

Labour and Employment Law

Newsletter



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Labour and employment law update

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**Dear clients,
dear business partners,**

As head of the German employment and labour law practice group and in the name of all of our partners and lawyers, I am delighted to present you with our latest newsletter informing you about current developments in case-law and politics and featuring topics around personnel management. This issue of our employment law newsletter again discusses many interesting topics – including labour law classics such as the scope of the right to give instructions and the co-determination right of the works council in case of payments by the parent company. As in our previous newsletters, we have summarised relevant decisions of the federal and lower courts in the case-law review section, along with a comment on how these judgments will impact on employment law aspects of your day-to-day business.

Just in time for the upcoming works council elections, the current edition of our newsletter includes detailed articles on trade union rights within the company and gives you inter alia an understanding of the recently enacted law regulating the entry and residence of third-country nationals within the framework of intragroup transfers.

Please find relevant legislative proposals and new developments – as usual – in our “political developments” section. In addition to the brand new considerations of the EU regarding the protection against wage dumping, the re-revision of the mass dismissal notice form is also worth mentioning.

I would like to thank you already at this point for your interest in our newsletter and hope that the selected topics will give you a profound overview of the daily work in our employment and labour law practice group.

We hope you will enjoy reading this newsletter.



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Jurisdiction/Decisions

1

Baden-Wuerttemberg LAG, decision of 06 September 2017
– 4 Sa 3/17

Right to give instructions during foreign assignments

The decision

The decision deals with the interesting topic of the employer's right to give instructions. Specifically, it concerns an employee who works as a project and design engineer. The employee was initially sent on a three-day business trip by his employer to meet a client in China and announced that there would be further business trips. The employee felt that he was sent on this trip as a punishment as he had insisted on being paid his Christmas bonus and holiday allowance. The employee requested the court to establish that he was under no obligation to work for the defendant abroad. The employee's action failed in both instances.

Pursuant to Sec. 106 sent. 1 of the German Industrial Code (*Gewerbeordnung, GewO*), the employer is generally entitled to specify the type, place and time of the employee's work performance at its equitable discretion, unless the conditions of work are specified in the employment contract, company agreements or a collective bargaining agreement and/or other statutory provisions. Pursuant to the court, the employment contract did not limit the defendant's right to give instructions in any way, so that in principle, the plaintiff has an obligation to also work abroad. The court also found that the provision regarding the place of the work performance owed by the employee did not contain a limitation either, as otherwise the reference to the reimbursement of travel costs, for example, would have been superfluous. In effect, each individual case must be interpreted to establish whether the employee's promised services are somehow by their very nature connected with business trips abroad. The court found this to be the case in this decision.

Practical consequences

The decision shows that the provisions of the employment contract and, in particular, the provisions regarding the employee's services including the place of performance, are of fundamental importance for the implementation of the employment relationship.

Fortunately, the employer's right to give instructions is to be interpreted broadly unless the employment contract contains limitations. However, to avoid ambiguities both for the employer and the employee, it is recommendable to include clarifying provisions in the employment contract. If it appears likely at the time the employee is hired that working abroad will at times be a regular component of the employee's job, this should be included in the employment contract to avoid any doubt at a later stage.



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Munich LAG, decision of 11 August 2017 – 9 Ta BV 34/17 Co-determination rights and rights to information with regard to payments from the parent company

The decision

Munich Regional Labour Court (*Landesarbeitsgericht, LAG*) had to address a matter that is yet to be decided on by the Federal Labour Court (*Bundesarbeitsgericht, BAG*) and has been subject in a similar form of a decision made by Baden-Wuerttemberg Regional Labour Court dated 17 January 2017, file number 19 Ta BV 3/16. Basically, this dealt with the question as to whether the works council enjoys co-determination rights with respect to the criteria for share options granted by an overseas parent company to employees of a German company and/or whether the works council has any rights to information in this regard. Munich Regional Labour Court negated a co-determination right, as has Baden-Wuerttemberg Regional Labour Court, since the German company was not able to influence the allocation by the parent company. The German managing director compiled a suggestion list of employees which he found were supposed to be granted shares by the parent company. However, it was the parent company which took the final decision. In addition, the managing director explicitly did not present the list in his capacity as German managing director but rather in his other position in the parent company which he held in the matrix structure of the group. The Regional Labour Court concluded that in this constellation a decision by the German company was not made in the first place and furthermore the German company had no freedom at all to be exploited by the works council within the framework of the co-determination procedure.

With regard to the numerous other asserted rights to information of the works council, Munich Regional Labour Court observed that the works council had no right of information at all regarding the questions as to which general principles were applied with respect to the employee share ownership, which payments and contributions of benefiting employees within the framework of the annual employee share ownership were acknowledged and which extraordinary employee activities were taken into consideration within the framework of granting employee share ownerships. According to Munich Regional Labour Court a right of information is only given with regard to the question as to which

employees are granted employee share ownerships and in which scope, and the question as to whether any group of employees would be disadvantaged in this regard. Since the defendant had already provided information hereof, all applications made by the works council were rejected. However, with regard to the question of a right of information concerning the principles applied to the allocation of employee share ownerships the appeal on points of law to be submitted to the Federal Labour Court will be allowed.

Practical consequences

In international matrix structures it is often common for benefits to be granted to the German employees by the overseas parent company, usually in the form of share options. In this regard works councils apprehend that the co-determination intended for the establishment of principles for salary distribution are circumvented. Due to the lack of a final decision made by the Federal Labour Court, there is a certain insecurity which is the reason why the decisions made by Munich Regional Labour Court and Baden-Wuerttemberg Regional Labour Court will contribute to a creation of legal security on the basis of the allowed appeal. As regards the decision in Baden-Wuerttemberg the appeal even includes the question of the scope of the right of information and related participation and monitoring rights of the works council when granting share options by an overseas parent company. Bremen Regional Labour Court stated in its decision dated 27 July 2016, file number 3 Ta BV 2/16 that there is a right of information of the works council with regard to the principles applied to the allocation of the shares by the parent company.



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BAG, decision of 29 June 2017 – 2 AZR 597/16 Suspicion of punishable offence not an essential prerequisite for having employees surveilled by a private investigator

The decision

On 29 June 2017, the German Federal Labour Court (*Bundesarbeitsgericht, BAG*) overruled the decision of Baden Württemberg Regional Labour Court (*Landesarbeitsgericht, LAG*) of 20 July 2016 (file ref.: 4 Sa 61/15) which was controversially discussed in practice and science.

