
Labour and Employment Law

Newsletter



Read all about it

Labour and employment law update

Issues

Jurisdiction/decisions

1. Admissibility of workplace headscarf bans
2. Employer to bear cleaning costs for hygiene clothing
3. Duty to report absence applies to full-time works council members in case of imminent absence
4. Remuneration claim for "internship" lasting more than five years
5. Clothes-change times might qualify as remunerable working hours

In brief

1. No claim for involvement of a lawyer when inspecting the personnel file
2. Written form requirement when taking parental leave
3. Non-genuine applications constitute a misuse of rights
4. Statutory minimum wage also applies to on-call time
5. Hidden employee leasing does not establish an employment relationship

Brexit

Are German employers affected as well?

Practical example

The new EU-US PRIVACY SHIELD

Political developments

1. Changes to the Maternity Protection Act
2. Increase of the statutory minimum wage to EUR 8.84 per hour worked with effect from 01 January 2017
3. New draft bill to combat illegal employment
4. Changes to the law regarding general terms and conditions of business

Column

It all ends with pensions

News

Dear clients, dear business partners,

This latest issue of our employment and labour law newsletter again takes a look at an interesting variety of topics – we will discuss the practical relevance of recent decisions in the area of works constitution law as well as specific issues concerning the minimum wage and parental leave. An entire section is devoted to detailed discussions of particularly relevant court decisions and their actual impact on day-to-day business.

The majority of continental Europe was flabbergasted by the referendum in Great Britain and its actual outcome. Since then, the media omnipresence of the “Brexit” spectre has become a reality. In addition to the political and economic tremors, the legal consequences are also hard to predict. Also from a labour and employment law perspective, “Brexit” is likely to have significant consequences – be it in the area of data protection or regarding the European Works Council. Our experts Dr. Manuela Rauch and Andrea Wirtz will provide you with a first analysis in this respect. Furthermore, Bernd Pirpamer and Andrea Wirtz provide an introduction to the new EU-US Privacy Shield.

The section “Political Developments” contains a wide array of topics. In addition to the changes to the Maternity Protection Act (*Mutterschutzgesetz*) and the draft bill to combat irregular work issued by the Federal Ministry of Finance (*Bundesfinanzministerium*), we also report on the increase of the statutory minimum wage.

This newsletter also introduces a new column: Under the headline “It all ends with pensions”, our renowned expert Dr. Rolf Kowanz will from now on present the latest developments in the area of company pension schemes.

We would also be delighted to welcome you in person to one of our numerous labour and employment law workshops and seminars in one of our German offices. We have again listed the upcoming events on the back of this newsletter. We hope you will enjoy reading this newsletter.

Your labour and employment law team

Jurisdiction/decisions

1

ECJ decision C-157/15 and ECJ decision C-188/15 Admissibility of workplace headscarf bans

Within a relatively short period of time, the ECJ was asked to decide in two different cases regarding the admissibility of a ban on wearing headscarves in companies. The Opinions, i.e. the non-binding decision proposals of the Advocates General, at the end of the two proceedings differed significantly:

ECJ decision of 31 May 2016 – C-157/15 "Achbita"

Opinion of Advocate General Kokott

Background

The ECJ examined the case of Ms Samira Achbita. After having worked for the Belgian company G4S Secure Solutions for approximately three years, the employee insisted on wearing a headscarf at work from now on for religious reasons. Her employer, however, informed her that she was not allowed to wear a headscarf at work due to the ban on wearing visible religious, political or philosophical symbols which applied at the company. The employee was not prepared to comply with this ban. Ms Achbita was dismissed as a result.

Opinion

In her Opinion, Advocate General Juliane Kokott takes the view that there is no direct discrimination on the ground of religion where an employee is banned from wearing an Islamic headscarf in the workplace, provided that the ban is founded on a general company rule. However, the Advocate General did recognise that the ban may constitute indirect discrimination, i.e. a rule which appears neutral but is capable of putting individuals or groups of individuals at a disadvantage based on religion. Such indirect discrimination may, however, be justified in the individual case, for example if the ban forms part of an employer's effort to achieve religious and ideological neutrality in the respective company.

However, the principle of proportionality must be observed in this regard. Advocate General Kokott regarded the indirect discrimination in the form of the company ban and the objective pursued with the ban as legitimate. Contrary to other grounds of discrimination which an employee cannot "leave at the door", the exercise of religion practices was a circumstance of private lifestyle which is subject to volition and can thus be modified. In the individual case, an employee could thus be expected to moderate his or her religious practices, religiously motivated behaviour or (as in the present case) clothing while on the employer's premises.

