

Labour and Employment Law

Newsletter



Read all about it

Labour and employment law update

Topics

Jurisdiction/Decisions

1. "Objective suitability" is no precondition for claims pursuant to the General Equal Treatment Act
2. Severability clause not a remedy for a void prohibition of competition
3. Probationary period: Reduced notice period requires clear contract wording
4. Legal consequences of contractual provisions violating the working time

In brief

1. Dismissal request by the works council as a reason for termination
2. Payment of fines does not constitute taxable work salary
3. Works council election also challengeable in case of errors in the election notice
4. Work salary also in case of a prohibition of employment pursuant to Sec. 11 of the Maternity Protection Act
5. Works council's right to inspect gross salaries and salary lists
6. No entitlement to removals of managing directors disrupting the business

Political developments

1. Construction industry: Draft bill on securing social funds
2. Electronic transmission of the wage statement
3. Decision of the Bundesrat: "Prepare co-determination for the future"
4. Reporting duties regarding Corporate Social Responsibility (CSR)
5. Oral hearing regarding the law on one collective bargaining agreement per company
6. Application for abolition of unfounded fixed-term employment contracts dismissed

Practical examples

- Headscarves and other religious signs in the company
- "Working 4.0" and employment and labour law
- "Minijobs" – disadvantages regarding statutory rights from the employment relationship
- Federal Finance Court changes its position regarding the taxation of company cars
- New forms for notices of mass dismissal
- New mindfulness (part 2) – Possibilities of implementation in the company

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 issue of our employment law newsletter again discusses many interesting topics – including labour law classics such as reduced notice periods during the probationary period and hot topics such as a current case regarding compensation payments in case of a prohibition of competition. Just like in our previous newsletters, we have summarised the most relevant recent judgments for you in the case-law review section, along with comments on how these judgments will impact on employment law aspects of your day-to-day business.

In the current issue of our newsletter, the thematic focus on the one hand lies on the two decisions of the European Court of Justice (ECJ) regarding the question of the legal admissibility of bans on headscarves in companies and possible options of the employer. On the other hand, we will provide you with an overview of the essential aspects of the progress dialogue “Working 4.0” and a very interesting outlook regarding possible changes in labour and employment law in connection with the digitalisation of the workplace.

We will inform you about new developments as well as current plans of the legislative – as usual – in the section “Political developments”. In addition to the newly introduced reporting duties regarding Corporate Social Responsibility (CSR), in particular the changes regarding the electronic transmission of the wage statement are worth mentioning.

I would like to thank you already at this point 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 the same time, 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.



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Jurisdiction/Decisions

1

BAG decision of 19 May 2016 – 8 AZR 470/14
“Objective suitability” is no precondition for claims pursuant to the General Equal Treatment Act



The decision

The plaintiff – born in 1953 – has a law doctorate, obtained 7 points (satisfactory) in both state law examinations and worked as an individual lawyer. The defendant – a partnership of lawyers – was looking for a „lawyer with 0 to 2 years’ professional experience” in a job advertisement, in which „a long-term perspective in a young and dynamic team” was offered. All lawyers employed by the defendant obtained final grades with at least 9 points (fully satisfactory) in their state law examinations; hence, according to the job advertisement a „first-class legal qualification” was expected. After a fruitless application, the lawyer asserted claims for compensation and damages before court due to an (alleged) discrimination because of his age pursuant to Sec. 15 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*).

However, the two previous instances dismissed the claim. The courts justified the dismissals of the claim by stating that no „objective suitability” of the plaintiff could be determined and that furthermore there was also a lack of „subjective seriousness”. This applied in particular in light of the fact that further claims for compensation of the plaintiff were pending against other potential employers. However, the plaintiff’s appeal led to the case being referred back to the regional labour court for a new hearing and decision.

Practical consequences

With respect to the wording of job advertisements, employers should exercise the utmost care: In the present case, an expected job requirement of “0 to 2 years’ professional experience” was generally considered as indirect discrimination pursuant to Sec. 3 para. 2 AGG. It is suitable to specifically discriminate older persons vis-à-vis younger persons due to the age – candidates with a longer

professional experience typically also have a higher age. In addition, the wording “a long-term perspective in a young and dynamic team” can also lead to a direct discrimination due to the age pursuant to Sec. 3 para. 1 AGG since the term “young” is directly linked to the age.

In the future, an “objective suitability” of the candidate, which was generally required according to the previous case-law, is no longer required. According to the German Federal Labour Court (*Bundesarbeitsgericht, BAG*), such a criterion burdens the judicial compensation process with complex questions of differentiation and ultimately frustrates the protection of statutory rights of the refused candidate. The “subjective seriousness” of an application is no longer required either – according to the formal definition of “candidate” pursuant to Sec. 6 para. 1 AGG, such a precondition can neither be derived from the wording of the specific provision nor from its sense and purpose. To which extent the way in which the formal status as a candidate was obtained constitutes an abuse of rights and to which extent the applicability of the AGG was thereby achieved against good faith, however, is not completely irrelevant. This will determine whether the objection that there has been an abuse of rights can be successfully held against such an application in court proceedings.

Practical tip

It has to be feared that – possibly encouraged by this decision – claims for compensation and/or damages will be asserted against companies significantly more often in court proceedings in the future. Hence, the decision of the BAG should be taken as an opportunity to subject the entire application process – starting from the wording of the job advertisements up to the sending of the refusal letter – to a comprehensive legal review in order to determine whether it is in conformity with the AGG.



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2

BAG decision of 22 March 2017 – 10 AZR 448/15 Severability clause not a remedy for a void prohibition of competition

The decision

In the present case, the parties to an employment contract argued about the payment of a compensation for non-competition before court. In the employment contract concluded, a post-contractual prohibition of competition without a claim for compensation for non-competition as well as a so-called severability clause were agreed. The severability clause was intended to have a validity-preserving effect: Instead of a void or legally invalid provision, an appropriate provision was to apply which comes as close as possible to what the parties to the employment contract would have intended had the voidness or invalidity of the respective provision been considered upon conclusion of the contract.

After termination of the employment relationship, the plaintiff adhered to the post-contractual prohibition of competition and requested, referring to the severability clause, the payment of a compensation for non-competition in the statutory amount (which was clearly not promised according to the contract). The employer as the defendant, however, referred to the voidness of the prohibition of competition which is prescribed by law for lack of an agreed compensation for non-competition and refused to make a respective payment.

