliance with applicable data protection laws. If the data was not obtained in compliance with such regulations, a number of regional labour court decisions in similar cases suggest that such data may not be used as evidence (cf. e.g. Baden-Württemberg Regional Labour Court, decision of 20 July 2016 – 4 Sa 61/15; Berlin-Brandenburg Regional Labour Court, decision of 14 January 2016 – 5 Sa 657/15).

Business and trade secrets

When employment relationships are terminated between the employer and the employee, disputes sometimes arise as to whether the information which the employee obtained due to the employment relationship might constitute business and trade secrets of the employer and thus enjoy special legal protection. Such questions are discussed with intensity especially where sales employees are concerned and the employer wishes to prevent the leaving employee from taking his entire customer base with him when he joins a competitor. However, contact data/ contacts of an employee in a social network which is used exclusively for professional purposes (such as Xing.de or linkedin.com) are generally not to be regarded





as business and trade secrets of the employer (cf. Hamburg Labour Court, decision of 24 January 2013 – 29 Ga 2/13). In contrast to an actual disclosure of business and trade secrets, “taking along” contacts from a social network used exclusively for professional purposes is thus generally unlikely to constitute a criminal act by the former employee.

Competition law aspects

The use of social networks may even have further legal consequences beyond a potential action against unfair dismissal. For example, sales employees intentionally posting comments on a private blog pretending that such comments are not of an advertising nature generally violate regulations against unfair competition. Pursuant to Sec. 4 no. 3 of the German Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb, UWG*), pretending to make private comments while actually intending to promote a certain company constitutes an act of unfair competition. This is also due to the fact that consumers generally trust private statements in blogs more than (obvious) advertising statements of a company (cf. Hamburg Regional Court, decision of 24 April 2012 – 312 O 715/11). It is therefore

recommendable to adequately train employees to prevent such unfair “overzeal”.

Contractual design options

It is always recommendable for employers to make the best and fullest use of contractual design options. It is a good idea to have clear (contractual) provisions in place governing the use of business resources and private Internet use during working hours.

Many companies have also introduced social media guidelines, i.e. for example (binding) recommendations for employees regarding safe social media use. It is generally recommendable to provide employees with a clear overview of the most relevant aspects with respect to social media from the employer’s perspective. Due to the complexity of the matter, it is absolutely mandatory to obtain legal advice when drafting such guidelines – in addition to a multidisciplinary involvement of various specialised departments (marketing, HR, corporate communication).

Practical example



Andrea Wirtz

Associate

Eversheds Sutherland Munich

Social media and data protection in the context of employment

The admissibility under data protection law of obtaining information on an applicant via social networks as an employer as well as the admissibility of monitoring an employee's social media use pose a myriad of legal questions. Data protection law generally applies the principle of prohibition with an approval option, i.e. the collection of personal data is generally prohibited unless it is approved as an exception.

Obtaining information from social media in the application process

The employer is generally entitled to collect data insofar as this is necessary in order to decide whether to establish an employment relationship. The principles regarding the employer's right to ask questions in the application process apply. In this context, obtaining information via social media is admissible in any case if such data is publicly available, unless the protection-worthy interests of the applicant obviously prevail. Information in social networks is publicly available if it is accessible for everyone, i.e. if access is not restricted to registered users of the social network or even contacts/friends of the applicant. In such cases, there can be no obvious conflicting interest of the applicant as the applicant must tolerate the fact that the public can access his data.

The case may be different where the relevant information is only accessible for registered users of the respective network. If the relevant information is accessible for all members of the network and if the respective network is a professional network such as Xing or LinkedIn, the employer is still entitled to obtain information within the above limitations.

However, this does not apply to exclusively private networks. It is important to be aware that Facebook can no longer be regarded as an exclusively private network. This follows inter alia from the recently updated general terms and conditions of Facebook. On this basis, collecting data from Facebook sections which are accessible for all members should still be admissible pursuant to the above principles. It is not admissible, however, to obtain information from social networks if this includes information which is only accessible for friends/contacts and the potential employer tricks its way into the applicant's circle of friends/acquaintances.