As we have already informed you in our newsletter no. 4 (page 7), Baden Württemberg Regional Labour Court admitted an action against unfair dismissal although the employer had found out with the help of a private investigator that its employee worked for a competitor while allegedly being incapable for work. Baden Württemberg Regional Labour Court, however, considered these findings to be unusable because the involvement of a private investigator (for covert surveillance) pursuant to Sec. 32 para. 1 sent. 2 of the German Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*) is only admissible if the employer tries to confirm the suspicion of a criminal offence. In the present case, however, such suspicion did not exist: It is not a criminal offence to work for a competitor and the period of continued payment of salary had already been expired – hence, there was no continued payment fraud either.

With its decision of 29 June 2017, the German Federal Labour Court established the principle that the covert surveillance of an employee by a private investigator may also be admissible pursuant to Sec. 32 para. 1 sent. 1 BDSG if there is a "simple" suspicion of gross misconduct by the employee which does not necessarily have to be a criminal offence and if this suspicion is based on specific facts.

Practical consequences

It is very positive that the German Federal Labour Court – inter alia by referring to European law – did not follow Baden Württemberg Regional Labour Court's strict interpretation of Sec. 32 BDSG and thus does not necessarily require the suspicion of a criminal offence for the involvement of a private investigator (for covert surveillance) but considers the "simple" suspicion of gross misconduct to be sufficient. According to the

decision of the German Federal Labour Court, such gross misconduct exists if the pretended incapacity for work serves the purpose of working for a competitor even if the period of continued payment of salary has already expired. However, the German Federal Labour Court points out that, as before, the suspicion must be based on specific facts and that the covert surveillance of an employee is only admissible if less intrusive means to clarify the suspicion have already been exhausted and the (covert) surveillance of the employee is ultimately the only option remaining to confirm the suspicion.

Practical tip

Not every suspicion of a breach of the employment contract justifies the (covert) surveillance of employees by a private investigator. Even now that the prerequisites have become somewhat less stringent through the decision of the German Federal Labour Court, it still has to be checked very critically in the specific case whether there actually is a suspicion of a gross misconduct, based on specific facts, by the employee which is not a criminal offence and whether the (covert) surveillance of the employee is actually the only means left to confirm the suspicion. Only if these prerequisites are fulfilled, can the employer request the reimbursement of the necessary expenses for private investigations. If the prerequisites established by the German Federal Labour Court are not fulfilled, the employer is not allowed to use the investigation findings as means of evidence for the actual misconduct in the court proceedings. The consequence may be that the employer loses the unfair dismissal proceedings against the employee due to a lack of sufficient evidence and the employer risks having to pay a compensation to the employee due to an infringement of the latter's moral rights.



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BAG, decision of 20 September 2017 – 10 AZR 171/16 Minimum wage as a basis for the calculation of extra pay

The decision

There was a dispute between the parties as to whether all working, holiday and public holiday hours as well as extra pay for night shifts of 2015 are to be calculated on the basis of the statutory minimum wage. The plaintiff has worked for the defendant as a technician for several years. Due to subsequent effectiveness, the industry-wide collective agreement of the metal and electronic industry of Saxony in the version of 24 February 2004 applies to the employment relationship. This collective agreement inter alia provides for a night shift allowance in the amount of 25% of the actual hourly wage and for a "holiday pay" in the amount of 1.5 times the average wage. For January 2015, the defendant paid, in addition to the contractual hourly wage of EUR 7.00 or EUR 7.15, which was too low pursuant to the German Minimum Wage Act (*Mindestlohngesetz, MiLoG*) applicable since 01 January 2015, "an allowance pursuant to the MiLoG" in order to reach the statutory minimum wage. The defendant did not, however, calculate the remuneration for a public holiday and a day of holiday as well as the night shift allowance for five hours on the basis of the statutory minimum wage but pursuant to the lower "old" contractual hourly remuneration. Moreover, the defendant set-off a paid "holiday pay" against minimum wage claims of the plaintiff.

The Federal German Labour Court (*Bundesarbeitsgericht, BAG*) ruled – apart from a minor difference in its calculation – in favour of the plaintiff just like the previous instances. Even though the MiLoG only provides for claims for hours actually worked, the employer is obliged pursuant to Sec. 2 para. 1 of the German Continued Payment of Wages and Salaries Act (*Entgeltfortzahlungsgesetz, EFZG*) to pay to the employee the remuneration for the hours lost due to a public holiday which the employee would have received if there had not been a public holiday (principle of continued wages and salaries). According to the court, this also applied to cases in which the remuneration was calculated on the basis of the MiLoG. The MiLoG did not contain any deviating provisions. The employer could not rely on a lower contractual remuneration. Pursuant to the provisions of the industry-wide collective agreement, the night

shift allowance and holiday pay stipulated in the collective agreement also had to be calculated (at least) on the basis of the statutory minimum wage of (at that time) EUR 8.50 as this was a part of the "actual hourly remuneration" within the meaning of the industry-wide collective agreement. A set-off of any "holiday pay" paid against claims under the MiLoG is not possible as the industry-wide collective agreement provides for an independent claim in this regard and as this does not constitute remuneration of actual hours worked.

Practical consequences

The decision once again confirms the previous case-law of the BAG with regard to minimum wage. In June 2016, the BAG decided that on-call hours are to be remunerated with the minimum wage. In May 2016, the court had decided with regard to a minimum wage stipulated in a bargaining agreement that this minimum wage was also to be paid within the framework of continued pay in case of sickness or as holiday pay. Additional payments for additional working hours, services or complications or for other reasons (e.g. capital-forming benefits) must not be set off against the payment of the minimum wage. However, it may be possible to set off annual special payments which are paid in monthly instalments, such as holiday pay or Christmas pay, against the minimum wage.