Both previous instances granted the employee's claim stating as a reason that, due to the severability clause, the void prohibition of competition has to be supplemented by a promise to pay a compensation for non-competition in the minimum amount prescribed by law. The replacement of the void prohibition of competition by a valid prohibition of competition against payment of a compensation for non-competition came closest to the presumed intent of both contractual parties had they considered the voidness of the prohibition of competition upon conclusion of the contract. The BAG, however, did not share this opinion: A post-contractual prohibition of competition is void if the respective provision does not include a claim of the employee for a compensation for non-competition. A severability clause also cannot remedy such a violation of Sec. 74 para. 2 of the German Commercial Code (*Handelsgesetzbuch*,

HGB) and thus does not lead to the validity of a prohibition of competition.

Practical consequences

With its decision, the BAG confirmed its previous case-law regarding post-contractual prohibitions of competition. If such a prohibition of competition does not contain a claim for a compensation for non-competition pursuant to Sec. 74 para. 2 HGB, this generally leads to the voidness of the post-contractual prohibition of competition.

The respective wording of a prohibition of competition has to put both parties into the position to make a decision regarding compliance with the prohibition of competition directly after the termination of the employment relationship. Hence, the validity of such a prohibition of competition must result from the agreement itself. This can regularly not be achieved by a severability clause: Ultimately, a severability clause only contains a purely evaluative decision whether and, if applicable, with which content the parties to the employment contract would have agreed a valid prohibition of competition had they been aware of the voidness. The validity of a post-contractual prohibition of competition without an agreed claim for a compensation for non-competition thus does not – and also not unilaterally in favour of the employee – result from the severability clause which is often included in employment contracts.

Practical tip

It is recommended to submit post-contractual prohibitions of competition to a legal review and, if required, to modify these respectively. In addition to considering the statutory requirements, a comprehensive knowledge of the respectively valid case-law is also required in order to avoid serious mistakes when drafting employment contracts.



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BAG decision of 23 March 2017 – 6 AZR 705/15

Probationary period: Reduced notice period requires clear contract wording

The decision

The subject-matter of the court proceedings was the specific interpretation of the employment contract concluded between the parties. With effect from 28 April 2014, the plaintiff was employed as a cabin attendant by the defendant. The standard form employment contract used contained an explicit reference to the applicable industry-wide collective bargaining agreement for the temporary employment industry. This collective bargaining agreement inter alia contained a provision according to which the employment relationship could be terminated during the probationary period by observing the reduced statutory notice period of two weeks pursuant to Sec. 622 para. 3 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*). However, the employment contract itself also contained independent provisions regarding the notice period – according to these provisions, a termination of the employment relationship was possible by observing a notice period of six weeks to the end of a calendar month. This clause, however, did not contain a restriction stating that the longer notice period should only apply after the expiry of the probationary period.

By letter dated 05 September 2014, the employer terminated the employment relationship by applying the reduced statutory notice period of two weeks with effect from 20 September 2014. With his action, the plaintiff successfully claimed that the employer did not observe the notice period of six weeks to the end of a calendar month which was agreed in the employment contract. Ultimately, the German Federal Labour Court (BAG) also confirmed the decisions of the two previous instances in which the employee had been successful.

Practical consequences

The decision of the BAG defines the requirements of a legally secure wording under the law governing standard terms and conditions more precisely with a view to the notice periods contained in employment contracts which are often significant for the respective decisions.

In case of a standard form employment contract provided by the employer and used in many cases, the provisions contained therein regularly constitute general terms and conditions. The employer as the user of general terms and conditions generally bears the risk of the invalidity of individual clauses. As in the present case, an invalidity may already result from contradictory provisions contained in the contract. In this respect, it is not the respective employee's responsibility to anticipate a legally correct conclusion regarding the actual intent of the employer in case of contradictory provisions.

Subject to any provisions having higher priority, the employer is generally entitled to agree a probationary period of not more than six months in the respective employment contracts and to make use of a reduced notice period during this period pursuant to Sec. 622 para. 3 BGB. However, if the employment contract contains a longer notice period in another clause and if it is not clear beyond doubt that the longer period shall only apply after the expiry of the probationary period, the following must be considered: According to the ways of interpretation typically to be expected, an average employee who is not legally qualified may only understand that the longer notice periods should also apply already during the probationary period.

Practical tip

The valid agreement of a reduced notice period during the probationary period requires an unambiguous wording. In addition, the requirements of a legally secure structuring of contracts, which are permanently developing by case-law and legislation, have to be followed closely and adopted stringently.



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BAG decision of 24 August 2016 – 5 AZR 129/16 Legal consequences of contractual provisions violating the working time

The decision

The decision of the German Federal Labour Court (BAG) dealt with the question whether a remuneration can be requested for hours worked beyond the statutory maximum working time. The plaintiff was employed by the defendant – a company operating in the area of waste removal and recycling – as a weighing master. In the employment contract, an average weekly working time of 40 hours was initially agreed. In fact, however, the daily working time amounted to 10.5 hours (i.e. 52.5 hours in total) on five working days per week and was thus also above the relevant statutory admissible maximum working time of 48 hours. However, the employer did not pay the employee a separate remuneration for the difference between the statutory admissible maximum working time and the hours actually worked, referring to Sec. 3 of the German Working Time Act (*Arbeitszeitgesetz*, *ArbZG*). After termination of the employment relationship, the plaintiff thus asserted claims for remuneration for the hours worked beyond the statutory admissible weekly working time before court.

The plaintiff did not succeed with her action in both previous instances. The German Federal Labour Court (BAG), however, decided in favour of the plaintiff. The court ruled that a claim for remuneration also exists for the hours worked beyond the statutory admissible weekly working time of 48 hours. The employer's violation of the statutory maximum working time pursuant to Sec. 3 ArbZG does not affect a possible remuneration claim of the employee.

Practical consequences

Ultimately, the BAG confirmed its established case-law regarding the question of a remuneration obligation with regard to hours worked beyond the statutory admissible maximum weekly working time of 48 hours. A violation of the statutory maximum working time pursuant to Sec. 3 ArbZG thus does not lead to an inapplicability of the employee's remuneration claim.