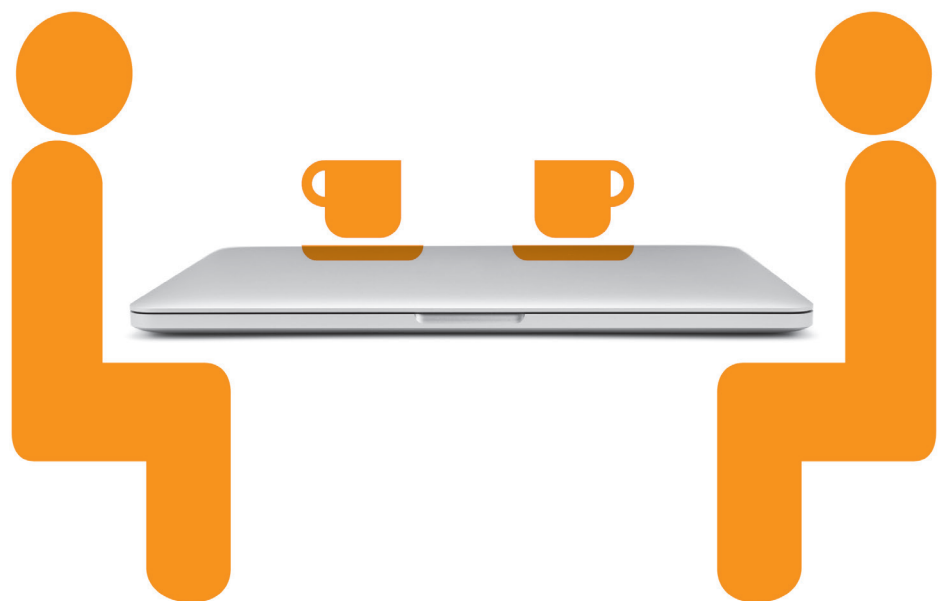
Monitoring social media use

Also in this respect, a non-specific, maybe even routine search in social networks for the names of employees is inadmissible under data protection regulations. A targeted search for an employee's activities may only be carried out where there is a justified suspicion that the employee breached his contract or committed a crime and it is necessary to obtain information via social networks. Whether it is necessary to obtain information via social networks depends on the circumstances of the individual case. These include inter alia the question of whether such information is publicly available (see above).

If the way in which the employer obtains information from social media violates the above principles, this will generally constitute an administrative offence, which currently carries a fine of up to EUR 300,000.00. When the General Data Protection Regulation enters into force on 25 May 2018, it will be possible to impose significantly higher fines (up to EUR 20

million/4% of the company's total world-wide annual revenue).

As the possibilities to monitor an employee's social media activities are thus limited during an existing employment relationship, it may be – as explained in the previous article – recommendable in order to prevent comments harming the company etc. to implement social media guidelines pursuant to which employees must be aware that the employer may monitor their activities.



Practical example



Dr. Daniel Scheerer
Partner
Eversheds Sutherland Munich

New mindfulness – part of a modern health management or more?

Calmness and meditation – also in Germany, corporate executives are attracted by the ideas of “new mindfulness” as part of an active and modern health management. However, this new focus always includes a performance component, i.e. partly aims at increasing efficiency.

In American companies in particular, mindful meditation during working hours and/or during breaks has rapidly gained relevance recently as a “stress-reducing” and “performance-enhancing” factor. Although German executives still prefer to talk about an “active lifestyle” to counterbalance job stress, there is nevertheless an ever-increasing interest in new mindfulness also in Germany.

In particular companies such as Google, SAP and other major players have already implemented programmes regarding “mindfulness” in Germany, and not only for executives.