ECJ decision 13 July 2016 – C-188/15 "Boungaoui"

Opinion of Advocate General Sharpston

Background

The ECJ also examined the case of Ms Asma Boungaoui. She worked as a project engineer for an IT consultancy firm and sometimes wore an Islamic headscarf at work. After providing on-site services at a client's premises, the client informed the company that his employees had complained about the headscarf. At the same time, the client requested that "there should be no veil next time". When Ms Boungaoui refused to comply with this request in a personal meeting, her employer terminated the employment relationship.

Opinion

In her Opinion, Advocate General Eleanor Sharpston takes the view that the freedom to manifest one's religion or belief falls within the scope of the Directive 2000/78/EC as it is an intrinsic part of the freedom of religion. Ms Boungaoui had thus been subjected to direct discrimination on the ground of her religion. A different person in a comparable situation who had not chosen to manifest his or her religious

belief would not have been dismissed. Directive 2000/78/EC provides that a difference in treatment does not necessarily constitute discrimination. However, in addition to other requirements, religion would have to constitute a genuine and determining occupational requirement due to the type of a specific professional occupation or the circumstances of its performance. In this case, however, refraining from wearing an Islamic headscarf could not be regarded as a genuine and determining occupational requirement. In Advocate General Sharpston's view, religious identity is an integral part of a person's life which cannot simply be discarded during working hours.

Practical consequences

Although from a legal perspective, the two cases are very similar, the views of the Advocates General differ significantly in some respects. The contents of the two Opinions give evidence of a certain lack of clarity regarding the legal assessment of the existence and specific type of a potential discrimination and possible justifications of differences in treatment.

Both general measures (e.g. establishment of an internal dress code by way of a company agreement) and individual measures (e.g. dismissal of an employee due to a respective violation) should thus always also be examined in terms of their compliance with the provisions of the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*). Otherwise, employers may run a serious risk of being sued for damages or compensation payments. Possible side effects such as reputational damage should also be considered.

Outlook

Although the Opinions are merely an independent decision proposal which is non-binding for the ECJ in its decision, they often indicate a certain direction for the subsequent decision.

It will be highly interesting to see the effects of both ECJ decisions on the German courts. The German Federal Constitutional Court (*Bundesverfassungsgericht*) already corrected its view regarding the general headscarf ban at schools in early 2015. However, the ECJ decisions which are expected shortly might also trigger significant developments regarding the decisions of German labour courts in matters concerning the AGG.



Dr. Stefan Kursawe
Partner

stefan.kursawe@eversheds.de
+49 89 545 65 193

2

BAG of 14 June 2016 – 9 AZR 181/15 Employer to bear cleaning costs for hygiene clothing

The decision

The employee bringing the action works in the slaughtering section of a slaughterhouse. The plaintiff as well as the other employees is required to wear white hygiene clothing at work. The hygiene clothing was provided by the defendant. The defendant deducted a fixed amount of EUR 10.23 per month from the plaintiff's net wage for the cleaning of the hygiene clothing made available to the plaintiff.

In his action, the employee claimed that the defendant was not entitled to deduct such fixed amounts from the net wage. He thus demanded backpay in the total amount of EUR 388.74 net for a period of just under three years. The plaintiff succeeded in the courts of the first two instances. The employer's appeal to the German Federal Labour Court (*Bundesarbeitsgericht*) was also unsuccessful.

The employee thus did not have to bear the cleaning costs of the hygiene clothing required at his workplace.

Practical consequences

Pursuant to Sec. 670 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), a reimbursement of expenses can be claimed from whoever has an interest in the performance of the actions which caused the expense. Both Directive (EC) No 852/2004 regarding food hygiene and the national Food Hygiene Regulation require the employer to comply with certain hygiene standards. Pursuant to this legislation, persons working in an area where foodstuffs are handled must wear suitable and clean work clothing. Such work clothing is appropriate specifically if it is light coloured, easily washable and clean and fully covers the personal clothing. In this case, it was thus the employer rather than the employee who had to bear the cleaning costs in his own interest.

It is in the employer's own interest to comply with these hygiene standards for food-processing establishments as the employer is the addressee of the applicable food hygiene regulations. It is thus not admissible to apply a cleaning deduction to the plaintiff's remuneration.

Practical tip

The Federal Labour Court did not answer the question whether the employer may allocate the expenses to the employee on the basis of a respective contractual agreement. Employers are thus advised to include a respective clause in employment contracts until the Federal Labour Court (potentially) declares the general invalidity of such clauses.