Employers are thus regularly not entitled to refuse to pay the employees a remuneration for hours worked beyond the statutory admissible weekly working time of 48 hours by referring to Sec. 3 ArbZG. As a reason, the court in particular refers to the purpose of this regulation pursuant to the Working Time Act: As a protective regulation for the working time, Sec. 3 ArbZG shall in the first place prevent a physical and mental exhaustion of the employee. In this respect, it is not necessary to withhold a remuneration for hours worked from the employee, which the employer accepted despite of the prohibition of employment. Sec. 3 ArbZG also does not contain a statutory prohibition for the employer not to remunerate the hours worked beyond the statutory admissible maximum thresholds.

Furthermore, it also has to be considered that the employment of employees beyond the statutory admissible maximum working time constitutes an administrative offence which is subject to a fine. Under certain preconditions, however, such employment in violation of the law may also constitute a criminal offence – in the worst case, the employer or its legal representative (e.g. management board or managing director) will be punished by a fine or imprisonment.

Practical tip

The mandatory provisions of the Working Time Act have to be considered carefully when drafting the respective employment contracts. In addition to objections by the Trade Supervisory Office or other competent supervisory authorities, the employer may also face considerable claims for subsequent payment of the employees, as in the present case.



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In brief

1

BAG decision of 28 March 2017 – 2 AZR 551/16 Dismissal request by the works council as a reason for termination

Pursuant to Sec. 104 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), the works council may request the dismissal of an employee from the employer if this employee repeatedly and seriously disrupts the peaceful cooperation in the company – in particular by a behaviour which is in violation of the law or by racist or xenophobic acts. The works council can assert this claim before court in decision proceedings. If, in this context, the employer is ordered with legally binding effect to dismiss an employee, there is an urgent operational need within the meaning of Sec. 1 para. 2 sent. 1 of the German Protection Against Dismissal Act (*Kündigungsschutzgesetz, KSchG*) for a termination with notice (*ordentliche Kündigung*) of the employment relationship with the employee disrupting the operational peace.

2

Düsseldorf Finance Court decision of 04 November 2016 – 1 K 2470/14 L Payment of fines does not constitute taxable work salary

The employer – a national parcel delivery service – paid the fines imposed on it due to illegal parking of its employed drivers. However, the competent tax office considered the payments as taxable work salary of the drivers. According to Düsseldorf Finance Court, the payment of fines due to illegal parking by the parcel delivery service, however, cannot be considered as work salary of the employed drivers. Instead, the payment of the fines in order to fulfil own liabilities mainly serves the employer's own interest. The payment of the fines thus does not have any remuneration character, for lack of an accrual of work salary on the part of the employees.

3

Düsseldorf Labour Court decision of 28 November 2016 – 2 BV 286/16 Works council election also challengeable in case of errors in the election notice

In the specific case, the election notice for a works council election contained the contradictory information that "three members" or "five members" have to be elected. In addition, the election notice, on the one hand, prescribed a postal vote for the entire company and, on the other hand, an election meeting was to take place nevertheless and the votes cast by the postal vote would have to be received three hours before the end of the election meeting. With respect to this procedure, Düsseldorf Labour Court criticised several violations of the statutory requirements of the electoral regulations. These were also suitable to have an impact on the result of the works council election. Hence, the works council election could be successfully challenged by the employer.

4

Berlin-Brandenburg Regional Labour Court decision of 30 September 2016 – 9 Sa 917/16

Work salary also in case of a prohibition of employment pursuant to Sec. 11 of the Maternity Protection Act

In an employment contract concluded in November 2015, the parties to the legal dispute agreed upon a commencement of employment with effect from 01 January 2016. Still in December 2015, the employee was granted a prohibition of employment under maternity protection law due to a high-risk pregnancy. Hence, the employee could not commence her activity with effect from 01 January 2016; however, she asserted claims for the salary which she would have received had she commenced the working activities vis-à-vis the employer. The employer, however, refused to make any payments. According to Berlin-Brandenburg Regional Labour Court, the employee had a claim for salary despite the prohibition of employment. It is not necessary to actually perform the working activities; the legal existence of the employment relationship is the only decisive factor. In addition, there is no economic burden for the employer since it is fully reimbursed for the salary.

5

Schleswig-Holstein Regional Labour Court decision of 09 February 2016 – 1 TaBV 43/15

Works council's right to inspect gross salaries and salary lists

A works council is generally entitled to inspect the gross salaries and salary lists of all employees of a company, except for executives. A respective right can be derived from the general tasks of the works council pursuant to Sec. 80 para. 2 sent. 2 BetrVG. This applies in any case if a respective inspection serves the purpose of checking whether a company complies with the principle of equal treatment. Such right of inspection is furthermore not limited to the respective individual operation since the principle of equal treatment generally applies to the entire company. Apart from that, the works council's right of inspection is not prevented by the competencies of a central works council, nor by any concerns under data protection law.

6

Hamm Regional Labour Court decision of 02 August 2016 – 7 TaBV 11/16

No entitlement to removals of managing directors disrupting the business

The provision of Sec. 104 BetrVG does not grant the works council the right to remove a managing director who disrupts the business. Within the framework of decision proceedings, the works council had applied for a removal of the managing director from the business of the employer's personally liable shareholder due to an (alleged) disruption of the operational peace. According to the Regional Labour Court, however, the managing director – also taking into consideration the definition of the term "employee" under European law – is not an employee within the meaning of Sec. 105 BetrVG due to his capacity as a representative of a corporate body of the personally liable shareholder and does thus not fall under the statutory scope of application of the BetrVG.

Political developments

1

Construction industry: Draft bill on securing social funds

As a reaction to a decision of the German Federal Labour Court (BAG) of 21 September 2016, the coalition parties have presented a draft bill regarding the future of the social funds in the construction industry. In its decision, the BAG declared the declaration of general applicability of collective agreements regarding the social funds procedure in the construction industry to be invalid. In the opinion of numerous experts, the decision jeopardises the future of the social funds in the construction industry – the social funds will in particular be faced with high repayment claims. In addition, there may be further significant disadvantages both for the companies in the construction industry and for their employees. In order to effectively combat these risks, the planned act shall, on the one hand, create an independent legal basis for the social funds procedure in the construction industry. On the other hand, the social funds shall be enabled to collect any outstanding amounts or to prevent repayment claims.