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Nuremberg LAG, decision of 24 May 2017 – 4 Sa 564/16 Post-contractual non-compete obligation – withdrawal by the employee

The decision

The parties were arguing about a claim of the plaintiff for compensation for non-competition for a period of three months on the basis of an agreed post-contractual non-compete obligation. The plaintiff's former employer was in default with payment of the compensation for non-competition and was requested by the plaintiff in an email dated 01 March 2016 to pay the amount due for the month of February by 04 March 2016. The defendant did not comply with this payment request. For this reason, the plaintiff declared vis-à-vis the defendant in an email of 08 March 2016 that he no longer felt bound by the non-compete obligation. He subsequently sued the plaintiff for payment of the compensation for non-competition for the period from February 2016 to April 2016. The court of first instance fully upheld the action. The appeal was successful in part. Nuremberg Regional Labour Court (*Landesarbeitsgericht, LAG*) regarded the plaintiff's email of 08 March 2016 as a legally effective withdrawal from the agreed post-contractual non-compete obligation. Pursuant to the court, he was thus entitled to a compensation payment for the period from 01 February 2016 to 08 March 2016. The court dismissed all further claims. The withdrawal declaration not only removed the non-compete obligation but also the defendant's payment obligation. As grounds for its decision, the court explained that the provisions regarding defects in performance in reciprocal contracts pursuant to Secs. 320 et seqq. of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) were also applicable to post-contractual non-compete obligations. In order to take into account the particularities of long-term contracts, the withdrawal only took effect "ex nunc", i.e. had no retroactive effect. In this context, the court found that the email of 08 March 2016 constituted a legally relevant reaction to the breach of duty committed by the defendant. The defendant had to interpret this declaration not merely as a legally irrelevant impulse reaction but as a legally relevant declaration of withdrawal. Furthermore, the court found that the statutory preconditions for a withdrawal were fulfilled as the defendant was in default and had been set a reasonable grace period by the plaintiff.

Practical consequences

The decision of Nuremberg Regional Labour Court confirms the case-law of the Supreme Court pursuant to which competition agreements constitute reciprocal contracts within the meaning of Secs. 320 et seqq. BGB. The compensation for non-competition and the non-compete obligation are thus synallagmatically opposed so that it is possible for the parties to release themselves from a post-contractual non-compete obligation by declaring a withdrawal.

The supreme courts have not yet passed a decision on the required length of the grace period granted to the employer. Since other regional labour courts partly assume that the period should be two to three weeks, a considerable legal uncertainty still remains with respect to the required grace period in case of payment defaults.

Practical tip

Employers should make every effort to ensure compliance with the obligations under an agreed post-contractual non-compete obligation, i.e. to pay the compensation for non-competition within the applicable deadlines. Otherwise, a payment default gives employees the opportunity to rid themselves of an unwelcome non-compete obligation and to move freely on the market. However, varying standards apply regarding the length of the grace period, depending on the LAG district of the respective company's registered seat and/or the last permanent place of work.



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BAG, decision of 23 August 2017 – 10 AZR 859/16 Sunday, public holiday and night shift bonuses not attachable

The decision

The proceedings at the Federal Labour Court (*Bundesarbeitsgericht, BAG*) dealt with the question whether bonuses for Sunday, public holiday and night shifts as well as bonuses for shift work or work on Saturdays or on days such as the Saturday before Easter Sunday (referred to as pre-holiday work) are exempt from attachment. The Plaintiff works as a home carer for the defendant, who operates welfare centres. Following insolvency proceedings which had been discontinued, the plaintiff was subject to a probationary period during which she had assigned her attachable remuneration to a trustee. In the period between May 2015 and March 2016, the defendant forwarded the portion of the plaintiff's net remuneration which the defendant believed to be attachable to the trustee. In doing so, the defendant also included the bonuses paid to the plaintiff under the collective agreement for work on Sundays, public holidays, night shifts, rotating shifts, Saturdays and pre-holidays as attachable remuneration. The plaintiff, who regards these bonuses as hardship bonuses which are exempt from attachment pursuant to Sec. 850a no. 3 of the German Code of Civil Procedure (*Zivilprozessordnung, ZPO*), now requested the defendant to pay her the amount which the defendant overpaid to the trustee. The plaintiff's action had been successful in the previous instance courts. Following an appeal lodged by the defendant, the Federal Labour Court set aside the decision of Berlin-Brandenburg Regional Labour Court and referred the case back to the previous instance. However, the Federal Labour Court judges found that the previous instance courts had correctly found that bonuses paid for work on Sundays, public holidays and night shifts constitute hardship bonuses within the meaning of Sec. 850a no. 3 ZPO and are thus exempt from attachment. Pursuant to the Federal Labour Court, this was due to the statutory protection of night sleeping hours and the constitutional protection of Sundays and public holidays. In Sec. 6 para. 5 of the German Working Time Act (*Arbeitszeitgesetz, ArbZG*), the legislator had thus stipulated a duty to compensate workers for night shifts, which the legislator regards as a particular hardship. Sundays and public holidays were subject to special protection under the constitution (Art. 140 of the Basic Law for the Federal Republic of Germany (*Grundgesetz, GG*) in conjunction with Art. 139 of the Weimar Constitution (*Weimarer Reichsverfassung, WRV*). Pursuant to Sec. 9 para. 1 ArbZG, a general

prohibition of employment applied on such days. Pursuant to the Federal Labour Court, this means that the legislator again regarded work on such days as a hardship. However, the court held that the legislator did not regard shift work and work on Saturdays or pre-holidays in the same way. Furthermore, the court stated that although the special provision of Sec. 850a ZPO serves the protection of the debtor by allowing the debtor to keep a larger part of its net income as exempt from attachment, it was nevertheless necessary in the interest of the creditors to reasonably limit the exemption of hardship bonuses from attachment pursuant to Sec. 850a no. 3 ZPO, which is why bonuses for shift work and work on Saturdays or pre-holidays were not exempt from attachment.

Practical consequences

The Federal Labour Court's decision appears well-balanced and correct. There has not been a clear consensus in literature and case-law so far regarding the attachability of such payments. Merely the protection from attachment of night shift bonuses has been largely uncontested. Sunday and holiday bonuses, on the other hand, are often regarded as fully attachable.

