

# Labour and Employment Law

## **Newsletter**



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Labour and employment law update

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**Dear clients,  
dear business partners,**

With the present edition of our newsletter, I, in my capacity as head of the German Employment and Labour Law practice group, would like to inform you in the name of all partners and lawyers about the latest developments in case-law and politics as well as about upcoming personnel management topics. As usual, we will discuss the latest decisions of regional labour courts up to the European Court of Justice in our case-law overview section. In this edition, we will also have a look at the German Federal Social Court's (*Bundessozialgericht, BSG*) decision on "false self-employment". The court's grounds for this decision have long been awaited after its press release and the decision may facilitate the cooperation between principals and freelancers.

As regards the labour and employment law practice, we will have a look at some important questions concerning the upcoming works council elections in 2018 as well as the current development of the German Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*). We will also continue the series on the aspects of a modern health management by taking into consideration labour and employment law requirements.

We will inform you about new developments as well as current legislative prospects – as usual – in the "political developments" section, such as the reform of the Maternity Protection Act (*Mutterschutzgesetz, MuSchG*).

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 provide some assistance for your work in the area of HR. 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. In particular, I would like to strongly recommend our traditional in-house labour and employment law symposium on 26 October 2017. We will provide you with more information on this by separate mail.

We hope you will enjoy reading this newsletter.



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# Jurisdiction/Decisions

1

ECJ, decision of 08 June 2017 – C-214/16  
Opinion of Advocate General Tanchev in the “King” case

## Background

The European Court of Justice (ECJ) examined the case of Mr King who had permanently worked as a self-employed salesman for an assembly company since 1999. He was paid entirely on commission and his contract with the company did not mention any paid leave nor were there any corresponding agreements with the company on this. On 06 October 2012, i.e. on his 65th birthday, Mr King's employment came to an end. Only a few weeks later, Mr King brought proceedings against the assembling company before the competent labour court, inter alia claiming financial compensation for outstanding holiday. His claim related to a compensation for (unpaid) leave actually taken as well as for leave which was not taken in kind. It was uncontested between the parties to the legal dispute that Mr King had to be deemed an „employee“ as defined by EU law and the relevant national law despite his status as a self-employed salesman.

In these proceedings, the national court decided for a preliminary ruling procedure and referred the case to the ECJ due to several questions regarding the specific interpretation of provisions under European law. It was particularly disputed which legal consequences it may have if a worker fails to claim any unpaid leave before the end of his employment relationship and/or if the employer does not give the employee the possibility to exercise his right to paid annual leave at all or only at a later point of the employment relationship. It also needed to be clarified under which circumstances a worker may carry over his right to annual leave if he did not take his leave just because the employer finally refused to pay him for any period of leave he takes.



## Opinion

In his opinion, Advocate General Evgeni Tanchev found that it is incompatible with the relevant EU law to require a worker to take leave first before being able to establish whether he is entitled to be paid for it. Pursuant to the relevant mandatory EU law, every worker is entitled to paid annual leave. In terms of time, the right to paid leave carries over until a worker has the opportunity to exercise it. However, if there has never been the opportunity to take paid leave during the employment relationship, a worker principally has the right to payment in lieu of leave for the entire employment relationship.

## Practical consequences

The decision of the ECJ on these rights to annual leave is also relevant for German companies. The decision yet to be passed may reach a particular (financial) dimension in “pseudo self-employment” cases. After a negative outcome of “status proceedings” under German law for employers, there may, for example, automatically arise significant financial compensation claims to the disadvantage of the employer if, for example, the contractual partner who is (supposedly) employed on the basis of a contract for work or services successfully asserts rights for leave and/or financial compensation claims retroactively for his employment – which may have existed for several years – after his status as an employee has been legally established. It is to be feared that the legal situation regarding the employment of freelancers which is already very confusing will become even more complex due to holiday claims which also need to be considered now. In order to avoid serious consequences, employers should, straight from the outset, focus on drafting such employment contracts as legally secure as possible.



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## 2

## BSG, decision of 31 March 2017 – B 12 R 7/15 R Remuneration level as an indication of self-employed activity

### The decision

The court proceedings between a North Bavarian administrative district and the Federal German Pension Insurance (*Deutsche Rentenversicherung Bund*) concerned the question as to whether an obligation to pay social security contributions applied to the activities of a family counsellor working on behalf of the administrative district.

The counsellor worked 4 to 7 hours per week, supporting an average of between one and two families per month. The administrative district and the counsellor concluded service agreements for each individual case, which provided for a remuneration of his services on the basis of an hourly fee of EUR 25.00. In addition, a support plan was drawn up which was generally prepared by the family together with the counsellor and an employee of the administrative district.

The German Federal Social Court (*Bundessozialgericht, BSG*), as well as the lower instance courts, confirmed that, contrary to the Federal German Pension Insurance's opinion, the contractual relationship constituted a service relationship with a self-employed service provider rather than an employment relationship. Upon due consideration of all circumstances of the individual case, the court came to the conclusion that, despite the obligation to work towards the objectives defined in the support plan, there was no right to give instructions to the counsellor as there was merely a further specification of the contractual duties rather than any specific instructions as to how to achieve the objectives. The choice, organisation and implementation of measures was mainly the responsibility of the counsellor. The fact that written reports had to be prepared every 6 months was, according to the court, also merely to be regarded as a provision of result reports

which is a standard procedure in the context of the provision of freelance services. Finally, the court stated that the fact that an hourly rate was agreed upon as the remuneration basis was also not an indication against a self-employed service provision, as this case concerned a mere service provision for which a success-related remuneration, which could be expected where the contractor is obliged to provide a material product, would have been unusual due to the specific nature of the contractual services.

### Practical consequences

The decision raises a first glimmer of hope for sectors which typically need to purchase services in the open market to be provided during a relatively short period of time. In its previous case law, the Federal Social Court, when considering the question whether there was a self-employed activity in this context, in particular regarded the provision of reports and a remuneration on an hourly basis as important indicators pointing towards the assumption that the respective contractor was in dependent employment.