2

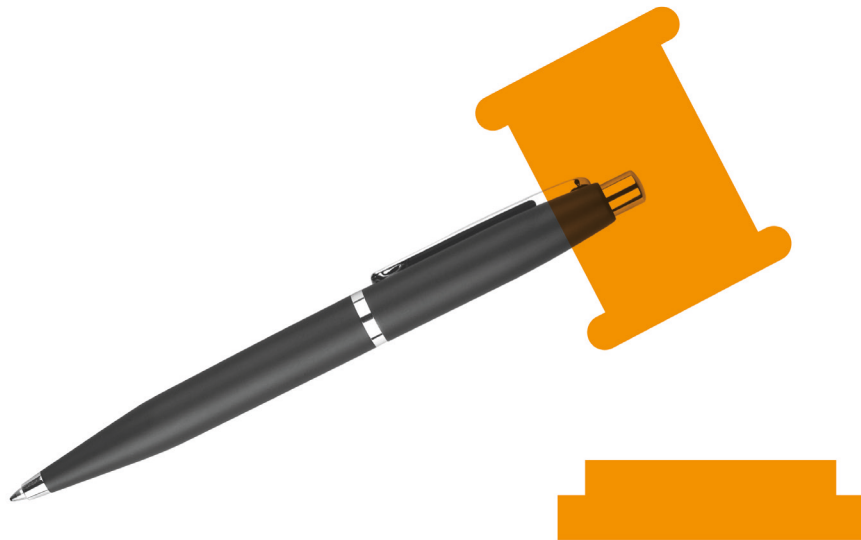
Electronic transmission of the wage statement

Due to statutory changes by the "Fifth Act Amending the Fourth Book of the German Social Code", companies are obliged to transmit the wage statement regarding the statutory accident insurance also electronically to accident insurance companies and employers' liability insurance associations with effect from 01 January 2017. Data to be transmitted in this way are in particular the salaries of the employees, the hours worked and the number of insured persons with summary electronic wage statements. After a transition period granted by the act, the transmission of the data will be exclusively electronically with effect from 01 January 2019, starting with the contribution year 2018.

3

Decision of the Bundesrat: "Prepare co-determination for the future"

On 10 February 2017, the Bundesrat adopted a decision on preparing the statutory co-determination for the future. In terms of content, the Federal Government is inter alia requested to review the legal possibilities of an adjustment of the co-determination at the level of German subsidiaries. This has become necessary in particular due to the circumstance that international groups increasingly act from abroad and regularly make strategic decisions having consequences for the staff in Germany abroad. The legislative is also required to adjust the definition of employee under works constitution law, close gaps of the German right of co-determination and vigorously address the development of new loopholes in particular also at the European level. However, it remains to be seen whether there will be any statutory changes.



4

Reporting duties regarding Corporate Social Responsibility (CSR)

On 09 March 2017, the Bundestag adopted the Act on the Implementation of the CSR Directive for the purpose of implementing European requirements. According to this Act, large companies which are also capital market-oriented within the meaning of Secs. 267, 264a HGB have to make a non-financial declaration for financial years commencing after 31 December 2016. In terms of content, such a declaration specifically also includes employee and/or social matters and can either be published as part of the management report or in a separate sustainability report.

5

Oral hearing regarding the law on one collective bargaining agreement per company

At the beginning of this year, the First Senate of the Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) dealt with five constitutional complaints against the law on one collective bargaining agreement per company (*Tarifeinheitsgesetz*). The constitutional complaints mainly concerned the regulation introduced by the law on one collective bargaining agreement per company in Sec. 4a para. 2 sent. 2 of the German Collective Agreements Act (*Tarifvertragsgesetz, TVG*). By this regulation, the case of conflict of overlapping scopes of applicability within one company of collective bargaining agreements of different trade unions which are not identical in content is to be solved by only applying the collective bargaining agreement of the trade union which has the most members within this company. The complainants – in particular several professional group and industry trade unions as well as an umbrella association – consider the regulation as an unconstitutional interference with rights protected by the Basic Law for the Federal Republic of Germany (*Grundgesetz, GG*). The result of the proceedings is not predictable – a decision of the Federal Constitutional Court can only be expected in a few months.

6

Application for abolition of unfounded fixed-term employment contracts dismissed

The conclusion of unfounded fixed-term employment contracts pursuant to the regulations under the German Act on Part-Time Work and Fixed-Term Employment Contracts (*Teilzeit- und Befristungsgesetz, TzBfG*) continues to be possible. With the votes of the coalition parties, the application of two opposition parties for deletion of the possibility of unfounded fixed-term contracts was rejected by the Committee for Labour and Social Matters.

Practical examples

Headscarves and other religious signs in the company

Is the employer allowed to prohibit employees from wearing religious symbols (such as headscarves) at the workplace?

Where employees show their private views and religious beliefs at the workplace, tensions in the work environment are virtually pre-programmed. The employer's interest in keeping a relatively neutral climate both within the company as well as vis-à-vis customers clashes with the employee's personal interests and the freedom of religion.

In particular if private views are expressed based on religious reasons, the requirements for a prohibition of such religious symbols are stringent according to the current case-law.

Current decisions on the prohibition of headscarves

On 14 March 2017, the European Court of Justice (ECJ) dealt with the topic of religious discrimination in the form of a prohibition to wear a headscarf at the workplace in two cases (C-157/15; C-188/15). We already briefly discussed this topic in our labour and employment law newsletter 3/2016.

The first decision of the ECJ concerned the dismissal of an employee because she refused not to wear the headscarf any longer. A customer of the dismissing company insisted that the employee can only provide services to him if she did not wear the headscarf. Subsequently, the company again requested the employee to remove her headscarf and, after she had refused to do so, ultimately dismissed her. As a reason for its request to remove the headscarf, the company referred to the principle of required neutrality and the necessity to comply with this principle

vis-à-vis its customers.

In its decision, the ECJ emphasised that the respective EU Directive (2000/78/EC) enables the individual member states to prescribe provisions that an unequal treatment due to a characteristic which is connected to a reason for discrimination stated in the Directive does not constitute a discrimination if the respective characteristic constitutes an essential and decisive professional requirement due to the type of a certain professional activity or the conditions of its performance, to the extent that it has a legitimate purpose and is a reasonable requirement.

In Germany, such a provision has been implemented in Sec. 8 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*).

According to the ECJ, the term "essential and decisive professional requirements", however, is to be understood objectively; subjective considerations such as the employer's intent to fulfil specific customer wishes are not sufficient.

The second decision of the ECJ concerned the case of an employee who insisted, contrary to the requirements of the company, on wearing a headscarf at her workplace, whereupon she was dismissed.