The Federal Labour Court's decision has brought legal certainty in this respect. However, bonuses for work on Sundays, public holidays and night shifts are only exempt from attachment insofar as they do not exceed a "normal scale". As a guideline for defining this scale, the Federal Labour Court makes reference to Sec. 3b of the German Income Tax Act (*Einkommenssteuergesetz, EStG*), which provides for tax exemption for night shift bonuses in the amount of 25% or 40% (depending on the exact time at which the night work is performed) and for Sunday bonuses in the amount of 50% of the basic salary. Bonuses for work on public holidays are tax-free in the amount of 125% or 150%, with the exact amount depending on the public holiday on which the work was performed. The 150% apply to work on 24 December from 2:00 p.m., on 25 and 26 December and on 01 May.



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Weiden Labour Court, decision of 17 May 2017 – 3 Ga 6/17 Employer's right to access work email accounts if private email use is allowed

The decision

In a final decision dated 17 May 2017, Weiden Labour Court (*Arbeitsgericht Weiden*) rejected the application for a preliminary injunction filed by an employee who wished to have his employer banned from accessing his work emails.

In his role with the employer, the applicant is inter alia in charge of the communication and coordination with factories located abroad. On 14 October 2016, the employee had sent an email to E. describing ways in which rules imposed by the employer could be bypassed. The conduct suggested by the employee posed a major financial risk for the employer. Due to this incident, the employer worried that the employee might commit another violation of his contractual duties and thus intended to access the employee's work emails. The employer furthermore declared that it was not interested in accessing any private emails, that the employee would be allowed to be present when the employer accessed the emails and that a member of the works council could also attend if requested. The employee objected to this request.

The employee believed that there was no reason for an unrestricted inspection of his emails and that, in particular, this was not justified pursuant to Sec. 32 of the German Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*). At the same time, the employee claimed that co-determination rights of the works council pursuant to Sec. 87 para. 1 no. 1 and no. 6 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) had not been complied with. Furthermore, the employee stated that the employer's intended actions would violate Sec. 88 of the German Telecommunications Act (*Telekommunikationsgesetz, TKG*) (secrecy of telecommunications) and Sec. 612a of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*). The employee explained that he did not know whether and to which extent he had any private emails on the company PC. The employer regarded the employee's application as an unfounded blanket application as there was no entitlement to generally prohibit the employer from accessing work emails. No explicit permission had been granted to send private emails, however, the employer could not exclude that this may have been tolerated in the past.



The court rejected the employee's application for a preliminary injunction. Pursuant to the court, the inspection of emails as intended by the employer was justified pursuant to Sec. 32 para. 1 BDSG. Although the employer had tolerated a private use of the work email account, the court did not regard the employer as a telecommunications provider. The justification of the measures planned by the employer was thus only subject to the standards of the BDSG. In this case, access to the emails was justified pursuant to Sec. 32 para. 1 sent. 1 BDSG as there were actual reasons to suspect a breach of contract by the employee due to his email of 14 October 2016. Accessing the emails was also a suitable measure in order to confirm or eliminate such suspicion. As the employee was not willing to cooperate at all, a less severe means was not available. The proportionality test thus showed that the employer's interests in accessing the work emails outweighed the employee's interests. Although the employee's moral right had to be taken into account and although accessing private emails against the employee's will due to the fact that the employer tolerates the receipt of private emails constitutes an encroachment on the employee's moral right, this was a rather abstract danger as the employee was not even sure whether he had any private emails on the company computer. The court held that in this case, the protection of the employer's established and operating business prevailed. There was also no violation of co-determination rights as the matter concerned an individual measure and was therefore not subject to co-determination.

Practical consequences

This decision confirms the previous case-law insofar as the court found that an employer is not a telecommunications provider within the meaning of the TKG, even if a private use of the company email account is allowed or tolerated. This in turn means that an intended inspection of email communications "only" has to fulfil the requirements of the BDSG but not those of the TKG. If the TKG was applicable, accessing an employee's email account would only be admissible in very rare exceptional cases.

Practical tip

Despite the decision that the TKG is not applicable in cases of allowed or tolerated private use of a company email account, it is recommendable to expressly prohibit such use if possible. This is because where private use is permitted or tolerated, much stricter requirements will always apply to an email access by the employer as the employee's moral right will have more weight in the balancing of interests which has to be carried out in each individual case than if the email account was used exclusively for business emails. If the employer nevertheless wishes to allow a private use of the company email account, it is absolutely recommendable to first define the modalities of such use – also including certain rights of access of the employer – in writing. This may be done by establishing a company directive or company agreement on email and IT use and obtaining a respective consent from the employee.



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BAG, decision of 30 August 2017 – 7 AZR 864/15 Temporary employment contracts with actors – particular nature of the employment

The decision

The plaintiff, an actor who had been playing a police inspector in the German TV series “Der Alte” for approx. 18 years, had always been employed on a temporary basis during this entire period, based on so-called “staff contracts” and/or “actors’ contracts”. The last employment contract of the plaintiff was concluded for the production of two episodes and had a fixed term until 18 November 2014. The defendant, who produces the crime series, already informed the plaintiff in September 2014 that his part would not be continued and that his contract would thus not be renewed, and terminated the contract by way of precaution.

The plaintiff then brought an action against the termination. The plaintiff claimed that a fixed term had not been validly agreed for his employment contract and that there was no objective reason for the fixed term.

The German Federal Labour Court (*Bundesarbeitsgericht, BAG*) – as well as the previous instance courts – dismissed the claim. The court found that the fixed term of the plaintiff’s employment contract was justified due to the particular nature of his work (Sec. 14 para. 1 sent. 2 no. 4 of the German Act on Part-time Work and Temporary Employment Contracts (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge, TzBfG*)). Pursuant to this, a time limitation of employment contracts with employees of broadcasting companies is justified if such employees have an influence on the programme. The court regarded the employee as having an influence on the programme, although the plaintiff had claimed that the script did not leave him any room for his own interpretation of the role. The court furthermore found that not only the broadcasting company itself but also a production company would have the right to apply a time limitation to the contract. As a reason for this decision, the court referred to the freedom of broadcasting and the freedom of art, which allow a development of the series and thus also the removal of characters and outweigh the plaintiff’s interest in the continuation of his employment contract.

Practical consequences

The decision of the German Federal Labour Court confirms the previous case-law regarding fixed-term employment contracts in broadcasting. Due to

the particular nature of the employment, it is generally possible to apply a fixed term to employment contracts of employees who have an influence on the programme. This objective reason does not apply to the administrative staff members of broadcasting companies; where technical staff members are concerned, it only applies if such members of staff can influence the contents of the programme. Although the courts take into account the interest of the employees in the continuation of their employment when balancing the interests of the parties, it is generally given little weight. In a similar case, the fixed term of the employment contract of an actor who had played a role in the TV series “Der Alte” for a total of 28 years was also regarded as effective.