Pursuant to the above decision, the Federal Social Court now holds the opinion that the respective remuneration amount may also play an important role in the legal qualification whether the contractor is in dependent employment or self-employed in the individual case. If the contractually agreed remuneration is much higher than the salary of an employee in a comparable role so that the contractor is in a position to make private pension provisions, this is generally an important indicator of a self-employed activity. Nevertheless, the criteria that the contractor must not be obliged to follow instructions and must not be integrated in the company still apply.



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## BAG, decision of 01 June 2017 – 6 AZR 720/15 Termination for cause due to disloyal conduct of a managing director

### The decision

The plaintiff was a managing director of the defendant, an association constituting an umbrella organisation for the local member associations. As a consequence of some not uncontroversial travel expense reports, serious controversies developed between the plaintiff and the chairman. The plaintiff therefore devised a perfidious strategy with the intention to bring about the chairman's resignation. In this context, the plaintiff for example asked each member to write a letter expressing a lack of understanding with regard to a specific communication from the chairman as well as the opinion that the only available option now was to schedule an extraordinary membership meeting in this respect with the objective to dismiss the association's chairman and his management team. Due to this disloyal and conniving behaviour, the association's management decided to terminate the employment relationship with the plaintiff with immediate effect and without a prior written warning.

In the context of the plaintiff's action against unfair dismissal, both lower instance courts confirmed the legal validity of the termination. As the managing director filed an appeal against this decision, the matter was – although the German Federal Labour Court (*Bundesarbeitsgericht, BAG*) confirmed that there had been a good cause for the termination – referred back to the Regional Labour Court to be heard again as the Federal Labour Court found that the facts had not been fully established.

### Practical consequences

This decision first of all confirms the Federal Labour Court's established case law regarding the good cause within the meaning of Sec. 626 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*). If, as in this case, a managing director connivingly and purposefully works towards the removal of the chairperson, thereby destroying the necessary trustful relationship and significantly disrupting the peaceful cooperation within the organisation, a termination with cause of the employment relationship is justified.

Accordingly, in addition to the violation of essential contractual duties also the culpable violation of ancillary obligations "in itself" is suitable as a good cause in order to justify a dismissal without notice. These ancillary obligations include in particular the duty of the parties to the employment contract to consider and respect the legitimate interests of the respectively other party. In managing positions in particular, deceiving the employer and/or engaging in disloyal or conniving actions generally constitutes a breach of such ancillary obligations.

Also, a prior written warning is not required, particularly in case of especially severe breaches of duty. A particularly severe breach of duty generally exist where the employer cannot even be expected from an objective point of view to tolerate the conduct once and it is obvious for the employee that the employer cannot possibly accept such conduct. In this case, the plaintiff must have been aware of the risks associated with her conduct – she even specifically intended to backstab the chairman with her tactical games and ultimately to severely tarnish his image. The defendant, i.e. the association, could not be expected to tolerate such conduct and there was no chance that it would – this was obvious, also for the plaintiff.

### Practical tip

Handling internal corporate conflict generally requires a great deal of tact and, especially if a termination is declared, also good timing – in particular in case of dismissals on suspicion of unlawful conduct, it can be particularly complex to precisely determine the dates of the two-week period in which the termination must be declared.



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## BAG, decision of 27 July 2017 – 2 AZR 681/16 Monitoring by means of keylogger software – Prohibition of exploitation

### The decision

The plaintiff had been employed by the defendant as web developer since 2011. In the context of a network release, the company informed its employees in April 2015 that the complete Internet traffic and the use of their systems would be logged. The company then installed a software on the plaintiff's company PC to monitor all keyboard strokes and regularly take screenshots. After the data generated with the help of this keylogger was evaluated, the plaintiff was called in to speak with his manager about the findings. In this meeting, he admitted that he had used his company PC for private purposes during his working time. Upon written request, he explained that he had indeed programmed a computer game and done some e-mail communication for his father's company but argued that this was only to a small extent and mostly only during his work breaks. With the data material which it obtained by means of the keylogger, the defendant could assume that the plaintiff had done a significant amount of private work while being at work and terminated the employment relationship for cause without notice (*außer-ordentlich fristlos*) and alternatively with notice.

The plaintiff's action against unfair dismissal was successful in the last instance. According to the German Federal Labour Court (*Bundesarbeitsgericht, BAG*), any findings obtained with the help of a keylogger concerning the private activities of the plaintiff must not be used in court because the defendant violated the plaintiff's right of informational self-determination which is protected under the general moral rights. This kind of information gathering was not admissible pursuant to Sec. 32 para. 1 of the Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*). When the defendant decided to use the software, it did not have any reason to suspect that the plaintiff was committing a criminal offence or other gross misconduct. Its measure was unsubstantiated and therefore inappropriate. Although the plaintiff admitted to have used the company computer for private purposes, the Regional Labour Court correctly found that this does not justify a termination without a prior warning.

### Practical consequences

With this decision, the Federal Labour Court took a clear stand on the exclusion of evidence which was improperly obtained by violating data protection regulations in unfair dismissal proceedings. Therefore, employers should make sure that they also observe data protection regulations when establishing the facts for a termination because, if it cannot prove the lawfulness of a termination in any other way, the employer may directly run the risk of losing the case as such evidence cannot be used in court.

### Practical tip

Not only in light of potential exclusions of evidence improperly obtained is it important for employers to consider the relevant data protection regulations when establishing the facts. A violation of data protection regulations – as was the case with the keylogger – may also lead to the imposition of a fine by the competent data protection authority. Pursuant to the current version of the BDSG such fine may amount to a maximum of EUR 300,000.00 depending on the type and severity of the respective violation. However, from 25 May 2018 on, when the EU General Data Protection Regulation in conjunction with the New German Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG-neu*) will enter into force (please find more information on this on pages 16 and 17 of this newsletter), these fines will be significantly higher (up to EUR 20 million or up to 4% of a company's total annual turnover worldwide).