The company-internal regulation prohibited the wearing of visible signs of political, philosophical or religious beliefs of the employees at the workplace as well as the display of any rituals resulting therefrom.

In this decision, the ECJ made it clear that a respective company-internal regulation generally does not constitute a prohibited direct discrimination since the regulation treats all employees equally and in an undifferentiated manner.



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However, a respective regulation may constitute an indirect discrimination if it turns out that the apparently neutral obligation, which a respective regulation may contain, actually leads to the fact that persons having a certain religion or ideology are discriminated against in a particular way.

The ECJ emphasised that an indirect discrimination nevertheless does not exist if it is justified by a legitimate objective and if the means to achieve this objective are reasonable and necessary.

According to the ECJ, the wish to express a policy of political, philosophical or religious neutrality vis-à-vis the public and private customers is to be considered as legitimate. This applies in particular if the employer imposes this obligation on those employees having contact with customers.

Such a regulation is only suitable to achieve the objective of neutrality vis-à-vis the customers if it is actually followed in a coherent and systematic way.

Ultimately, the precondition is that the regulation is only applied to employees having customer contact.

In case of a violation of a respective company-internal regulation, however, a dismissal is only justified if the employer has checked in advance whether it is possible to continue to employ the employee in a job without customer contact.

At a national level, the decision of Berlin-Brandenburg Regional Labour Court of 09 February 2017 (14 Sa 1038/16) is of particular importance in this context. In this decision, the court decided that a general prohibition of a Muslim headscarf for teachers at state schools is not admissible without a specific danger. At the time this newsletter was finalised, the reasons for this decision were not yet available. The Regional Labour Court also admitted the appeal before the Federal Labour Court.

Hence, it remains to be seen which conclusions can be drawn from the decision of Berlin-Brandenburg Regional Labour Court.

Practical consequences

If an employer intends to prohibit employees from wearing a headscarf at the workplace, it will have to consider the requirements resulting from the decisions of the ECJ. Initially, the precondition is that the prohibition is

based on a company-internal general regulation rather than an individual prohibition.

Such a company-internal requirement has to indiscriminately address all religious, political or ideological signs at the workplace and also has to be implemented accordingly for all employees with customer contact.

This requirement of the ECJ already constitutes considerable issues in practice since the scope of this requirement currently cannot be foreseen. For example, visible tattoos or even certain hairstyles may constitute an expression of one's personal ideology. The same applies to certain fashion styles or the use of an advertising pen of a political party.

According to the requirements of the ECJ, in order to be able to enforce a prohibition to wear a headscarf, an employer would theoretically also have to address such expressions of personal ideology at the workplace and to check consistently in each individual case whether its employees are in fact violating the company-internal regulations.

If an employee violates the respective regulation, the employer first would have to check whether a transfer or a dismissal with the option of altered conditions of employment to a position without customer contact is possible.

For companies this means that they always have to weigh up whether the desired objective (prohibition of wearing a headscarf) leads to a considerable deterioration of the working atmosphere due to the necessary prohibition of symbols normally accepted within the company (e.g. small crucifix on a necklace).

In addition, certain hygiene or safety regulations applicable within the company may also prohibit the wearing of religious symbols. For example, the wearing of necklaces (e.g. with crucifixes) may be prohibited when operating certain machines. Wearing a headscarf may also violate safety regulations if it is thereby no longer possible to wear prescribed protective helmets.

However, also in this context, a prohibition due to hygiene or safety regulations applicable within the company must only reach as far as this is mandatory in order to implement the hygiene or safety regulations. If an employee refuses to remove the respective religious signs despite the prohibition, it always has to be checked,

prior to declaring a dismissal, whether a continuation of the employment at another workplace without respective hygiene or safety regulations is possible.

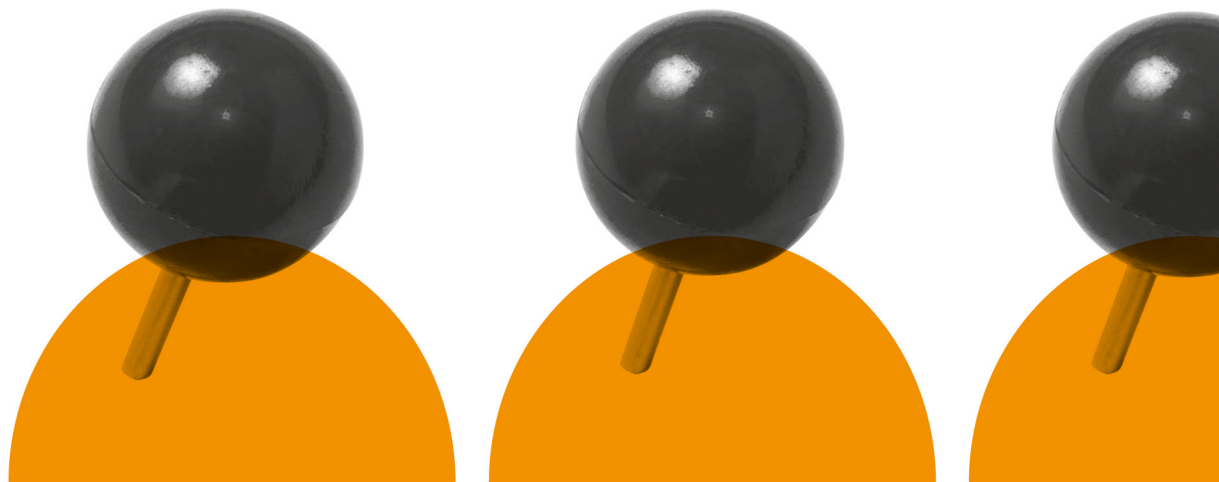
Contractual design options

If a company intends to prohibit (inter alia) the wearing of headscarves, this, according to the current case-law of the European Court of Justice (ECJ), is only possible for employees with customer contact.

A general regulation within the company is mandatory, which, insofar as the company has a works council, is also subject to co-determination.

In addition, such a regulation generally has to indiscriminately prohibit the wearing of all religious or ideological symbols.

However, a dismissal in case of a violation of such a prohibition is generally only possible if the prohibition has also been indiscriminately implemented in the past and if there is no possibility to continue to employ the employee in a job without customer contact.