The question as to the circumstances under which the “particular nature of the employment” may constitute an objective reason for a fixed-term contract has most recently been brought to public attention by the “Müller” case. This case is currently pending at the German Federal Labour Court and regards the question as to whether it is admissible to apply a fixed-term to an employment contract with a professional footballer on the basis of this objective reason. The labour court found that the time limitation was not admissible, the second instance court overruled the decision and provided detailed reasons explaining why the court regarded the time limitation of the employment contracts as effective. It remains to be seen which position the Federal Labour Court will take in this matter. With respect to top-level coaches, however, the Federal Labour Court has already decided that employment contracts may only be concluded for a fixed term pursuant to Sec. 14 para. 1 sent. 2 no. 4 TzBfG if it is actually to be expected in the individual case that the coach will no longer be able to motivate the athletes after a certain period of time. This requirement is generally not fulfilled if the specific nature of the composition of the athletes means that the members of the team change frequently, which is probably the rule especially in the area of professional team sports.



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Political developments

1

The Pay Transparency Act is coming into effect

On 06 July 2017, the German Pay Transparency Act (*Entgelttransparenzgesetz, EntgTranspG*) for more pay equality between men and women came into effect. The quintessence of the act is the individual right of employees vis-à-vis their employers to request information on the criteria pursuant to which the remuneration of comparable employees is determined. Employees in companies with more than 200 employees can file such a request with their employers. After the taking effect of the act on 06 July 2017, there will be a transition period of six months so that it will be possible to file such a request on 06 January 2018 for the first time. The internal review procedure provided for in the Pay Transparency Act is, contrary to the original bill, no longer mandatory. Companies with more than 500 employees which are obliged to submit a management report, will have to enclose a report on the situation of equal opportunities and pay equality in the company to their management report. In 2018, the report is to be enclosed to the management report for the first time. After this transition period, the report is to be enclosed to the management report every five years in case of companies bound by collective bargaining agreements or with applicable collective bargaining agreements and every three years for all other companies.

2

New EU rules against wage dumping

In the night from 23 October 2017 to 24 October 2017, the EU countries agreed on new rules for the protection against social and wage dumping. Pursuant to these rules, employees assigned from abroad are to be paid like national employees in the future. With this reform, not only salary and remuneration rules applicable to local employees are now also applied to assigned employees, assignments are now, for the first time, limited EU-wide. In the future, assignments must not last longer than twelve months, in exceptional cases no longer than eighteen months. The transport industry will presumably constitute an exception. For this sector, individual rules will be established. The decision of the countries will result in a reform of the assignment guidelines and will possibly require further changes of laws on national levels.



3

Yet again: New form for the notification of collective redundancies

The German Federal Employment Agency has updated the new form for the notification of collective redundancies again after only a few months. The information requested by the Agency partly contradicted the requirements of Sec. 17 of the German Protection Against Dismissal Act (*Kündigungsschutzgesetz, KSchG*). As a result, companies faced the problem of either not complying with the Agency's requirements and to therefore risking a rejection of the collective redundancies or being the losing party in unfair dismissal proceedings due to a violation of Sec. 17 KSchG. The Federal Employment Agency has now reacted towards the criticism and provided a new form online. In the new form, the Agency differentiates between obligatory and non-obligatory information. Moreover, the new form contains notes that missing obligatory information results in the notification being invalid. Due to this change, it is recommended when filling out the form in the future only to provide the information which the Agency marked as obligatory (with an asterisk).

4

Let us introduce: The Company Pension Reinforcement Act

On 07 July 2017, the German Bundesrat passed the Law for the Reinforcement of Company Pension Schemes (*Betriebsrentenstärkungsgesetz, BRSG*). The new law will come into force on 01 January 2018. The quintessence of the new law is the possibility to introduce a company pension scheme in a company by means of a collective bargaining agreement. Moreover, in case of a defined contribution scheme and a conversion of earnings into pension, the employer is to be obliged to pay at least 15% of the converted earnings exempted from social insurance to the pension institutions as an additional contribution. With the new Company Pension Reinforcement Act, it is possible for the first time to offer a company pension scheme while the employer is not liable for a continuous level of payments. As a result, the employer is only liable for a "target pension", i.e. a predefined company pension corresponding to the contributions made, not for their yield. Employers which are not bound by collective bargaining agreements and employees can agree that the respective collective bargaining agreements also apply to them. However, there will not be a legal obligation for employers to offer a collective bargaining law-pension. For now, the new regulation shall only apply to agreements on the conversion of earnings into pension from 01 January 2018. As regards agreements already existing, the employer's contribution shall only become obligatory after a transition period of four years, i.e. from 2022.

5

Personal crisis turning professional crisis

According to the absence report 2017 prepared by the federal association of the German health insurer AOK, the overall number of psychologically ill persons as well as the times of absence per patient increased. In 2016, with an average of 25.7 days, the absence times due to psychological problems topped the list of illnesses and therefore lasted twice as long as all other illnesses with an average of 11.7 days. The absence report especially focuses on personal crises of employees which also have negative effects on their work. The report states that every other employee affected by a personal crisis felt that his/her efficiency was limited and went to work despite being sick. The number of people affected increases with age. In this connection, more and more demands for a more specific wording of the preventive law are raised. The absence report 2017 shows that company measures within the framework of the company health scheme can help to support employees also in personal crises and thereby reduce the risk or prevent altogether that such a crisis affects the employee's work environment.

Practical examples

Trade union rights – What is a trade union actually allowed to do in a business?

Companies more and more often question the commitment to collective bargaining agreements. According to analyses of the Institute for Economic Research (*Institut der deutschen Wirtschaft, IW*), the number of employers bound by collective bargaining agreements decreases. Moreover, the level of organisation of trade union members in businesses varies widely, depending on the industry and the economic framework conditions.

Apart from the comprehensive and very effective socio-political and economic initiatives of the heads of the trade unions, the importance of trade union rights in business is underestimated. Trade unions do not only conduct negotiations regarding collective bargaining agreements or organise strikes.