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## BAG, decision of 14 June 2017 – 10 AZR 330/16 BAG in disagreement over the legal consequences of an “unfair” relocation

### The decision

With its decision of 14 June 2017 (10 AZR 330/16), the German Federal Labour Court's (*Bundesarbeitsgericht, BAG*) 10th senate asked the 5th senate whether it still upheld its case law of 22 February 2012 (5 AZR/29/11) pursuant to which employees must comply even with unfair instructions, as long as their unfairness has not been established with final legal effect.

The query from the 10th senate was prompted by a case in which an employee did not comply with an instruction to relocate from Dortmund to Berlin and consequently received a written warning. Following another warning based on a repeated refusal to work (in Berlin), the employer ultimately terminated the employment relationship with immediate effect; the unfair dismissal proceedings against this termination are currently pending with the Federal Labour Court's 2nd senate (2 AZR 329/16).

The Federal Labour Court's 5th senate based its legal opinion – which the 10th senate now disagrees with – on the provisions of Sec. 315 para. 3 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), pursuant to which specifications of the work performance – which must be made at the employer's equitable discretion and specifically include matters such as the work location – are only binding if they actually comply with the standards of equitable discretion. However, pursuant to the court, an unfair performance specification is not void but merely non-binding, Sec. 315 para. 3 sent. 1 BGB.

### Practical consequences

Only a press release from the Federal Labour Court is available so far with respect to the query from the 10th to the 5th Senate, so that we have no detailed information regarding the considerations with respect to the intended deviating ruling. The main argument on which the previous instance court, Hamm Regional Labour Court (*Landesarbeitsgericht, LAG*) based its decision dated 17 March 2016 (file ref. 17 Sa 1660/15) in favour of the employee was that, pursuant to the court, the case law of the 5th senate led to

unacceptable consequences for the employee and to an intolerable shift of risks.

For the time being, as it is yet unclear which legal consequences the Federal Labour Court will assign to an unfair relocation in the future, employers facing disputes in this context should keep in mind that there is a risk that in the future, employees may be entitled to compensation for default of acceptance even if the employee failed to comply with a relocation request, and that, consequently, such failure to comply might not constitute a cause for termination, meaning that terminations on this basis will be ineffective. In this respect, it also remains to be seen which legal opinion the Federal Labour Court's 2nd senate, which is originally the competent senate for unfair dismissal cases, will take in this matter. The action against unfair dismissal was successful in both lower instance courts – labour court and regional labour court. Assuming that, as an imminent change in the case law is really quite possible, there would be no protection of legitimate expectations with respect to the previous case law, it is recommendable to carry out a new, critical risk analysis of already pending legal proceedings.

Where a relocation is not only unfair but also ineffective for other reasons, such as non-compliance with the participation rights of employee representatives, the 5th senate also already stated in its decision of 22 February 2012 that a non-compliance with such relocation requests would not have any negative consequences for the employee. This means that – irrespective of the varying legal opinions currently maintained at the Federal Labour Court – the other requirements of an effective relocation still must be complied with.



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6

## LAG Dusseldorf, decision of 08 June 2017 – 11 Sa 823/16 Death threat justifies termination without notice

### The decision

In this case, the plaintiff challenged the validity of a termination without notice. In the context of elections for an employee representation body, the plaintiff – who had been working in an administrative position for a state office of criminal investigation (*Landeskriminalamt*) since 1988 – unauthorisedly copied election campaign posters on office photocopiers at his own initiative. The plaintiff's line manager consequently asked the plaintiff to reimburse the costs incurred in this context. The plaintiff's reaction came promptly – he filed a criminal complaint against his line manager for coercion. However, the ensuing preliminary investigation proceedings led to the plaintiff being effectively convicted of fraud. Ultimately, the festering conflict erupted and culminated with the plaintiff verifiably threatening his line manager over the phone using the words *"I'll put a knife in you"*. Due to this incident, the employer terminated the employment relationship with the plaintiff with immediate effect.

The plaintiff, however, challenged the validity of the dismissal in court. Both the labour court and the regional labour court ruled that the dismissal without notice was effective. According to the court, the employer could not reasonably be expected to continue to employ the plaintiff due to the severe and serious threat to the line manager.

### Practical consequences

The decision of Dusseldorf Regional Labour Court insofar also confirms the now widely established case law of the Federal Labour Court pursuant to which severe insults and verbal threats vis-à-vis the employer or its representatives justify a termination of the employment relationship, with or without notice. Such behaviour generally constitutes a material violation of the employee's obligations under the employment contract.

However, further factors may have to be considered in the context of the balancing of interests to be carried out before declaring a termination with or without notice: Specifically, these may include the general tone used within the organisation or the respective industry, the

level of education or mental state of the individual employee as well as the specific situation in which the insult or threat was made. In terms of assessing the effectiveness of a termination under employment law, it may therefore also be relevant whether the employee making the threat had previously been provoked in that respect or whether he perhaps apologised afterwards. Furthermore, the employer must ascertain in each individual case whether a prior written warning might (still) be required as the less severe means before declaring the termination.

### Practical tip

Disputes and sometimes also "rough" manners are not completely out of the ordinary in companies – particularly in stressful periods. However, inter alia due to the employer's duty to care with respect to the employees, employers must not tolerate threats to the disadvantage of line managers or colleagues which are as obvious as in this case. Nevertheless, the serious decision whether to – potentially even without a prior warning – proceed straight to the sharpest sword among the sanctions available under employment law, i.e. a termination without notice, requires careful prior consideration in each individual case.