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“Working 4.0” and employment and labour law

With the progress dialogue “Working 4.0”, which lasted until the end of 2016, the Federal Ministry for Labour and Social Affairs (BMAS) established a partly public and partly expert forum in which the future of the working society was discussed, inter alia under the heading of digitalisation.

The term “Working 4.0” is associated with the fourth industrial revolution, i.e. a networked, digital and flexible employment world which, since the beginning of the 21st century, has been leading to a fundamental change of the production methods and which will also lead to a cultural and social change. In this context, many political tasks and challenges under employment and labour law must be faced in order to create sufficient legal framework conditions for Germany as a centre of business in view of the progressing digital restructuring of the employment world.

In particular the following topics will face some considerable changes in the future:

- **Working time:** The progress dialogue “Working 4.0” particularly focused on various questions regarding working time. On the one hand, the respective structuring of the working time is to protect the employees from excessive working hours and thus from exhaustion and, at the same time, prevent any risks for the safety and health of the employees. On the other hand, to the advantage of the individual employee, there shall be more options for a flexible working time which also gives the employees more flexibility in terms of time and place. In addition to the advantages of more flexible working times – for example home office solutions for a better work-life-balance – however, also the burdens

resulting therefrom (e.g. extra work and untypical working times as well as increasing availability around the clock due to digitalisation) must be taken into consideration.

In order to sufficiently meet the identified demand for flexible working time models, in particular the organisational possibilities of regulation as well as those regarding collective bargaining agreements are to be extended. In addition to the strengthening of individual claims regarding the working time and the intention to introduce a general claim of the employee for fixed-term part-time work (which has already been agreed upon in the coalition agreement), also a statutory right to a home office solution was discussed. Further amendments to the German Working Time Act (*Arbeitszeitgesetz, ArbZG*) may take place in the medium term by the intended introduction of an act on options for a flexible working time. By derogation from the previously applying Working Time Act, such an act may grant the employees considerably more flexibility regarding their working time, place of work and maximum daily working hours as well as the periods of rest in the future. However, it remains to be seen whether such an act will be introduced.

- **Health and safety at work:** Due to the increasing digitalisation, a shift from physical to mainly psychological requirements can be observed in many professions – also caused by developments across various job activities such as a loosening of working time limits, flexibilisation and mobile working. Thus, it is not surprising that psychological illnesses of the employees increase (e.g.



“burnout”) and in the meantime constitute one of the main reasons for (permanent) reductions of the earning capacity and early retirement.

In the context of the progress dialogue “Working 4.0”, different challenges were identified: The importance of retaining the individual employability continues to be of great interest. In addition, occupational health and safety and medical care have to be adjusted to both the demographic development and the digital change – in this context, a development of the classic instruments of occupational health and safety towards an “occupational health and safety 4.0” is to be initiated with the objective of better protecting and strengthening the employees’ health in case of work-related psychological stress. Moreover, it is important to avoid undesirable developments and – in view of an increasing removal of boundaries in terms of time and place and a flexibilisation of the work environment – to promote personal responsibility and individual health competence of the working population in general. In addition to an improved advice and support for executives and employees in connection with mobile working, this may inter alia also take place with respect to raising awareness of

those responsible for occupational health and safety in the company regarding psychological stresses and the promotion of a sustainable culture of prevention within the companies. Companies are thus to be offered different possibilities of (voluntary) audits in order to obtain an overall idea of how and whether the company is prepared to face the modern challenges in the area of occupational health and safety.

- **Employee data protection:** The importance of an effective protection of employee data results from the employment relationship between employer and employee. However, the importance of employee data protection will clearly increase due to the continuous digitalisation. This applies in particular in light of the fact that more and more employees perform their activities by using digital devices and applications and – as a side effect – various personal data can therefore be collected, stored and analysed.

But also technical developments create new challenges for employee data protection: This applies in particular in case of a removal of the servers located in the companies in favour of “cloud computing” and/or general “cloud” solutions and in case of an increased

use of notebooks, handheld devices and smartphones. At the same time, there are new applications and methods (e.g. "data mining") which, in addition to the general identification of cross connections and trends, may also be able to calculate the future behaviour of consumers or even employees.

However, it remains to be seen whether and which further concrete steps the national legislator will take to implement the General Data Protection Regulation (GDPR) of the EU which enters into force in 2018. It cannot be excluded that after the introduction of the already planned "EU data protection adjustment and implementation act" – which will replace the German Federal Data Protection Act in its current form – the Federal Ministry for Labour and Social Affairs will recognise that there is a need for further measures: For example, the progress dialogue "Working 4.0" also included an open-ended discussion of the necessity of a separate employee data protection act.

- **Co-determination:** The progress dialogue "Working 4.0" furthermore indicates significant changes regarding employee co-determination within the company.

The Federal Ministry for Labour and Social Affairs has declared that it intends to generally promote the establishment of works councils by means of various measures: In the first place, it is intended to significantly improve the protection against dismissal for employees who support the establishment of a works council. Furthermore, a reform of the Works Constitution Act is planned with the objective of extending the simplified election process also for companies with up to 100 employees entitled to vote. In addition, it is to be reviewed whether it is necessary to strengthen the sanctions in case of inadmissible obstructions of works council elections.

Also with respect to the day-today works council activities, a need for action was identified at various points: According to the currently applicable legal situation, for example, it is not possible, due to the non-public nature of meetings, to hold works council meetings also via video conference. At this point, a specific need for adjustment to the developments of the digital age was recognised and the admissibility of video conferences for works council meetings was considered.

Within the scope of application of Sec. 87 para. 1 no. 6 BetrVG, the codification of an independent entitlement of the works council to involve a respective expert prior to the introduction of new work methods and equipment as well as of new hardware and software was also discussed. In addition, it is to be reviewed whether it is required to generally supplement the BetrVG with data protection provisions. It cannot be excluded that there will be additional legal interactions with the employee data protection.

With respect to the co-determination within the company, it is also to be prevented in the future that the possibilities to establish subsidiaries under corporate law lead to the fact that the co-determination within the company dwindles away. As a possible solution, it was discussed that the employees of subsidiaries and sub-subsidiaries have to be counted with respect to the thresholds of the German One-Third Participation Act (*Drittelbeteiligungsgesetz, DrittelbG*) without any restrictions.