Dr. Susanne Giesecke
Partner

susanne.giesecke@eversheds.de
+49 89 545 65 210

3

BAG of 24 February 2016 – 7 ABR 20/14 Duty to report absence applies to full-time works council members in case of imminent absence

The decision

In this case, the German Federal Labour Court (BAG) examined the duties of full-time works council members to report times of absence from the workplace. The employer had required full-time works council members to inform the employer when they are off-site for appointments within the context of their activities as a works council member. They were also asked to provide information on the location of such appointments. The works council and the full-time works council members argued that the employer did not have a legitimate interest in being informed when the full-time works council members leave and return back from external works council business. The works council thus asked the court to confirm that full-time members were not required to report when they leave or return to the company premises.

The labour court granted the works council's application and the regional labour court also confirmed the decision of the first instance. At the Federal Labour Court (BAG), however, the employer's complaint was successful in most aspects.

Full-time works council members are thus only released from their duty to work, not however from their duty to be present at the workplace. Consequently, full-time works council members generally have to be available on-site to perform works council tasks. The employer thus also has a legitimate interest to be informed when one or several of the full-time works council members are temporarily not available on-site and to know how long they will be absent. This is to ensure that a works council contact person is always available for the employer as and when matters concerning company co-determination arise in the company. However, the BAG ruled that the employer was not entitled to be informed regarding the location of external works council business. Such information could – if required e.g. for the reimbursement of travel costs – also be supplied after the event by the works council or the respective full-time member.

Practical consequences

Pursuant to established BAG case law, part-time works council members were already subject to a duty to report when they leave and return back to the workplace. Part-time works council members must inform the employer when they are temporarily released from their duty to work and thus leave their workplace. These duties are also derived from the principle of trustful cooperation between the employer and the works council. They are intended to facilitate the allocation of work and compensation measures for the loss of working hours for the employer.

The BAG has now confirmed these duties also for full-time works council members: If they attend to off-site works council business, they also have a duty to report when they leave and return back to the premises. They must also inform the employer of the expected duration of the absence due to the works council activities.

Practical tip

Employers thus no longer need to shy away from imposing a corresponding duty to report periods of absence on the works council.



Dr. Dirk Monheim
Partner

dirk.monheim@eversheds.de
+49 89 545 65 259

4

LAG Munich of 13 June 2016 – 3 Sa 23/16 Remuneration claim for “internship” lasting more than five years

The decision

Auf The plaintiff had been working for the defendant, a financial agency and insurance company, on the basis of an “Internship Agreement” since September 2009. Pursuant to the contract, the plaintiff was obliged to work 43 hours per week for a monthly remuneration of EUR 300. The internship was to provide the plaintiff, who was a minor when she entered into the contract, with at least four years “professional experience” as required for admission to take the qualified financial advisor exam. Under these contractual conditions, the plaintiff worked for the defendant until March 2015 in compliance with the objective intended by both parties.

In court, the plaintiff claimed that the “Internship Agreement” was to be regarded as an employment contract and demanded subsequent payment of several ten thousand euros. Specifically, she claimed that the focus lay on the performance of work and that a work period of just under five and a half years could not be considered an internship. Furthermore, the calculated hourly pay only amounted to EUR 1.61 and was thus *contra bonos mores*. The defendant argued that the remuneration was to be regarded as an expense allowance. Furthermore, the plaintiff’s sub-standard performance had actually caused a financial loss. Also, in-depth training measures had been required in addition to the regular internship hours on each Monday and on the first Saturday of each month.

Both courts agreed with the plaintiff’s legal position. From a legal point of view, the “Internship Agreement” – despite the chosen denomination – had created an employment relationship. The plaintiff thus successfully claimed the subsequent payment of several ten thousand euros.

Practical consequences

The denomination on its own is not necessarily an indicator of the legal nature of a contractual relationship. The details of the respective contract and its actual day-to-day implementation may – as was the case here – give rise to an employment relationship between the parties.

In the present case, the focus lay on the plaintiff’s work performance rather than on the training character of the work relationship. The intention for the internship to last several years is also a significant criterion indicating that an employment relationship existed between the parties. Furthermore, the court held that the agreed remuneration of EUR 300 per month was also *contra bonos mores* and thus invalid. A specific remuneration is regarded *contra bonos mores* where the compensation is clearly disproportionate to the work performance. In this case, it was clear that over a long period of time, the plaintiff had not received a fair compensation for her work. On the basis of the statutory minimum wage and considering the usual remuneration, the court ultimately found that the plaintiff was entitled to receive approx. EUR 50,000.