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## 7

## LAG Dusseldorf, decision of 21 June 2017 – 4 Sa 869/16 Admissible secondary employment does not justify a termination without notice

### The decision

In this case, the parties were in dispute regarding the effectiveness of a dismissal. The plaintiff had been working as a general manager for the employer – a bar association – since 01 May 2004. The employment contract contained a clause pursuant to which the plaintiff was entitled to run her own law firm as well as, with the employer's consent, to realise her own publications and presentations. However, the employer accused the plaintiff of having unduly used the employer's resources for her secondary employment. The employer's allegations also included the accusation that the plaintiff had enlisted the help of other employees for the preparation of her own publications and/or presentations. On this basis, the employer terminated the employment relationship with immediate effect.

In court, the plaintiff successfully claimed that the termination declared vis-à-vis her was ineffective: The competent labour court, i.e. the court of first instance, came to the conclusion that the termination declared by the employer was ineffective. Dusseldorf Regional Labour Court (*Landesarbeitsgericht, LAG*) ruled that this was legally correct – the employer's appeal was thus unsuccessful.

### Practical consequences

Ultimately, Dusseldorf Regional Labour Court thus indirectly confirmed the consistent case law regarding the appropriateness of a secondary employment as a compelling reason to justify a termination of the employment relationship.

An inadmissible secondary employment generally suffices to justify a termination without notice of the employment relationship if the employee's secondary employment is in competition with the employer or if the performance owed by the employee under the employment contract is impaired by the secondary employment. A continued and intentional performance of obviously inadmissible secondary employment without the employer's knowledge also qualifies as a compelling reason to justify a termination without notice of the employment relationship.

However, if the employer explicitly permitted a secondary employment, the situation is different.

Where – as in this case – the employment contract contains a clause pursuant to which the employee is entitled to carry out secondary employment, it is generally not possible to simply base a termination without notice on such secondary employment. Pursuant to Dusseldorf Regional Labour Court, this rule also applies in any case if the secondary employment was performed openly and transparently and even if the employee relied too heavily on the employer's resources in performing such secondary employment. In such situations, the employer will generally be required to issue a prior written warning as the less severe means.

### Practical tip

The decision of the employer as to whether and to which extent employees should be allowed to carry out secondary employment requires careful consideration. This fully applies also to any sanctions under employment law imposed due to an inadmissible and/or excessive secondary employment. Furthermore, we would recommend including respective provisions regarding a potential secondary employment in the employment contract and to review the legal effectiveness of such provisions at regular intervals in line with the continuous modifications of the case law.



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# In brief

1

## Hamburg Tax Court, decision of 10 May 2017 – 4 K 73/15 Documentation duties pursuant to the German Posting of Workers Act

Pursuant to a non-appealable decision of Hamburg Tax Court (*Finanzgericht Hamburg*), the statutory documentation duties pursuant to the German Posting of Workers Act (*Arbeitnehmerentsendegesetz, AEntG*) also apply to industries where a collective bargaining agreement has been declared generally binding. Within the scope of applicability of the Regulation Regarding Compulsory Working Conditions in the Agriculture and Forestry Sector (*Verordnung über zwingende Arbeitsbedingungen in der Land und Forstwirtschaft, LandwArbbV*), employers are thus subject to a statutory obligation to keep adequate records regarding the commencement, end and duration of the daily working times of all employees – rather than only for marginally employed workers. Pursuant to the court, the provisions of the German Minimum Wage Act (*Mindestlohngesetz*) do not exclude a corresponding applicability of Sec. 19 AEntG either.

2

## ECJ, decision of 22 June 2017 – C-126/16 Transfers of undertakings – Employees' rights

In case of a post-bankruptcy transfer of undertakings due to an agreed "pre-pack", the relevant statutory employee rights generally remain applicable. A "pre-pack" is an agreement which is made in preparation of a transfer of an undertaking with the purpose of enabling a swift re-start of sustainable business units after a bankruptcy. Such agreements are above all also intended to preserve both the value of the company and jobs. Although it is generally possible pursuant to Art. 5 of Directive 2001/23 that employee rights determined under EU law may not be applicable in case of a transfer of undertakings with bankruptcy proceedings, a bankruptcy after an agreed "pre-pack", which primarily aims at the preservation rather than the liquidation of the company, generally does not justify such non-applicability.

3

## FG Hesse, decision of 11 May 2017 – 1 K 1824/15 Primary workplace for employed airline staff

If a specific airport is allocated as the workplace in an employment contract of employed airline staff, this may generally establish the specific airport as the employee's "primary workplace". The allocation in the employment contract is decisive in this respect – whether the employer had a statutory obligation to allocate the employee to a specific airport or reserved the right in the employment contract to also use the staff at a different airport is irrelevant from a tax perspective. Employees are thus generally (now) only entitled to tax-deduct the travel expenses from their home to the airport within the framework of the distance allowance (*Entfernungspauschale*) rather than in their actual amount pursuant to the travel expense principles.

## 4

## Düsseldorf FG, decision of 26 January 2017 – 9 K 3682/15 L Participation in an “awareness week” as a non-cash benefit

In this case, employees were given the opportunity to participate in a one-week training event to learn about the basic principles of a healthy lifestyle. Although participation was not mandatory, the employer bore the participation costs with the exception of travel expenses. The event focussed on preventive healthcare aspects without a specific reference to health hazards associated with the profession. Düsseldorf tax court (*Finanzgericht, FG*) found that the event did not primarily serve the employer’s own business interests. Consequently, the participation in the “awareness week” had to be regarded as a taxable salary component in the form of a non-cash benefit.

## 5

## ECJ, decision of 27 April 2017 – C-168/16 and C-169/16 Place of jurisdiction for actions brought by flight crew members

In the opinion of the Advocate General at the ECJ, the court at the location “where or from which” the employees mainly perform their contractual duties vis-à-vis the employer may be competent in case of disputes regarding employment contracts of stewardesses and stewards. In order to establish such location, it is, amongst other criteria, of particular importance where the employee commences and ends his or her working days and/or where the planes on which the employee works are usually based.