Within the framework of the progress dialogue "Working 4.0", a number of different solutions and possible changes were identified. However, a full implementation appears quite ambitious – in particular also due to the partly far-reaching legal consequences and interdisciplinary complexity. Hence, it remains to be seen whether and with which results the respective parliamentary legislative procedures will be initiated – for now, the progress dialogue "Working 4.0" has provided us with an exciting glimpse into the future where interesting questions under employment and labour law appear on the horizon.

“Minijobs” – disadvantages regarding statutory rights from the employment relationship

Pursuant to a current study carried out by the RWI – Leibniz Institute for Economic Research (*Leibniz-Institut für Wirtschaftsforschung*) to analyse marginal employment relationships (minijobs) and the effects of the statutory minimum wage, many persons working in marginal employment are deprived of their rights from the employment relationship.

Pursuant to the German Federal Employment Agency (*Bundesagentur für Arbeit*), there is a total of approximately 7.5 million marginally employed workers in Germany.

From an employment law perspective, the employment of “mini jobbers” is to be treated as a “regular employment relationship” with all respective rights. In addition to protection against dismissal, this also includes rights such as continued pay during sickness periods and paid annual leave.

Specific regulations which deviate from those applicable to full-time or part-time employment relationships only apply with respect to certain social insurance and tax aspects. The “*Minijob-Zentrale*” is the competent collection office for all minijobs in Germany. Employers are obliged to register their mini jobbers with the Minijob-Zentrale and to pay monthly contributions. The application process as well as the due dates and amounts of contributions differ depending on whether the minijobber is employed by a commercial entity or by a private household. The employers bear the lion’s share of the contributions. This includes fixed contributions to health and pension insurance, statutory accident insurance, charges and taxes (paid for the “minijobber”).

Despite the fact that marginally employed workers are entitled to all statutory rights resulting from an employment relationship,

the above study revealed that many “minijobbers” are at a disadvantage in this respect compared to full-time employees in “normal” employment relationships. More than 30 percent of the “minijobbers” participating in the study stated that they did not receive any paid annual leave. 31 percent stated that they did not receive continued pay during periods of sickness and 20.7 percent of those eligible did not receive any “maternity leave pay”. Also, four out of ten “minijobbers” do not get paid on bank holidays.

On a positive note, however, most “minijobbers” receive at least the minimum wage. Since 01 January 2017, the previous minimum amount of EUR 8.50 has been increased to EUR 8.84 gross per hour. Furthermore, in comparison to the RWI’s previous study conducted in the year 2012, a positive trend emerged with respect to the granting of statutory benefits. A comparison between the years showed that benefits such as break periods, continued pay for bank holidays and sickness periods and paid annual leave were granted a lot more frequently in the year 2016 than in the year 2012. Pursuant to the study, this might be due to companies and employees being more aware of employee rights. The recording requirements pursuant to the German Minimum Wage Act (*Mindestlohngesetz, MiLoG*) may also have had a similar effect.

Overall, there is thus a positive trend with respect to the employment of “minijobbers”. Nevertheless, it must be emphasised again that despite the particularities with respect to social insurance, there are generally no differences between marginal employment relationships and “normal” employment relationships from an employment law perspective.



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Federal Finance Court changes its position regarding the taxation of company cars

In the case before the German Federal Finance Court (*Bundesfinanzhof, BFH*), the employer had provided his employee with a company car for professional as well as private use. The employee had to bear all petrol costs for the company car himself, even the portion which pertained to the use of the car for professional purposes. Pursuant to the 1%-gross list price rule, the provision of the company car constituted a non-cash benefit worth EUR 6,300 in the assessment period. On the other hand, the petrol costs borne by the employee in that assessment period amounted to EUR 5,600. In his income tax return, the employee tried to claim the petrol costs as income-related expenses with respect to his income from salaried employment.

The employee's competent tax office did not accept the deduction of income-related expenses, also making reference to the previous case-law of the Federal Finance Court. Pursuant to the administrative arrangements, individual cost items borne by the employee, with the exception of leasing instalments, were not to be considered as reducing the non-cash benefit. Furthermore, the Federal Finance Court's previous case-law stated that individual costs of the company car borne by the employee could not be recognised if the non-cash benefit is determined pursuant to the 1%- gross list price rule (BFH, decision of 18 October 2007, file ref.: VI R 57/06).

In the decision of 30 November 2016 (file ref. VI R 2/15), the BFH abandoned its previous case-law and ruled in favour of the employee. Whilst a fee paid by an employee for the use of a company car does not constitute an income-related expense, it does nevertheless reduce the non-cash benefit resulting from the option to use the company car within the context of the income tax deduction

procedure. In the case decided by the court, the non-cash benefit amounting to EUR 6,300 thus had to be reduced by the petrol costs borne by the employee in the amount of EUR 5,600. The taxable non-cash benefit consequently amounted to no more than EUR 700. The Federal Finance Court expressly pointed out that in such cases, the employee was required to fully document and prove the scope of the expenses borne by the employee. In comparison to the deduction of income-related expenses as initially applied for by the employee, the deduction of the costs borne by the employee from the value pursuant to the 1%-gross list price rule has the advantage that these costs also reduce the required social insurance contributions.

In another decision dated 30 November 2016 (file ref. VI R 49/14), the Federal Finance Court ruled that individual costs borne by the employee or financial contributions by the employee could only reduce the non-cash benefit resulting from the provision of a company car down to an amount of EUR 0. Should the costs borne by the employee or the contributions made by the employee exceed the non-cash benefit, then the exceeding amount will not have any tax consequences. Equally, it will not be possible to deduct such exceeding amount from the income from salaried employment as income-related expenses.

New forms for notices of mass dismissal

In the autumn of 2016, the German Federal Employment Agency (*Bundesagentur für Arbeit, BA*) published new forms for notices of mass dismissal pursuant to Sec. 17 of the German Employment Protection Act (*Kündigungsschutzgesetz, KSchG*) which contain amendments creating considerable extra work for employers.

Pursuant to the act, the notice must contain the following information: Name of the employer, registered office and type of the company, reasons for the planned dismissals, the number and the professional groups of the employees to be dismissed, the number and the professional groups of the regularly employed staff, the timeframe of the dismissals and the intended criteria for the selection of the employees to be dismissed.