Practical tip

The contractual design of internship agreements and the use of interns require a high degree of prudence. Otherwise, there might be financial disadvantages. Furthermore, companies should be aware that under certain circumstances, the German Minimum Wage Act (*MiLoG*) may also apply to interns.



Frank Achilles
Partner

frank.achilles@eversheds.de
+49 89 545 65 215

5

Regional Labour Court, 23 November 2015 – 16 Sa 494/15 Clothes-change times might qualify as remunerable working hours

The decision

In proceedings at Hesse Regional Labour Court (*Landesarbeitsgericht, LAG*), the parties were in dispute regarding the remuneration of times required to get changed and to get to the actual workplace on the company premises. The plaintiff works at the defendant's waste-to-energy plant and has to wear protective equipment for health and safety reasons. With his action, the plaintiff claimed that the times spent at the workplace to get changed and to get from one location to another on the company premises should be credited to his working time account. After activating the time recording terminal, it regularly took the plaintiff 1-2 minutes to walk to the change rooms, where he changed into his protective clothes and then proceeded to the shift handover. The plaintiff regarded the time spent walking to the change rooms and getting changed as working time. He thus claimed compensation for a total of 39.68 hours which he invested in these activities in the period between 2012 and April 2013.

Both previous instance courts essentially agreed with the plaintiff. The time spent to get changed and walk to and from the change rooms was almost completely recognised as remunerable working time.

Practical consequences

Getting changed counts as working time if it is done for the benefit of a third party such as the employer, i.e. if wearing a certain type of work clothes is mandatory and the employee gets changed at the company premises.

In the present case, LAG Hesse ruled that the employee wore the work clothes for the benefit of a third party. The employee had to wear specific protective work wear to protect his

health. Although the employer did not specifically instruct the employee to get changed on the company premises and the mere possibility to get changed and to clean dirty work clothes at the workplace could not be interpreted as an implicit instruction in this respect, the employee nevertheless got changed for the benefit of a third party, i.e. in the interest of his employer, and this was thus to be regarded as remunerable working time.

A significant aspect for this decision was that the protective work wear was particularly distinctive. The plaintiff could thus not be expected to travel from his home to his workplace wearing such conspicuous apparel. Furthermore, due to the nature of his work, the protective clothing was often so dirty that the plaintiff could neither be expected to keep it at his private home nor to use his private car and/or public transport wearing it. In effect, the plaintiff was thus forced to get changed on the company premises.

Practical tip

To avoid having to remunerate changing times, employers are advised not to instruct employees to wear specific work clothes and/or to get changed at the workplace. It may also be advisable in this respect to use inconspicuous work clothes. If, however, a specific type of protective work clothes is required by law, it is unlikely that the employer will be able to "avoid" having to remunerate employees for times spent getting changed and walking to and from the changing rooms. In this case, we would recommend to optimise spatial concepts and to adapt operational procedures to save costs.



Dr. Daniel Scheerer
Partner

daniel.scheerer@eversheds.de
+49 89 545 65 138

In brief

1

BAG decision of 12 July 2016 – 9 AZR 791/14 No claim for involvement of a lawyer when inspecting the personnel file

Pursuant to Sec. 83 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), employees are entitled to inspect the personnel file kept on them and may also involve a member of the works council into the inspection. However, this statutory regulation does not lead to a right of the employee to involve a lawyer into the inspection of his personnel file. The involvement of a lawyer against the will or without the consent of the employer is thus not possible. According to the court, neither the employer's obligation of consideration nor the employee's right to informal self-determination gave rise to such a claim.

2

BAG decision of 10 May 2016 – 9 AZR 145/15 Written form requirement when taking parental leave

Pursuant to the statutory regulations of Sec. 16 para. 1 of the German Federal Parental Benefit and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz, BEEG*), compliance with the statutory written form requirement is mandatory when taking parental leave. The prescribed written form requirement is not complied with if the employee declares via fax or email that he or she wishes to take parental leave. In the case on which this decision is based, the employee informed the employer of her decision to take parental leave by fax only. Non-compliance with the written form requirement neither leads to the parental leave being taken with full legal effect nor does it result in a special dismissal protection pursuant to Sec. 18 BEEG.

3

ECJ decision of 28 July 2016 – C-423/15 Non-genuine applications constitute a misuse of rights

Non-genuine applications which are solely intended to assert compensation claims pursuant to the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) constitute a misuse of rights. In the present case, a Munich-based lawyer who is a known "AGG hopper" applied for a trainee position at an insurance company. The insurance company at first rejected the application; however, a later invitation to an interview was not accepted by the lawyer. Subsequently, the unsuccessful applicant asserted compensation claims for an alleged discrimination because of his age and gender. The courts of the first two instances dismissed the action. The Federal Labour Court (*Bundesarbeitsgericht, BAG*) referred to the European Court of Justice (ECJ) regarding a question of interpretation of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. According to the ECJ, the protective purpose of these Directives, however, does not include applicants whose application is solely intended to pursue the goal of asserting claims for payment of a compensation. Such behaviour must rather be assessed as a misuse of rights.