# Political developments

1

## Right to return from part-time to full-time employment denied

Disappointment at the Federal Ministry for Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales, BMAS*): The attempt to establish a right to return from part-time to full-time employment has failed for now. It has been decided that the cabinet will not consider the matter in the current legislative period. The BMAS had intended to establish the right to return from part-time to full-time employment – with mandatory effect for all companies with a minimum of 15 employees – in particular to provide women with a permanent and legally enforceable right to avoid getting stuck in part-time employment. It remains to be seen whether the planned right to return from part-time to full-time employment will be put to parliament at a later point in time – also in the context of the dialogue process “Arbeiten 4.0”.

2

## Minimum wage for temporary workers

A binding minimum wage has again been introduced for temporary workers. Following a joint proposal submitted by both parties, the third minimum wage ordinance for temporary workers has entered into force on 01 June 2017 – a mandatory minimum wage thus applies for the temporary employment sector. The ordinance provides for a minimum wage of EUR 9.23 for temporary workers in the old West German states and EUR 8.91 in the old East German states.

3

## Renewed decrease of the contribution rate to the artists' social insurance

The contribution rate payable to the artists' social insurance has decreased for the second consecutive year and is planned to amount to 4.2 percent in 2018, i.e. a full percentage point less than in the year 2016. The purpose of the contribution to the artists' social insurance is to provide social security for freelance artists and writers, and a pro-rated amount is also payable by companies which exploit the work of artists or writers. The German Ministry for Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales, BMAS*) has submitted a respective draft of the Ordinance regarding Artists' Social Insurance Contributions (*Künstlersozialabgabe-Verordnung*) for interdepartmental coordination. The ordinance is scheduled to be published in the German Federal Law Gazette (*Bundesgesetzblatt*) by the end of September 2017 at the latest.

4

## Application for codification of an anti-bullying act

Before the end of the 18th legislative period, one of the opposition parties in the German parliament (*Bundestag*) has initiated an application for the creation of a law to protect employees from workplace bullying. In addition to amendments of the German Occupational Health and Safety Act (*Arbeitsschutzgesetz, ArbSchG*), it is also intended to independently codify the term “bullying” in a statute. In this context, bullying is to be defined as a form of an infringement of general moral rights. The statutory scope of protection is intended to ensure comprehensive protection for all individuals affected by bullying in line with the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*). However, it remains unclear whether the (future) federal government will also recognise a need for legislative action and take further steps in this respect.



## 5

## Reform of the Maternity Protection Act has been adopted

The reform of the Maternity Protection Act (*Mutterschutzgesetz, MuSchG*) has been adopted with some delay. In a second reading on 12 May 2017, the federal parliament (*Bundesrat*) has passed the German Law updating the Maternity Protection Legislation (*Gesetz zur Neuregelung des Mutterschutzrechts*). Some of the changes – such as inter alia the extension of the statutory protection periods after the birth of a disabled child and the introduction of a protection against dismissal in case of miscarriages – are likely to already enter into force this summer. Other changes, however, such as in particular the inclusion of pupils, students and interns in the act's scope of protection and the integration of the Regulation on the Protection of Mothers at the Workplace (*Verordnung zum Schutze der Mütter am Arbeitsplatz, MuSchArbV*) in the MuSchG as revised in this respect, will not apply until 01 January 2018.

## 6

## Limited success of federal government efforts to combat illegal employment

On the occasion of the 60th anniversary of the German Act Against Illegal Employment (*Gesetz zur Bekämpfung der Schwarzarbeit, SchwarzArbG*) on 30 March 2017, the Cologne Institute for Economic Research (*Institut der deutschen Wirtschaft Köln, IW*) has presented a sobering summary of the fight against illegal employment. Although research shows that almost one in ten German households employs a cleaner, only approx. 10% of all cleaners are employed as "mini jobbers" or in an employment relationship which is subject to social insurance. The thirteenth report on the effects of the Act Against Illegal Employment which was resolved by the German federal cabinet on 07 June 2017 also documents that illegal employment and undeclared work still constitute significant (economic) problems. On the positive side, however, the percentage of illegal work is relatively low in Germany (size of the shadow economy amounting to approx. 10.4% of the gross domestic product) compared to other countries.

## 7

## Social security contribution: Due date regulations will be simplified

The Second Debureaucratisation Act (*Zweites Bürokratieentlastungsgesetz*) will introduce new rules for the due dates of social security contribution pursuant to Sec. 23 of the German Social Security Code IV (*Sozialgesetzbuch Viertes Buch, SGB IV*) with retroactive effect as of 01 January 2017. The "simplified procedure" for salaries which vary from month to month is therefore now available to all companies. The parliamentary group Bündnis 90/DIE GRÜNEN intends to better protect employees from workplace bullying. It has submitted an application (18/12097) in this respect, in which it requests the federal government to propose an act which defines bullying as a legal term denoting a form of moral rights infringement and adopts a protection in line with the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) for all individuals affected by bullying. This is to apply in general to all private and public employment and service relationships. Further specifications are also to be added to the German Occupational Health and Safety Act (*Arbeitsschutzgesetz, ArbSchG*).



# Practical examples



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## New Federal Data Protection Act – Need for action regarding data protection

On Friday, 21 July 2017, the New German Federal Data Protection Act (*Bundes-datenschutzgesetz-neu, BDSG-neu*) was published. It had become necessary to adjust the existing German data protection law as the EU General Data Protection Regulation (**GDPR**) shall govern all aspects of data protection within the entire EU as from 25 May 2018. Although the GDPR was specifically aiming at standardising the legal situation regarding data protection within the EU, it now contains extensive opening clauses. Such clauses require, or enable, action on the part of the Member States to amend their legislation in order to fill any undefined gaps resulting therefrom. Germany did so by means of the BDSG-neu. Due to the fact that the GDPR will take priority, it will first of all have to be reviewed in the future whether the GDPR stipulates provisions for a specific case and, if so, whether such provisions contain opening clauses. In the latter case, the respective provision of the BDSG-neu must then be applied.