A survey conducted by Harvard Business Manager¹ involving 700 German executives recently showed that also in Germany, 17 percent of the survey participants already perform meditation or mindfulness exercises at least once every week, that 27 percent of the participants perform such exercises at least on a regular basis and that another 26 percent of the participants were at least very interested in such exercises. Only 23 percent of the participants had no interest in such exercises (9 percent did not answer the question).

The principle on which the mindfulness movement is based goes back to the seventies and the US professor of medicine Jon Kabat-Zinn. But what exactly is this new trend and what does “mindfulness” actually mean? The tendency to dismiss this concept as esoteric fails to recognise the potential of this new movement for businesses. Ultimately, the term “mindfulness” means becoming more aware of the present, which includes the professional life and health (not only) of executives.

Although it is possible to reduce stress and thus improve the individual health of employees through training in mindfulness, when companies offer such programmes to their staff, improving their employees’ quality of life is of course not their only focus. Offering employees specific training programmes to practice mindfulness can in fact be used by companies as a means to increase creativity and performance.

For instance, mindfulness can help employees on days with a busy meeting schedule to “re-start” before each meeting rather than taking the problems and issues from the previous meeting into the next meeting. This focus and the resulting open-minded attitude towards the “here and now” can create a whole new dynamic which helps to streamline and expedite the development of solutions for specific issues.



Beatrice Christin Hotze
Associate
Eversheds Sutherland Munich

¹ Survey conducted with members of the association “Die Führungskräfte” (the executives) for Harvard Business Manager, 2016, published in Harvard Business Manager, issue of January 2017



Mindfulness can also serve as a way to measure the performance of executives on a basis other than business figures. Perfect business figures will not be able to help individual employees who do not feel understood or valued, which leads to constantly high costs for the company due to a failure to achieve employee loyalty.

Ultimately, mindfulness is an approach which can help to become more aware of one's own actions and, as a consequence, not only to reduce stress but also to generate a new type of understanding towards the people and colleagues around us. In the context of corporate culture, this may increase employee retention and thus also improve the company's financial performance, if the approach is supported by the company's management.

With this in mind, the latest mindfulness concepts mainly seek to provide exercises which can easily be integrated into the employees' everyday (work) life and often take less than 10 minutes per day. The intention is to make mindfulness an integral part of the daily work routine without much effort being required.

The results of the Harvard Business Manager survey show that the concept of "mindfulness" which arose in the USA has clearly arrived in German companies and is shaking off the stigma of a "merely spiritual" matter not to be talked about. In fact, companies nowadays regard the concept of "mindfulness" as a modern way to increase performance and as a part of their health management and the personal development of their employees.

In future articles and newsletters, we will be looking at current developments in the area of "mindfulness" as well as legal and practical issues which become relevant in the context of the introduction and implementation of respective mindfulness training programmes.

Practical example



Fabian Schöniger

Associate

Eversheds Sutherland Hamburg

Pension promises in the low-interest environment

The continuing low interest levels force more and more pension funds to reduce their pension benefits from future contributions. In many cases, guaranteed benefits under company pension schemes were reduced – even in existing contractual relationships. Employers must therefore ask themselves whether and to which extent this may lead to discrepancies between the promised and the actually paid pension benefits which they, as the party owing benefits under the company pension scheme despite the involvement of an external pension fund institution, will have to adjust at their own cost.

Context

An employer providing its employees with a company pension scheme via a pension fund is fully “liable” for such pension scheme pursuant to Sec. 1 para. 1 sent. 3 of the German Company Pensions Act (*Betriebsrentengesetz, BetrAVG*) (“Einstandspflicht”, obligation to assume liabilities). In general, this also applies if the pension fund exercises its right pursuant to the articles of association to resort to reductions of benefits to compensate for any shortfalls. The German Federal Labour Court (*Bundesarbeitsgericht, BAG*) very recently expressly confirmed the employer’s obligation to assume liabilities in the case of a reduction of ongoing benefits by the *Pensionskasse für die Deutsche Wirtschaft VVaG* (pension fund for German businesses), at least insofar as employer-financed pension promises are concerned (BAG, decision of 15 March 2016 – file ref. 3 AZR 827/14).