4

BAG decision of 29 June 2016 – 5 AZR 716/15 Statutory minimum wage also applies to on-call time

According to the BAG, also on-call times must be considered as remunerable working time. Hence, the statutory minimum wage also has to be paid for on-call times in general. The plaintiff in this case regularly performed on-call times within the framework of a 4-day week on 12-hour shifts. With his action, the plaintiff claimed that the employer did not pay the statutory minimum wage for these on-call times. The BAG ultimately dismissed the plaintiff's payment claims with final legal effect. The remuneration of the on-call time was not shown separately. However, contrary to the plaintiff's opinion, the monthly remuneration exceeded the statutory minimum wage also in view of the on-call times.

5

BAG decision of 12 July 2016 – 9 AZR 352/15 Hidden employee leasing does not establish an employment relationship

The plaintiff at first worked as a temporary worker for the defendant, a company operating in the automotive sector. The plaintiff's contractual employer was in possession of an employee leasing licence and had concluded several contracts for work and services with the defendant. In order to fulfil the obligations under the contracts for work and services, also the plaintiff performed activities for the defendant. Before court, the plaintiff argued that the contracts for work and services between the defendant and the plaintiff's contractual employer were merely concluded in order to hide the employee leasing. According to the plaintiff, the legal consequence of such hidden employee leasing was that an employment relationship was established between the plaintiff and the defendant. The BAG did not share this opinion: In the court's view, no employment relationship between the temporary worker and the hiring company is established in cases of hidden employee leasing – in contrast to cases where no employee leasing licence exists.

Save the Date: 09 November 2016 – 05:30 pm until 07:00 pm followed by networking

After-work event on the reform of the German Personnel Leasing Act
(*Arbeitnehmerüberlassungsgesetz, AÜG*)

"What will be changed? When will the changes come into force?
Which structuring options do exist?"



Brexit

Are German employers affected as well?



Dr. Manuela Rauch

Principal Associate
Eversheds Munich

A few months have passed since the majority of the British people voted in favour of leaving the EU. The result of the EU Referendum does not, in itself, constitute a formal step towards withdrawing from the EU. The UK Government will, therefore, need to formally invoke Article 50 of the Treaty on European Union. The UK will stop being an EU Member State on the earlier of a withdrawal agreement being concluded or two years from the date formal notice is given.

There are approximately 3 million citizens of the European Economic Area (EEA) who are currently making use of their free movement of workers right in the UK and approximately 1.2 million British people who live and work outside the UK in the EEA. Furthermore, there are approximately 2,500 subsidiaries of German companies in the UK and approximately 3,000 subsidiaries of British companies in Germany. We expect that the UK's withdrawal from the EU will entail some changes for these employees and companies, even if the mechanisms and timing of Brexit will only become somewhat clearer in the coming months.

At this point we would like to clearly point out that initially, from a legal perspective, there are unlikely to be any changes for approximately two years, but still we would like to address a number of issues that German employers who have relations with the UK should increasingly keep an eye on:

– Residence and employment permits

The impact of the UK's withdrawal from the EU on immigration law in Europe is not yet clear, but employees intending to take on work beyond the border might have to apply for a work visa in the future. Highly

qualified British workers may no longer be able to simply move to another member state and start working there; they may have to apply for a "Blue Card" instead. For less qualified British workers and self-employed workers, the strict national legislation for taking up work in the EU would apply.

To be on the safe side, in the future you should include a clause in your employment contracts (again) that makes a valid residence/work permit a condition of the contract, if you have not provided for this already. In order to avoid discrimination against other nationals, it must be ensured that no distinctions are drawn between different nationalities.

The ultimate impact of the UK's withdrawal from the EU on business travellers also remains to be seen.

– Secondments

Companies have to be aware that in the future, secondments to and from the UK could entail complex legal questions. With regards to (long-term) secondments, apart from questions on residence and work permits, employers may particularly have to consider social security concerns as secondments to foreign countries may no longer be covered by EU Regulation (EC) 883/2004 and provisions on inbound and outbound transmission may again be applicable to determine whether an employee may remain in the social security system of the home country. It is also possible that after the UK's withdrawal from the EU, the German-British social security agreement, which had become immaterial due to the EU membership of both countries, will become applicable again. The social security agreement is still in force and is currently used for matters not regulated by the EU regulation.