### Consequences for employment and labour law

With regard to employee data protection, Art. 88 GDPR provides for an extensive opening clause. The German legislator has now filled this gap with Sec. 26 BDSG-neu. While being largely equivalent to Sec. 32 BDSG, this section does, nonetheless, contain several clarifying provisions, in particular:

- Explicit provision that collective agreements, i.e. collective bargaining agreements, shop agreements and service agreements, can be used to justify the processing of personal data;
- Specific requirements regarding a consent within the framework of an employment relationship; such consent will, in the future, in any case be deemed voluntary if the employee obtains an advantage (e.g. introduction of a company health management, permission to use company IT for private purposes);

- The freedom to construct collective agreements is limited by the principles set forth by the GDPR, i.e. a collective agreement can only serve as justification if the data protection principles are observed; it can in this respect not establish new and/or additional principles.

### **Need for companies to take action**

It should already be widely known that the legal situation applying to data protection as from mid-2018 requires a review and possibly an adjustment of company-internal data protection processes. Owing to the BDSG-neu which applies in addition to the GDPR, the new legal situation can now be assessed in its entirety and the respective adjustments can be actively put into practice. Although neither the GDPR nor the BDSG-neu considerably

change the substantive admissibility of the actual data processing procedures, adjustments will most likely be required in every company. Adjustments must, in particular, be made as the requirements regarding documentation and justification of data processing significantly increased due to the GDPR. Mainly the managing board or the managing director is responsible for the implementation of the required adjustments. Nine months still remain to implement such adjustments and this period should be put to good use in order to avoid possible fines which will be imposed in the future and which will be considerably higher due to the GDPR. Moreover, another risk which should not be taken lightly by companies is the possibility that data subjects may request compensation for immaterial damage due to a data protection violation.





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## The New Mindfulness (Part 3) – Participation of the Workforce Representation Bodies

In the previous issues of our newsletter (1 and 2/2017), we reported on the current developments regarding the “new mindfulness movement” and addressed possibilities of implementation within the company.

Building on these articles, we would like to focus on the question as to what extent the implementation of certain programmes regarding mindfulness within the company requires a participation of workforce representation bodies and in particular of the works council.

Initially, however, we would like to point out that, independent of the legal necessity of a participation of the works council in the implementation of certain propositions, it can always be helpful for employers to ensure they have the support of the workforce representation bodies and for them to be involved from an early stage. This approach can also be useful in order to increase the workforce’s general acceptance of such propositions. Apart from a participation of the works council, it can also be helpful to involve the representative for severely disabled employees or youth and trainee representatives in order to pre-emptively dispel any resentment of the workforce. For larger companies, cooperating with a health insurance company might also come into consideration.

Independent of the voluntary cooperation with the workforce representation bodies, there are numerous areas in which a cooperation, in particular with the works council, is mandatory.

If, for example, employees are granted longer work breaks in order for them to be able to use the additional time to integrate short mindfulness exercises into their daily working routine, this measure is subject to

co-determination rights of the works council pursuant to Sec. 87 para. 1 no. 2 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), since the place and duration of the breaks are concerned.

If the employer arranges for a particular room to be used jointly or alone by the employees (outside of their working hours) to perform their mindfulness exercises, a co-determination right for this room as a welfare facility pursuant to Sec. 87 para. 1 no. 8 BetrVG might come into question.

If the employer provides his employees with a budget which can be used, for example, in order to participate in mindfulness seminars, the questions as to what proportion of the budget will be provided to which employee is also subject to the works council’s co-determination right pursuant to Sec. 87 para. 1 no. 10 BetrVG.

The preliminary question as to whether the employer intends to offer any programmes or support in the first place and how high a budget would be provided for this is not subject to co-determination rights.

All aspects considered, one can say that the question IF certain mindfulness programmes are provided is a decision solely made by the employer. The question as to HOW this kind of support is shaped is, however, subject to co-determination rights of the works council in many areas. Independent of this, we recommend to get the works council and other workforce representations of interests on board as early as possible in order to be able to jointly address the employees and therefore achieve broad acceptance of the offered programme.

## Works council elections 2018 – What changes will employers have to expect?

The general works council elections 2018 are just around the corner. After the summer break the workforce and the works council committees will start their preparations. There will certainly be election processes which have been well-practised for years and for which the employer will not have to expect any peculiarities.

On the other hand, economic and political framework conditions give rise to the assumption that in some companies there will be new elections for the first time or that the committees are subject to change. The competent trade unions will attempt to extend to or increase their influence on numerous companies. With one glance at trade union initiatives it becomes apparent that a number of issues have been raised which do not only play a role on a collective bargaining level but will have a crucial impact on the companies. Apart from specific conflicts within the companies, we deem the following Germany-wide issues noteworthy:

- the initiative “Working hours: New line of thought” (*“Arbeitszeit neu Denken”*),
- the suggestions made in the “White Paper Work 4.0” (*“Weißbuch Arbeiten 4.0”*)
- “DGB’s Fourteen Points” (*“14 Punkteplan des DGB”*) for the extension and stabilisation of the commitment to collective bargaining agreements in Germany and
- the fundamental confirmation of the Law on One Collective Bargaining Agreement Per Company (*Tarifeinheitsgesetz, TEG*) by the Federal Labour Court (*Bundesarbeitsgericht, BAG*).

Therefore, the first step will be the influence of trade unions on regional works council committees. As a second step, the expansion of the influence of

trade unions on a company and group level will be implemented by constituting the central works council, group works council as well as the European works council. Trade unions have special expertise in organising and executing works council elections. Due to their experience and their legal legitimisation to initiate and supervise works council elections, sound and well prepared trade unions or individuals must be expected to stand for election.

The influence of trade unions also has positive aspects. However, one can expect that the trade unions attempt to bring the decrease in commitment to collective bargaining agreements in Germany to a halt by increasing their influence in works council committees. With regard to collective bargaining law, future consequences will be demands to enter employers’ associations or to conclude company collective agreements.