Pension promises in the low-interest environment

The supreme courts have not yet passed a decision in constellations where pension funds reduce benefits not because they

are in financial distress but simply in response to the fact that, due to the continuing low interest levels, they are no longer able to (fully) “earn” the promised benefits on the capital market. In certain cases, reductions implemented by pension funds – as long as they are permissible under insurance law e.g. pursuant to Sec. 233 para. 1 sent. 1 no. 1 of the German Insurance Supervision Law (*Versicherungsaufsichtsgesetz, VAG*) or Sec. 197 para. 3 sent. 2 VAG – may also affect the “underlying employment relationship” and reduce the employer’s obligation to assume liabilities.

The following constellations are possible:

- A **“dynamic reference clause”** in the pension promise also refers to the provisions regarding reductions, so that a “pension shortfall” would be avoided from the outset.
- The principle of a **significant change of the contractual basis** (*Störung der Geschäftsgrundlage*) (Sec. 313 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*)) may also serve to justify a reduction of the employer’s obligation to assume liabilities if the low interest levels were unforeseeable at the time of the promise.
- Finally, a reduction based on an **“unforeseen development of the company pension scheme”** or a poor financial situation of the company may also be possible. Both constellations have already been recognised by the German Federal Labour Court in similar cases (BAG, decision of 10 November 2015 – 3 AZR 390/14).

However, it remains to be seen whether the courts will actually decide in favour of a reduction of the duty to assume liabilities in these cases.

Practical consequences

Until the supreme courts have passed decisions on such constellations, employers are well advised in cases of announced or actually implemented benefit reductions by a pension fund to check in each individual case whether and to which extent they are required to cover the pension shortfall due to their duty to assume liabilities. Furthermore, in times of continuing low interest levels, employers should take particular care with the wording of pension promises.



Column



Dr. Rolf Kowanz
Partner
Eversheds Sutherland Hamburg

It all ends with pensions

On 21 December 2016, the German Federal Cabinet passed a draft bill for a company pensions support act, thus initiating a paradigm shift in the area of company pension schemes. The act seeks to establish a “social partner model” pursuant to which the bargaining partners will be entitled to provide mere “contribution promises” if external pension fund institutions are involved, meaning that the employee alone bears the investment risk of the company pension scheme while the employer will only be liable for its promised contributions. The new act is planned to come into force on 01 January 2018.

Context

Currently, employers only have a choice between the known pension promises (*benefit promise, contribution-based benefit promise and contribution promise with minimum benefits*) for company pensions schemes. Irrespective of the type of pension promise chosen by the employer, the employer has always been under an obligation to also promise specific (minimum) benefits for pensionable events. The employer is then (subsidiarily) liable for such benefits, even if the company pension scheme is operated by an external pension fund institution (welfare fund, pension fund) and such institution fails to (fully) earn and pay the promised benefits.

The social partner model

In order to promote the concept of company pension schemes and also to support the bargaining partners, the act is designed to enable the bargaining parties to include pension promises in collective bargaining agreements in the form of “**mere contribution promises**”. The

employer would then only be obliged to pay contributions and would no longer be required to promise any benefits. Consequently, the employer would no longer be subject to an obligation to assume liabilities and would thus be free of any liabilities after payment of the agreed contributions (“**pay-and-forget**”). The purpose is, specifically in the current low interest environment, to remove obstacles hindering employers from introducing company pension schemes and at the same time to increase profit opportunities for employees by giving up insurance-type guarantees.