Andrea Wirtz

Associate
Eversheds Munich



– Data protection

To date, the UK has been benefiting from the uniform level of data protection within the EU like any other EU member state. This means a transmission of data from a company in Germany to a recipient in the UK is treated in the same way as the transmission of data from a German company to a recipient in Germany.

Even now the transmission of personal data to recipients outside the EU and the EEA is assessed differently. According to EU data protection rules, these states are generally regarded as “unsafe”. Therefore additional measures are required for the transmission of personal data to such countries in order to ensure data protection compliance. The EU Commission has positively confirmed the required level of protection in the context of the adequacy decision for a number of countries (such as: Andorra, Argentina, Canada, Switzerland, Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand and Uruguay), whereas, for the transmission of personal data to other countries, specific regulations must be observed. Before the safe harbour decision of the European Court of Justice in October 2015 there was the possibility for the USA to guarantee the appropriate data protection level by self-certification of the receiving US-company. The decision on the succession plan, the so called EU-US-Privacy Shield, was recently made by the EU Commission (for more information please see p. 15 of this newsletter).

When other countries are affected as recipients by international data transfer, binding corporate regulations can serve as a basis for data transfer within a group.

Otherwise, contractual arrangements on the basis of EU standard contract terms come into consideration.

At this point it is still unclear if such regulations will also be applied to the UK. What is clear, however, is that as far as personal data transfers from Germany to the UK are concerned, there are no special particularities to be considered whilst the UK remains a member of the EU.

However, it is clear at this point that, unless the UK and the EU agree to the contrary, the new General Data Protection Regulation (GDPR), which will apply directly in the EU member states from the end of May 2018, will not have direct effect in the UK once the UK leaves the EU. Companies based in the EU which transfer data to the UK may, therefore, have to revise their already concluded data transfer agreements with British (group) companies.

– European Works Council

Furthermore, it is unclear to what extent regulations for European employee representations will be applicable in the UK in the future. There are approximately 1,100 European works councils (EWC) and the European stock company (SE) works councils that could possibly be affected by this. The guidelines for the EWC and the SE currently enable the involvement of British employees in these cross-border committees. However, following the withdrawal of the UK from the EU, British employees may no longer be entitled to participate in the EWC and the SE works council. Moreover, the committees may no longer be eligible to information and consultations about measures which are planned by the group management in the UK.

Summary

Thus it is clear that Brexit could affect German companies in several ways. However, currently nobody can definitively predict the actual effects of the UK's withdrawal from the EU; these essentially depend on the outcome of the negotiations between the UK and the EU, with principally the following three conceivable constellations:

1. "Norway" Model

The UK remains a member of the EEA, an existing economic agreement between the EU, Norway, Iceland and Liechtenstein. In this case, the majority of the existing provisions for the freedom of movement in the EEA would continue to be valid. The UK would also be regarded as a safe third country with regards to data protection meaning there would be no changes for data transfers to the UK. With regards to European employee representations, in addition to the 27 member states, Norway, Iceland and Liechtenstein have also adopted respective national provisions regarding the EWC directive; the UK could simply continue to apply today's existing laws (*The Transnational Information and Consultation of Employees Regulations 1999*).

2. "Switzerland" Model

In this scenario the UK could, like Switzerland, recognise certain elements of EU legislation within the framework of separate bilateral agreements. This could also affect the EU

Data Protection Directive and the GDPR which will take effect on 25 May 2018. As far as the freedom of movement in the EEA is concerned, this would, however, probably mean that the agreements would be less liberal than in EEA-states and that consequently at least bureaucratic hurdles for the cross-border assignment of employees would arise.

3. "Third Country" Model

In the third scenario no (short or medium-term) agreement would exist between the UK and the EU. In this case the UK would become a "third country", i.e. British employees would be subjected to the same restrictions as for example employees from Africa or South America. For cross-border data transfers, principally the same regulations would apply as for transfers from Germany to Africa and Asia (binding corporate regulations, agreements on the basis of EU standard contract clauses).

For more information on this matter, please do contact us any time.

For more general information on Brexit please also see Eversheds' Brexit Hub.

Regarding the topics data protection and global mobility, we also recommend the following training courses:

IT Systeme im Betrieb und Unternehmen (IT systems within the business and enterprise)

(28 September 2016)

Entsendungen von und nach Deutschland (Secondments from and to Germany)

(05 October 2016; 03 November 2016; 23 November 2016)

For more information on our training programme, please visit eversheds.de/veranstaltungen.