In Germany, trade union members have comprehensive rights in businesses due to the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*).

This article will provide an overview of the rights and obligations of trade union representatives in businesses. If the commitment to collective bargaining agreements of employers decreases further, the essential working conditions will in the future increasingly be negotiated on company-level. Moreover, the Law on One Collective Bargaining Agreement Per Company (*Tarifeinheitgesetz, TEG*) leads to a new competition between the trade unions in businesses.

In businesses, **trade union members** can act vis-à-vis the employer as employees, works council members or **external representatives** of the trade union with rights of initiative, participation rights and consultation rights.

The rights of trade union members must

be observed. However, the trade union members also have to observe **limits**.

In the following paragraphs, the rights and obligations of trade union members in businesses will be summarised:

1. Right to access the business

1.1 Exercising of trade union tasks and rights under the BetrVG

Sec. 2 para. 2 BetrVG grants to IG Metall (Trade Union of Metal Workers) a **right of access** linked to its tasks and rights under the BetrVG (at least one trade union member must be present). Principally, the trade union can freely determine the time and the duration of the access. However, the union is obliged to **inform** the employer **in due time** of the person of the representative, the time and the purpose of the visit so that the employer has sufficient time to review whether the access right is legitimate. In urgent cases, it is sufficient to inform the employer immediately before the visit. The right of access covers all locations of the business, provided that this is required for exercising the specific tasks under the BetrVG.

1.2. Trade union solicitation within the business

In addition to the right of access pursuant to Sec. 2 para. 2 BetrVG, the trade union represented in the business also has a right of access in order to **recruit members**. For this purpose, information material with content related to the trade union may be distributed and posters may be hung up, provided that this does not lead to chaotic putting up of posters. The space for the putting up of posters has to be **agreed upon in advance with the employer**.



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Trade union members who are at the same time employees of the company may only carry out recruitment measures as employees if they do not breach their duties under the employment relationship while doing so. For example, advertising material may only be distributed outside of the working hours as this constitutes **a trade union activity and therefore no working time which is subject to the payment of a remuneration.**

1.3 Limitations of the rights of access

Depending on the extent and intensity of the exercising of the right of access, this right can be **denied or limited** due to legitimate business requirements of the employer, e.g. guarantee of an undisturbed business operation, observance of industrial peace, confidentiality or security aspects. Reasons related to the person of the trade union representative can only establish a prohibition of access if this representative clearly overstepped his/her authority repeatedly, consistently disturbed the industrial peace or gravely insulted the employer, its representatives or employees of the business and if it is to be feared that this will happen again.

2. Right to participate

2.1 Staff meetings

The trade union represented in the company has an independent right to participate in meetings of the staff

or of individual departments, Sec. 46 para. 1 BetrVG. The right to participate also applies to works council meetings (Sec. 53 para. 3 BetrVG) and meetings of young and trainee employees (Sec. 71 sent. 3 BetrVG).

The trade union can make statements and comment on questions which arise. Party-political topics must not be discussed. Moreover, staff meetings must **not** be misused **as a platform for the recruitment of members.**

The employer must **not** refuse access to the staff meeting on the basis of one on the reasons specified in Sec. 2 para. 2 BetrVG. As participants of a staff meeting, representatives of trade unions also have to observe the **principle of a trust-based cooperation.**

2.2 Support and advice in works council/ economic committee meetings

There is only a right of participation for **one** trade union representative if the trade union is represented in the works council/central works council/group works council **and** if the participation was applied for by one quarter of the members of the works council (Sec. 31 BetrVG)/central works council (Sec. 51 para. 1 sent. 1 in conjunction with Sec. 31 BetrVG)/group works council (Sec. 59 para. 1 in conjunction with Sec. 31 BetrVG).

It is then generally the trade union's responsibility to choose a representative to take part in the works council meeting.



3. Right of initiative to establish a works council

The trade union represented in the company has the right of initiative to ensure that an **election committee** for the works council election is established or that a defaulting election committee is replaced (Sec. 16 para. 2, Sec. 17 para. 3, 4, Sec. 18 para. 1 sent. 2, 3 BetrVG). If no trade union member entitled to vote is represented in the election committee, the trade union can assign an additional employee to the election committee who is, however, not entitled to vote (Sec. 16 para. 1 sent. 6 BetrVG). The trade union itself can also **propose a candidate** for the works council election (Sec. 14 para. 3, 5 BetrVG). The trade union is furthermore obliged to exercise the right to challenge the works council election before court if laws were violated within the framework of the election (Sec. 19 para. 2 BetrVG).

4. Trade union shop stewards

In order to effectively enforce the interests of their members vis-à-vis the employer, trade unions can appoint **individual employees of the company** as trade union shop stewards. These act as **connecting links** between the full-time official of the trade union and other trade union members in the company. In addition to the exercising of the interests of the trade union members within the company and negotiation of collective bargaining agreements as well as collective bargaining policies for the employees, another part of their responsibilities is the recruitment of new members. The trade union shop stewards inform the trade unions about the wishes of the employees.

The trade union shop stewards **principally have the same rights and the same legal status as the other employees of the company**. They must neither receive preferential treatment nor must they be disadvantaged due to their trade union activities, Sec. 75 BetrVG.

Applications and notifications of trade union shop stewards are therefore the statement of an opinion which the employer does not have to act upon.

5. Trade union activities of a works council member which is also a trade union member

When enforcing targets and interests of his/her trade union, a works council member which is at the same time a trade union member has to observe the **principle of**

neutrality and separate the role as trade union member from the role as works council member. As works council member, the trade union member has a **confidentiality obligation regarding business and trade secrets** if the employer explicitly declared that the respective matters are to be kept confidential.

Despite the **prohibition of industrial action** for works council members in their official capacity, a works council member may participate in industrial actions just like any other employee if it acts in its role as trade union member.

Every works council member as well as the council as a whole have to carefully observe this separation due to their important position.

For example, a works council member in its role as works council member is **not permitted** to:

- advertise the membership in IG Metall as a works council member
- use working material of the employer for trade union activities or creation of advertising material
- use the staff meetings as a trade union meeting
- call for an industrial action/a strike during staff meetings
- distribution of calls for strikes on works council paper/ documents
- organisation of strike actions during works council meetings
- remuneration of trade union activities as works council activities

This overview is not exhaustive but is intended to show that trade unions have a strong influence on day-to-day procedures in companies in Germany. However, employers need to keep an eye on the limitations of these trade union activities in their businesses as, even though every trade union is a social partner, they are also external organisations.