Further key points of the social partner model currently are:

- Removal of the employer’s duty to provide insolvency protection;
- Removal of the employer’s duty to make necessary adjustments;
- Pension payments would vary depending on the “investment success”, both during the vesting period (“target pension”) and in the pension period;
- Old age pension entitlements immediately become non-forfeitable;
- Scheme may be operated by a joint institution of the bargaining partners;
- An additional employer contribution “should” be included in the collective bargaining agreement for protection purposes;;
- Bargaining parties can introduce an automatic deferred compensation even for existing employment relationships and (only) grant employees a right to object (“**option system**”);
- Employers who are not subject to a collective bargaining agreement may refer to collective bargaining agreements.

It remains to be seen whether the draft bill will successfully pass through both houses of the German parliament in this legislative period.

Practical consequences

Employers should check at an early stage which possibilities the “social partner model” holds for them, in particular **to reduce unfavourable balance sheet effects and liability risks**. However, as the intended changes will only apply to collective bargaining agreements, small and medium-sized companies which are not subject to collective bargaining agreements will still be bound to the “classic” types of company pension schemes including the known liability risks. Critics regard this – and the ever-increasing complexity of the law on company pensions – as the draft bill’s major flaw.



News

Complete training programme 2017

Global Mobility – Secondments to and from Germany
23 May 2017 (Munich), 20 June 2017 (Hamburg)

Introduction to German Employment Law
28 June 2017 – English (Munich)

Show your teeth – Strategies against misuse of works council rights
29 June 2017 (Munich), 06 July 2017 (Hamburg)

Works council elections 2018 – The employer's role, rights and duties
12 October 2017 (Munich)

Upcoming Breakfasts and Afterworks

17 May 2017 Breakfast
07:30 – 09:00 a.m.
(Munich)

19 July 2017 Afterwork
6:00 p.m. to 7:30 p.m., post-event networking
(Munich)

20 September 2017 Breakfast
07:30 – 09:00 a.m.
(Munich)

15 November 2017 Breakfast
07:30 – 09:00 a.m.
(Munich)

For further information, please visit eversheds-sutherland.de/veranstaltungen.

With 2,300 lawyers in 29 countries, Eversheds Sutherland is one of the largest and most successful law firms worldwide. With 61 offices in Africa, Asia, Europe, the Middle East and the USA, Eversheds Sutherland advises its clients on all national and international business law matters. In Germany, we have over 100 lawyers, tax advisors and notaries in Berlin, Hamburg and Munich.

This publication was last updated on 15 February 2017. The information contained therein is of a general nature and is not suitable as a basis for decisions in individual cases without previous specific advice. In particular, it cannot replace the provision of individual and case-specific legal advice. We do not assume any liability for the completeness and accuracy of the information contained in this publication. © Eversheds Sutherland (Germany) LLP

Contact with respect to the publication within the meaning of Sec. 55 of the German Interstate Broadcasting Treaty (RStV) is David Johnson, Eversheds Sutherland (Germany) LLP, Brienner Straße 12, 80333 München (Munich), Germany, davidjohnson@eversheds-sutherland.de

Eversheds Sutherland (Germany) LLP is a limited liability partnership, registered office One Wood Street, London EC2V 7WS, United Kingdom, registered in England and Wales, register number OC396870. Eversheds Sutherland (Germany) LLP is also entered into the partnership register of Munich Local Court under PR 1474. A list of partners is available for inspection at the above address, at the Munich office and entered into the partnership register of Munich Local Court under PR 1474. Eversheds Sutherland (Germany) LLP is authorised and regulated by the Solicitors Regulation Authority of England and Wales and governed by the SRA Code of Conduct (see www.sra.org.uk/handbook/).

Eversheds Sutherland (Germany) LLP is part of a global legal practice consisting of separate and distinct legal entities that operate under the name Eversheds Sutherland. Each Eversheds Sutherland entity is a separate legal entity and is not responsible for the acts or omissions of, nor can bind or obligate, another Eversheds Sutherland entity. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com/germany.

eversheds-sutherland.com/germany