Practical example

The new EU-US PRIVACY SHIELD

Following the decision of the European Court of Justice (ECJ) of 06 October 2015 regarding the invalidity of the Safe Harbor decision, the transfer of personal data from companies within the EU to recipients in the USA was only admissible under strict preconditions. These difficult conditions in connection with the transfer of personal data will soon cease to exist. On 12 July 2016, the EU Commission made a decision on adequacy regarding the successor of the Safe Harbor Agreement, i.e. the EU-US Privacy Shield. Under the EU-US Privacy Shield, transfers of personal data to the USA will be easier again in the future.

The precondition for a transfer of personal data pursuant to the principles of the EU-US Privacy Shield is that the receiving company in the USA has to undergo a respective certification at the US Department of Commerce. It has to submit to the data protection regulations set forth in the EU-US Privacy Shield Framework and subsequently obtains respective certifications from the US Department of Commerce. This self-certification process started on 01 August 2016. A list of participating countries can be found under www.privacyshield.gov/list.

The EU-US Privacy Shield contains the following innovations:

- multi-stage means of redress for EU citizens;
 - joint annual review of the functioning of the privacy shield by the EU Commission and the US Department of Commerce.
- Hence, if a recipient in the USA possesses a self-certification pursuant to the EU-US Privacy Shield and, furthermore, if the respective transfer of personal data to such recipient fulfils the requirements of the German data protection laws, the transfer will again be admissible – as it was prior to the aforementioned decision of the ECJ.
- However, it remains to be seen whether the EU-US Privacy Shield will withstand a new review by the ECJ. Activists already announced new procedures.
- We will, of course, inform you about future developments in connection with this issue.
- companies in the USA are subject to stricter requirements for the protection of personal data of EU citizens;
 - the US Department of Commerce and the Federal Trade Commission are obliged to take more intensive control and enforcement measures;
 - data access by US authorities is only permitted for reasons of national security and under clear restrictions, protection measures and supervisory mechanisms;



Bernd Pirpamer
Partner
Eversheds Munich



Andrea Wirtz
Associate
Eversheds Munich

Political developments

1

Changes to the Maternity Protection Act

The Federal Government submitted a draft bill on changes to the Maternity Protection Act (*Mutterschutzgesetz, MuSchG*). It is intended to improve, in particular, the possibilities of continued employment during pregnancy and breastfeeding in order to avoid professional disadvantages for women.

In its statement of 17 June 2016, the upper house of the German parliament (*Bundesrat*) welcomed the essential new regulations. In addition, a statutory codification of the right to return to the previous or an equal workplace under the conditions which existed before the maternity leave – which is already standardised by European law – was suggested. However, it is unclear whether a respective regulation will already be introduced in the course of the legislative procedure.

2

Increase of the statutory minimum wage to EUR 8.84 per hour worked with effect from 01 January 2017

The minimum wage commission proposed to the Federal Government to increase the statutory minimum wage of currently EUR 8.50 gross to EUR 8.84 per hour worked. Approximately 3.7 million employees are to benefit from this increase. With effect from 01 January 2017, the transitional regulation which permits a deviation from the statutory minimum wage under collective bargaining agreements also ceases to exist. This concerns, in particular, agriculture and forestry, employees in landscape gardening as well as in the East German textile and clothing industry. In these sectors, the previous minimum wage of EUR 8.50 will apply on an interim basis until 31 December 2017.

With effect as of 01 January 2018, the new statutory minimum wage determined by the minimum wage commission will apply across all industry sectors and without exceptions of individual segments.

3

New draft bill to combat illegal employment

The Federal Government presented a new draft bill to combat illegal employment. The draft bill and the regulations contained therein are intended to provide effective means to combat tax evasion, social security fraud and all forms of illegal employment. By means of improving the legal framework conditions, in particular the examination and investigation activities of the Financial Control of Undeclared Employment (*Finanzkontrolle Schwarzarbeit, FKS*) and the competent local authorities are to be optimised in order to effectively combat illegal employment. At the same time, the FKS will be provided with enhanced IT equipment.

4

Changes to the law regarding general terms and conditions of business

With effect as of 01 October 2016, the changes to the law regarding general terms and conditions of business will also affect the drafting of employment contracts. With respect to exclusion clauses in employment contracts which are concluded after 30 September 2016, the following must be considered: An agreed written form requirement in order to assert claims might no longer withstand a control of the general terms and conditions.