If you require any support with regard to the influence of trade unions in your business, we are happy to advise. This influence must not necessarily be a strike. Staff meetings, conciliation committees or the upcoming 2018 works council election is traditionally strongly influenced by trade unions.



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The ICT Directive takes effect in Germany

On 01 August 2017, the German law for the implementation of the European Intra-Corporate Transfer Directive 2014/66/EU ("ICT Directive") regarding the conditions for the entry and residence of third-country nationals within the framework of company-internal transfers came into effect. Companies having their seat outside of the EU are, subject to certain prerequisites, to be enabled to assign employees more easily and in particular more quickly to Germany by means of a new residence title, the ICT card. The implementation of the ICT Directive has the following consequences:

1. ICT card

The ICT card for employees can be applied for under the following prerequisites:

- transfer within the same group of companies;
- the employee is a manager or specialist;
- the employee has been employed by the company for at least 6 months;
- duration of the assignment in Germany: at least 90 days and a maximum of three years;
- approval of the Federal German Employment Agency of the commencement of the employment;
- valid employment contract with the national employer for the duration of the assignment and return to the national employer after the assignment;
- remuneration (salary and benefits in kind) and employment conditions (working time, holiday, continued pay in case of sickness etc.) comparable to the German employees.

2. Quick mobility within the EU with an obtained residence title

If the following conditions are fulfilled, it is even sufficient to notify the Federal German Agency for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge, BAMF*) in case of an assignment to Germany on short notice:

- the employee has a residence title of another EU member state granted pursuant to the ICT Directive;
- duration of the assignment in Germany: up to 90 days within 180 days;
- proof that the national branch to which the employee is assigned is part of the same company/group of companies;
- employment/assignment contract has been submitted to the competent authorities of the other member state;
- valid passport;
- certificate regarding the permit to enter the country and reside in the country for the purpose of the company-internal transfer issued by the BAMF.

3. Long-term mobility within the EU – mobile ICT card

The assigned employee can commence the work in Germany with the ICT card from another EU member state already before the approval if the application is filed 20 days prior to the assignment to Germany and if the following conditions are fulfilled:

- transfer within the same group of companies;
- the employee is a manager or specialist;
- the employee has a residence title of

another EU member state granted pursuant to the ICT Directive;

- duration of the assignment in Germany: more than 90 days;
- receipt of the approval of the Federal German Employment Agency of the commencement of the employment prior to the transfer;
- valid employment contract with the national employer for the duration of the assignment and return to the national employer after the assignment;
- remuneration (salary and benefits in kind) and employment conditions (working time, holiday, continued pay in case of sickness etc.) comparable to the German employees.

After the commencement of work and receipt of the approval, the assigned employee receives the mobile ICT card from the competent immigration authority.

4. Conclusion

On the whole, the implementation of the ICT Directive in all EU member states is to be assessed positively. Companies of third countries benefit from the harmonisation of the residence titles in the EU and are able to assign their employees to the EU much more flexibly and easily. However, it remains to be seen whether difficulties arise within the framework of the implementation by the authorities.

You can find further interesting facts about assignments in our Global Mobility Blog under www.globalmobility.legal.





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Flexible working models

The buzz word "Work 4.0" means for companies that more and more job applicants expect them to provide a convenient work-life balance. This includes in particular also working hours that can be brought in line with family obligations or needs. According to the motto "anytime anywhere", applicants request flexible working times as well as freedom of choice regarding the place of work.

Working time models

This is why working time models where the employee has a considerable influence on or even a right to decide when to perform his/her work are currently very popular. This stands in contrast with the "flexible working time allocation" which allows the employer in case of a fixed working time below the regular full-time, e.g. 30 hours per week, to deviate upwards or downwards within the framework provided for by case-law by means of respective contractual agreements and with a reasonable period of notice in order to adjust the actual working time to the actual amount of work. The Federal Labour Court has ruled that possible deviations of 25% upwards and 20% downwards can be agreed upon.

The models referred to above which allow the employee to (partly) autonomously decide are the "flexitime" and "trust-based working time" models. The flexitime model is split into a simple and a qualified flexitime. Within the simple flexitime model, the duration of the daily working time is fixed but the employee can freely decide when to commence and when to go home. Within the qualified flexitime model, the employee also determines the duration of the daily working time and must only comply with the weekly or even monthly working time agreed upon. It is in

both cases a challenge to ensure the proper flow of operations. For this reason, most flexitime models still stipulate certain core times for all employees during which they have to be at the place determined by the employer, mostly the company premises. Only the period before and after this core time is flexible and greatly varies in length. Another variant of this core time model is the determination of an "operating time". This also means that the employer determines a core time except that not all employees have to be present at the same time. They merely have to coordinate among each other to ensure that their department is adequately staffed for the business to operate without interruptions.

Compliance with the contractually-owed weekly or monthly minimum working time within such models is controlled by means of a working time account. The "trust-based working time" model generally does not include such an account. Within this model, the employee is merely given an assignment but the employer is not interested in a certain attendance time. In the end, the employee is only expected to fulfil the task assigned to him/her. However, as the legislator requires the employer to record working time exceeding eight hours a day and as the works council is according to case-law entitled to be fully informed about the total time worked by an employee per day, it is not actually possible to implement a genuinely trust-based working time which is not recorded at least in companies which have a works council. The employer may, however, transfer the recording obligation to the employee and the latter is then only obliged – when performing the agreed trust-based working time – to keep the records available in case any authority or the works council request to view them. However, this model bears the obvious risk that the scope of work assigned may

be too large or too small in proportion to the contractually owed weekly working time and that, in the end, one of the contractual parties might not be happy with the arrangement.