Particularly companies which are not bound by collective bargaining agreements or even intend to terminate an existing collective bargaining agreement should closely observe the works council elections in 2018 and be well prepared on a legal and tactical level.

Day-to-day projects such as negotiations regarding reconciliation of interests and social plans, M&A transactions, withdrawals from employers’ associations or negotiations regarding “sensitive” shop agreements will run more sluggishly after the summer break and from January 2018 will have a major impact on all participants in the works council elections. If a company is downsized, scaled up, merged, split off or transferred before the election in 2018, this must be considered in the election in 2018.

Since 2014, workforces and company structures have changed which might not



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have caused any extraordinary re-elections but which could now have an impact on the upcoming elections. An analysis of the personal and structural changes within the company since 2014 is inevitable, and will be required at the latest when the election committee demand to view the relevant list of employees in order to initiate the election notice.

After all, some companies are parting with works council members due to a breach of their official duty during the current election period. It will have to be determined in each individual case based on the latest decision by the Federal Labour Court (*Bundesarbeitsgericht, BAG*) whether these past breaches of duty can even still be pursued during the new/re-elections in 2018 in order to successfully continue court proceedings.

Before and after the elections in 2014, there have been labour court decisions in litigation proceedings on questions regarding works council elections which will partly have to be taken into consideration in the upcoming elections for the first time. Please see below a short summary of decisions which we deem noteworthy:

### **1. Schleswig-Holstein LAG, decision of 02 April 2014 – 3 TaBVGa 2/14 Information duty regarding the preparation of the list of employees entitled to vote in works council elections**

With this decision, Schleswig-Holstein Regional Labour Court clarifies that works council elections can only be discontinued in cases of patently obvious and particularly severe breaches. Consequently, the employer is not entitled to refuse to provide the election committee with information regarding the list of employees entitled to vote and thus avoid the generation of costs for a faulty works council election unless the upcoming election is expected to turn out null and void. According to the court, this is the case when severe, particularly gross and obvious breaches were committed.

### **2. 2. Hamburg LAG, decision of 07 March 2016 – 8 TaBV 4/15 Rescission of a works council election**

It is Hamburg Regional Labour Court's view that the election committee is obliged to immediately point out non-remediable faults within the meaning of Sec. 8 of the electoral regulations (*Wahlordnung, WO*) in order for the

representative of the list to be able to submit a new proposal for a candidate. If part of the supporting signatures are on sheets of paper which do not bear a reference to a list of proposals, a multiple stapling of the list of proposals and of the supporting signatures results in a duty to provide information of the election committee becoming applicable pursuant to Sec. 7 para. 2 sent. 2 WO. According to Hamburg Regional Labour Court, this duty to inform is all the more applicable if, prior to that, minor faults such as obvious typing mistakes have already led to a formal complaint.

### **3. Sachsen-Anhalt LAG, decision of 05 April 2016 – 6 TaBV 19/15 Determination of seat allocation; counting method; election result**

Sachsen-Anhalt Regional Labour Court (*Landesarbeitsgericht, LAG*) regards the counting of votes pursuant to Sec. 15 para. 2 of the electoral regulations (*Wahlordnung, WO*) on the basis of the d'Hondt method as admissible. The regulator behind the WO was not required to prescribe procedures pursuant to Hare/Niemeyer or Sainte-Laguë/Schepers. In particular, the court also did not regard the application of the d'Hondt counting method as a violation of Art. 3 para. 1 of the Basic Law for the Federal Republic of Germany (*Grundgesetz, GG*).

### **4. BAG, decision of 27 July 2016 – 7 ABR 14/15 No exclusion from the works council due to a breach of duty in a previous term of office**

Pursuant to a decision of the German Federal Labour Court (*Bundesarbeitsgericht, BAG*) of 27 July 2016, employers are entitled pursuant to Sec. 23 para. 1 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) to apply for a court decision to exclude a works council member due to a gross breach of statutory duties. According to the Federal Labour Court, such exclusion can be granted if, even taking into account all circumstances of the individual case, it seems unacceptable that the works council member should remain in office.

The Federal Labour Court also stated that it is not possible to exclude a works council member from a newly elected works council on the basis of a breach of duty committed during the previous term of office.



### **5. BAG, decision of 24 August 2016 – 7 ABR 2/15 Responsibilities of the works council in the lending company**

In a decision dated 24 August 2016, the German Federal Labour Court (*Bundesarbeitsgericht, BAG*) found that the works council of the hiring company was not responsible to represent all rights and duties under works constitution law of the leased workers working at the hiring company. Pursuant to the court, this also applies if the leased workers are posted to the hiring company on a more than temporary basis. The Federal Labour Court found that the responsibility of the works council for leased workers in the lending company or the hiring company depends on the subject-matter of the asserted co-determination right and the respective decision right of the lending company or the hiring company. Pursuant to the court, leased workers are eligible to vote in the hiring company if they are leased to perform work for the hiring company for a period of over three months.

### **6. BAG, decision of 08 November 2016 – 1 ABR 57/14 Participation of the works council regarding the use of external staff**

Pursuant to the German Federal Labour Court (*Bundesarbeitsgericht, BAG*), using external staff to man the entrance to a specialist clinic does not constitute an employment within the meaning of Sec. 99 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) even if the tasks to be performed in the role were previously performed by internal employees of the specialist clinic and the external staff has received instructions from internal employees of the specialist clinic.

### **7. Düsseldorf LAG, decision of 13 December 2016 – 9 TaBV 85/16 Violation of material election rules; election room**

Pursuant to a decision of Düsseldorf Regional Labour Court (*Landesarbeitsgericht, LAG*) dated 13 December 2016, the secret ballot principle requires the election committee to make arrangements to ensure that voters can mark the ballot paper unwatched. Unless the voting was done in a separate room which can be monitored, it was therefore necessary to put up screens or partition walls. The decisive factor is not whether voters were actually watched but whether they could subjectively feel safe in the knowledge that they were not watched.