Column

It all ends with pensions

Employers who offer their employees a company pension scheme have to review every three years whether the current company pensions have to be increased. Reason enough to consider two recent decisions of the BAG regarding this "adjustment review" in more detail:

BAG, decision of 10 February 2015 – 3 AZR 37/14

The decision

The employer, a manufacturer of "vitamin products", justified its failure to adjust the company pension with its poor economic situation. It stated that it was particularly dependent on the parent company since the latter solely purchased its products at specific transfer prices. Moreover, it had agreed with the works council, within the framework of protecting the site from being closed, that no pension adjustment will take place since (further) redundancies would become necessary in case of such adjustments. The BAG did not follow this line of argumentation. The economic situation of the employer was positive, which was proven by the annual financial statements. It was irrelevant that the key figures were merely achieved due to a specific agreement with the parent company. With respect to the pension adjustment, only the actual economic situation was relevant and not a fictitious point of view. The BAG also pointed out that the agreement on protecting the site from being closed concluded with the works council constituted an inadmissible deviation to the detriment of the employees (Sec. 17 para. 3 sent. 3 of the Law on the Improvement of Company Pension Schemes (*BetrAVG*)). In addition, the employer could also not generally refer to a redundancy since this would always depend on an overall view of the economic situation.

Practical consequences

The decision made clear that solely the actual economic situation of the employer is decisive with respect to the obligation to adjust company pensions. Agreements with the works council are not an appropriate means to suspend a pension adjustment.

BAG, decision of 10 March 2015 – 3 AZR 739/13

The decision

The employer concluded a controlling agreement with the parent company. Consequently, it did not adjust pensions due to the deterioration of the economic situation. The plaintiff was of the opinion that the employer, in view of the parent company's economic situation, was nevertheless obliged to adjust the pensions. The mere existence of a controlling agreement did justify an "inclusive calculation", i.e. a calculation which takes the parent company's economic situation into account and where the increase is ultimately financed by the parent. Leaving aside its previous case law, the BAG ruled that the mere existence of a controlling agreement – without any other preconditions – is no longer sufficient and thus rejected an "inclusive calculation".

Practical consequences

By this decision, the BAG marks the end of a lurching course which has been taken since the 1980s. At some point, the BAG allowed the employer to submit discharging proof or requested that there always also needed to be a "damaging instruction". Recently, and despite considerable criticism, the BAG again ruled that the mere existence of a controlling agreement would be sufficient. According to the present decision of the BAG, the employer may avoid an "inclusive calculation" if it can argue and prove that the typical risk situation of a controlling agreement did not materialise.



Dr. Rolf Kowanz
Partner
Eversheds Munich

News

Complete workshop programme for 2016

Company agreements and collective bargaining agreements
27.10.2016 (Munich)

Implementation of corporate integration management in
thecompany
17.11.2016 (Munich)

Secondments to and from Germany
05.10.2016 (Munich)
03.11.2016 (Hamburg)
23.11.2016 (Berlin)

Introduction to German employment law
12.10.2016 (Munich)

IT systems within the business/company
29.09.2016 (Munich)

Giving notice of termination - do it right!
20.10.2016 (Munich)
22.11.2016 (Hamburg)

Dealing with Low Performers
22.09.2016 (Munich)
01.12.2016 (Berlin)

Upcoming Breakfast and Afterwork Seminars

09.11.2016
05:30 p.m. until 07:00 p.m. followed by networking
(Munich)

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

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

Eversheds is one of the leading full service law firms worldwide. In Germany, more than 90 lawyers at our offices in Munich, Hamburg and Berlin provide advice on all questions of business law including public law. Eversheds employs more than 2,000 lawyers in 55 offices in 28 countries around the world. The law firm's clients include listed national and international companies, Fortune 500 companies as well as medium-sized companies and wealthy private clients.

This publication was last updated on 25.05.2016. The information contained herein is of general nature and is not suitable as a basis for decisions in individual cases without previous advice; the information does, in particular, not replace legal advice in the individual case. We do not assume any liability for the completeness and accuracy of the information contained in this publication. © Eversheds Deutschland LLP

Contact with respect to the publication within the meaning of Sec. 55 of the German Interstate Broadcasting Treaty (RStV) is David Johnson, Eversheds Deutschland LLP, Briener Straße 12, 80333 München (Munich), Germany, david.johnson@eversheds.de

Eversheds Deutschland LLP is a limited liability partnership with its seat at One Wood Street, London, EC2V 7W5, United Kingdom, registered in England and Wales under OC396870. A complete list of the members of Eversheds Deutschland LLP and their professional qualifications can be inspected at the seat of the partnership.

eversheds.de

Eversheds Deutschland LLP is a member of Eversheds International Limited.