Flexible place of work

In particular with respect to the trust-based working time model, the place of work also plays an important role. Employees often request to be permitted to perform their work at their place of choice as only the results count. Such requests exceed the scope of the classic home office model. Within the home office model, the work equipment is generally to be provided by the employer. If the employee provides the equipment, he/she has a claim for reimbursement of the cost which is generally settled by means of a fixed allowance. The principle does not apply if the home office is mainly in the interest of the employee or he/she is free to decide whether to use it or not. The employer is, in turn, in all scenarios obliged to comply with the requirements of the Occupational Health and Safety Law. It is in this context, however, admissible that the required risk assessment is made on the basis of information provided by the employee and the employer does not have to visit the home office. Not only with respect to the home office model but in particular also if the employee is allowed to perform his/her tasks from anywhere, the employer is obliged to ensure that there is sufficient data protection in place. Despite the numerous obstacles and extra effort for the employer as described above, companies will not be able to avoid contemplating the options mentioned if their internal organisation allows for such models and if they wish to remain an attractive employer.



Column



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It all ends with pensions

It happens every now and again in connection with pension plans that the amount of the company pension differs depending on the group of employees. Affected employees often explain the lower company pension with (indirectly) discriminating circumstances. For example, the so-called "split pension formula" can lead to lower pensions for part-time jobs mainly held by women and a "ceiling cap clause" can mean lower pensions for younger employees in the individual case. This is why the European Court of Justice has recently had to decide on both regulations and has ruled in both cases that the employee groups affected are not subject to inadmissible discrimination (source: ECJ decision of 13 July 2017 – C-354/16 – "Kleinstauber").

Facts of the Case

In the case to be decided upon by the ECJ, the employer had a pension scheme in place which evaluated salary components above the contribution assessment ceiling higher than salary components below that ceiling when assessing the amount of the employees' old-age pension under the company pension scheme ("split pension formula"). This resulted in lower pensions for part-time jobs mainly held by women as the contribution assessment ceiling is only seldomly exceeded in this context. The employer's pension scheme furthermore included a clause limiting the years of service to be taken into account with respect to the pension amount to a maximum of 35 years ("ceiling cap clause"). If the employee leaves the company before the agreed date, this and the statutory pro-rata reduction pursuant to Sec. 2 of the German Company Pensions Act (*Betriebsrentengesetz, BetrAVG*) lead to a situation where the length of service which still has to be fulfilled after completion of the required years of service up until

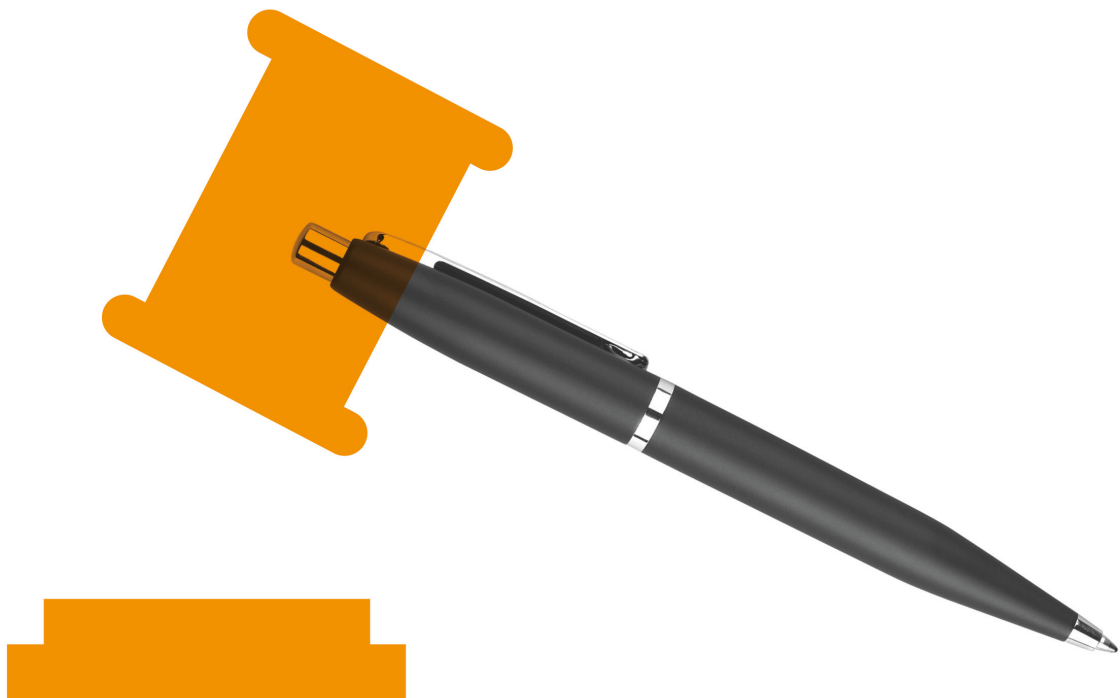
retirement becomes relevant for the amount of the company pension. This period of service is longer for younger employees than for the older ones so that they have to work longer as a result in order to receive the same amount of pension as their older colleagues. In addition to the disadvantages under the split pension formula due to her sex, the plaintiff also felt discriminated due to her (young) age.

ECJ Ruling

The European Court of Justice ruled that both regulations are admissible and do not constitute a discrimination. The higher evaluation of salary components above the contribution assessment ceiling is (indirectly) disadvantageous for women as the number of women working in part-time is generally higher than the number of part-time working men. The ECJ found, however, that the pension scheme pursued the admissible goal to proportionally reflect the employees' living standard during their gainful employment as close as possible in their retirement. This was achieved in particular by the "split pension formula" which evaluates the salary components above the contribution assessment ceiling higher precisely because they are not accounted for within the framework of the statutory pension. According to the court, this can be balanced out via the company pension. The court continues that the capping of the years of service which can be taken into account for the assessment does not constitute an inadmissible discrimination of younger employees either. This regulation first and foremost related to the length of service with a company and met the corporate need for an assessable and a calculable drawing on the corporate pension provisions.

Practical consequences

From a practical perspective, the European Court of Justice's decision is much appreciated as it considerably increases legal security. The admissibility of the "split pension formula" has so far not been seriously doubted. The decision regarding the admissible ceiling cap for assessable years of service is, however, particularly interesting as the alternative, a purely linear pension system without a cap for the assessable years of service, would completely exclude a discrimination of younger employees. However, this is no reason for employers to become complacent: Violations of the principle of equal treatment or of the prohibition of discrimination due to age or sex are and will be the hot topics of the future. Pension schemes and other pension promises still have to be constructed with great care. In this context, not only the "regular" but also the exceptional cases and their impact on individual employee groups should be taken into consideration and thought through beforehand.



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