To avoid any queries from the Agency regarding the measure which might delay the staff reduction process, we would recommend submitting the notice using the forms published on the Agency's homepage. However, the known forms were quietly changed in November 2016 as follows:

- The number of forms was reduced down to two.
- The categorisation of all employees and of the employees affected by the mass dismissal in form BA-KSchG 1 has changed dramatically: While previously, employees had to be categorised into 144 different professional groups using a separate form, all employees working for the company and the employees marked for dismissal now – contrary to the wording of the Act – have to be categorised on the main form into occupational groups based on a list prepared by the BA. The individual professions are broken down into ten

professional areas, 37 main professional groups, (the previous) 144 professional groups, 700 professional sub-groups and 1,286 professional categories. Since the occupational groups – as was the case for the professional groups – do not normally match the job specification used in the companies, it is generally necessary to perform a manual categorisation; the increased number of occupational groups will thus lead to a significantly higher work load in the future.

- Furthermore, the new forms do not only require a specification of the dismissal date but also of the notice period. This means that based on the table included in the form, employees must be categorised in such detail that virtually every single employee will have to be listed.
- The previous "*Liste der zur Entlassung vorgesehenen Arbeitnehmer*" (list of employees to be dismissed) was replaced by form BA-KSchG 2, which now requires "*Angaben zur Arbeitsvermittlung*" (information regarding placement services); there have been no changes in terms of content.

The changes to the mass dismissal forms are truly annoying as they make it even more difficult to submit a correct mass dismissal notice. However, employers should comply with these requirements to avoid problems in subsequent unfair dismissal proceedings due to formal mistakes.

If you are planning staff reduction measures exceeding the thresholds of Sec. 17 KSchG, we would therefore recommend to familiarise yourself with the new forms as soon as possible and to allow sufficient time for the preparation of the notice.



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New mindfulness (part 2) – Possibilities of implementation in the company

In the previous issue of our newsletter (1/2017), we reported on the current developments regarding the “new mindfulness movement” in German and international companies and highlighted its advantages. We would now like to look at how this exciting concept can be put into practice in companies.

Companies are already offering a wide variety of options, ranging from brief 10-minute (relaxation) exercises for individual employees to workshops and seminars for specific groups of employees or even for the entire workforce.

As a rule, it is not possible to simply exercise the employer’s instruction right to oblige employees to participate in such offers as the instruction right is limited by the employment contract. Therefore, should the employer wish to generate the option to make it mandatory for employees to participate in such offers, this would generally have to be agreed beforehand between the employer and the employee in the employment contract.

However, with a concept focusing mainly on self-reflexion and awareness of an inner focus, it does not make much sense to oblige employees (against their will) to participate in respective activities. A much more sensible approach would be to create a genuine interest among the workforce by providing specific information on such offers as well as their advantages. Such offers can only achieve the intended effect of increasing the efficiency of the workforce if employees do not perceive them as an “imposition” or a “burden”.

If the employer does not instruct the employee to carry out such exercises or to participate in workshops, the employee will have to regularly use his break times or his free time for such activities.

However, in order for the employer to nevertheless create an additional “incentive to voluntarily invest time”, it would for example be recommendable to grant additional (perhaps even paid) break periods (for example for short 10-minute exercises).

If the company already offers a programme in the context of which employees are granted the option to invest a certain number of their working days per year in their personal development, such mindfulness offers (e.g. workshops or seminars) can be integrated into existing training programmes.

Another option would be for the employer to pay (some or all of) the costs of such seminars which employees attend in their free time. Finally, companies could (maybe even during working hours) offer voluntary seminars with external trainers. As a positive side effect, such events, if they take place on a regular basis, could also improve the working atmosphere and team spirit in the company.

Overall, there are thus numerous options which companies can use to create incentives for employees to voluntarily participate in mindfulness training offers. Such incentives can be individually tailored depending on the structure of the respective company and any internal programmes already in place at the company, if companies keep an open mind with respect to such new approaches.

Column

It all ends with pensions

Our average life expectancy is still increasing. As we all know, the problem of demographic aging is a major challenge for our pension systems. The legislator has now attempted to set a new course by introducing an act aiming at adding flexibility to the transition from work to retirement and at providing support and rehabilitation to the working population (referred to in short as “flexi-pension”). Unfortunately, however, the act still does not provide new options for secure time limitations of employment relationships which continue past the statutory retirement age – the “risk” that a limitation is ineffective in such cases thus remains as high as ever.

Context

The flexi-pension has created numerous new possibilities to achieve a “gradual” transition from work into retirement. Some changes are already effective – others will enter into force on 01 July 2017. One of the most important changes: The previous four-stage partial pension system is replaced by a continuous consideration of income supplementing the pension. This makes it easier to receive a salary in addition to an early retirement or reduced-earning-capacity pension. At the same time, employees will continue to gain statutory pension insurance earning points which will ultimately increase their pension entitlement.

So far so good. However, from an employment law perspective, these changes are difficult to implement. Since 2014, employers and employees have been able to agree to extend the employment relationship past the statutory retirement age and to limit the period of the continued employment by making a respective agreement in time, i.e. before the commencement of the retirement (Sec. 41 sent. 3 of the German Social Security Code VI (*Sozialgesetzbuch*

VI, SGB VI)). However, there are still major concerns against this provision under European law. Pursuant to the directive on fixed-term work (Council Directive 1999/70/EC), in order to prevent abuse arising from the use of successive fixed-term employment contracts, EU Member States must introduce measures to ensure that there is always an objective reason justifying the renewal of such contracts as well as a maximum total duration and a maximum number of such renewals. The provision of Sec. 41 sent. 3 SGB VI does not fulfil any of these requirements. If Sec. 41 sent. 3 SGB VI was indeed found to be violating European law, any time limitations based on that provision would also be ineffective.

Practical consequences

In practice, due to the uncertain legal situation, companies wishing to use the expertise and professional experience of older employees and employees wishing to remain employed past the statutory retirement age and thus use the social insurance advantages of the flexi-pension will have to rely on the objective reasons specified in Sec. 14 of the German Act on Part-time Work and Fixed-Term Employment Contracts (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge, TzBfG*) for the time being. Specifically, this includes the objective reason of temporarily increased staff requirements (Sec. 14 para. 1 sent. 2 no. 1 TzBfG) and replacement of temporarily absent employees (Sec. 14 para. 1 sent. 2 no. 3 TzBfG). Even though a fixed-term employment past the statutory retirement age is desirable from a social insurance point of view and the flexi-pension was meant to promote such employment, employers must be very careful when using such fixed-term employment agreements.



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News

Complete training programme 2017

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

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

Upcoming Breakfasts and Afterworks

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

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

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

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