### **8. BAG, decision of 21 February 2017 – 1 ABR 62/12 Employed status of German Red Cross nurses within the meaning of the Temporary Works Directive**

In a decision of 21 February 2017, the German Federal Labour Court (*Bundesarbeitsgericht, BAG*) found that a situation in which a member of an association works for a third party for a fee and subject to instructions and, in this context, enjoys the same level of protection as an employee, is nevertheless to be regarded as employee leasing within the meaning of Sec. 1 para. 1 sent. 1 of the German Personnel Leasing Act (*Arbeitnehmerüberlassungsgesetz, AÜG*).

### **Closing remarks**

The election committees and the companies' employees do of course play the most important role in works council elections. However, the employer does not have to remain entirely passive. The employer is not prohibited from voicing an opinion, taking individual personnel measures or even from making strategic changes to the company structure which may influence the works council elections. It must be assessed in each individual case whether the employer is manoeuvring within the legally admissible frame of influence. If major conflicts or significant changes of the works council committees, works council chair persons and releases are on the cards, employers nowadays start their legal and strategical preparations already in the year 2017. We will of course be happy to assist you in this respect across Germany and across all industries.

We will be offering the following events regarding the works council elections 2018:

#### **Training: Works council elections 2018**

12 October 2017 – Munich – fee applies – German  
Topic: Works council elections 2018 – The employer's perspective

#### **Webinar: Works council elections 2018**

08 November 2017 – online – free of charge – English  
Topic: Overview regarding the works council election 2018 from the employer's perspective for English-speaking HR roles

#### **Industrial Relations Conference**

November 2017 – Munich – free of charge – German  
Topic: M&A & then? Integration processes after business acquisitions

# Column



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## It all ends with pensions

### **Can company pensions of managing directors be settled with a one-off payment?**

Upon the termination of an employment relationship or when an employee retires, the question often arises whether the employee's company pension can be "capitalised", i.e. settled by means of a one-off payment. Unless such a right to choose a capitalisation of the employee had already been agreed in the pension promise, the capitalisation of non-forfeitable pension entitlements and ongoing company pensions desired by both parties are in practice often barred by the prohibition of severance payments pursuant to Sec. 3 para. 1 of the German Law on the Improvement of Company Pension Schemes (*Gesetz zur Verbesserung der betrieblichen Altersversorgung, BetrAVG*). Respective agreements between the employer and the employee are generally invalid.

Pursuant to the labour courts, the restrictions of Sec. 3 BetrAVG do not fully apply to managing directors, irrespective of whether or not they hold participations in the company. With its decision dated 21 April 2009 (file ref. 3 AZR 285/07), the German Federal Labour Court (*Bundesarbeitsgericht, BAG*) held that in agreements with members

of corporate bodies there can be deviations from the protective provisions of the BetrAVG to the same extent as this is possible for collective bargaining parties on behalf of employees. However, collective bargaining parties can create provisions deviating from Sec. 3 BetrAVG, i.e. also companies with their managing directors.

Whether the 2nd senate of the German Federal Supreme Court (*Bundesgerichtshof, BGH*) which is often competent in case of legal disputes with members of corporate bodies would go along with this opinion of the labour courts has so far been entirely open. Consequently, there was considerable legal uncertainty for companies concerned when they unanimously wanted to capitalise pension entitlements or ongoing pension payments of managing directors, e.g. for balance-sheet-related reasons. The decision of the Federal Supreme Court of 23 May 2017 (file ref. II ZR 6/16) was therefore highly anticipated; the decision dealt with the question whether it was permissible to deviate from the provisions of the BetrAVG to the detriment of members of corporate bodies of incorporated companies. Fortunately, the Federal Supreme Court confirmed the decision of the Federal Labour Court – at least for specific circumstances.



## Facts of the case

The plaintiff was a minority shareholder managing director of a German Limited Liability Company (*Gesellschaft mit beschränkter Haftung, GmbH*) which was the respondent. He retired and initially received a monthly pension; the remaining shareholders of the respondent then decided to prematurely capitalise the pension entitlements of the plaintiff after the occurrence of the pensionable event and referred to a respective clause in the pension promise. This clause explicitly provided for a capitalisation. The action was directed against the resolution of the shareholders. The plaintiff claimed that the statutory prohibition of severance payments pursuant to Sec. 3 BetrAVG had been violated.

## Decision

Contrary to the previous instance, the Federal Supreme Court left the question open as to whether an option for capitalisation in favour of the company reserved in the pension promise is actually subject to the prohibition of a severance payment pursuant to Sec. 3 BetrAVG or whether such option does from the outset not fall into the scope of applicability of the prohibition. In any case, it is possible to deviate from Sec. 3 BetrAVG to the detriment of the members of corporate bodies of corporations to the same extent as deviations from the provision are

admissible within the framework of collective bargaining agreements (Sec. 17 para. 3 sent. 1 BetrAVG). Members of corporate bodies are – typically – also not inferior in negotiations. Apart from that, an even greater imperative nature beyond that would protect members of corporate bodies better than employees.

## Practical consequences

From a practical perspective, the decision of the Federal Supreme Court is much appreciated and results in a considerable increase of legal certainty as managing directors regularly file actions regarding their pension entitlements before the ordinary courts and not before labour courts. However, one shouldn't be over-optimistic: The Federal Supreme Court only had to decide the question whether the option for a capitalisation can be validly agreed upon which had already been provided for in favour of the company within the framework of the pension promise. The question (which is highly relevant in practice) whether, in case of a termination of the employment contract or upon retirement, a unanimous severance payment, revocation or waiver of the company pension of managing directors who did not exercise a controlling influence over the company can subsequently be validly agreed remains unclear.



# News

## Upcoming Events

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

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

26 October 2017 Labour and Employment Law Symposium  
05:30 – 07:30 p.m. with post-event networking  
(Munich)

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

For further information, please visit [eversheds-sutherland.de/veranstaltungen](https://eversheds-sutherland.de/veranstaltungen).

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