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Newsletter
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Dear readers,

We welcome your interest in our „Employment Law" Newsletter.

As usual, this Newsletter will provide you with an overview of current employment-law developments and important decisions of the Federal Labour Court of practical relevance.

The implementation of the 2014 Pension Package by the Federal Government constitutes an initial, major legislation project under the coalition agreement. The spectacular decision of the Federal Social Court concerning compulsory old-age pension insurance for in-house lawyers is causing a stir among company lawyers. We provide an initial outlook on the consequences of this decision for those affected as well as for companies. As soon as the full text of the judgment is available, we will again take up this theme - in particular the question of protection of confidence. The European Court of Justice and the Federal Labour Court have also again commented on the subject of holiday. The Federal Labour Court (BAG) has strengthened the rights of shift workers with health impairments, in order to protect them against the loss of their jobs. We also wish to draw particular attention to judgments on the subjects „Scope of the obligation to inform in the event of transfer of company ownership", „Termination of an employment contract through the conclusion of a contract of employment as Director" as well as „Non-binding prohibitions to compete". Finally, the BAG has had the opportunity of commenting on the admissibility of so-called collective-wage-agreement differentiation clauses which are intended to ensure exclusive benefits for members of trade unions.

We wish you enjoyable and stimulating reading.

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The Practice Group Employment Law is made up of a team of lawyers specialising in employment law and qualified specialist lawyers for employment law. We advise and represent national and international companies in all areas of employment law. Our articles cover important new decisions, changes to the law and current case law in the field of employment law.

2014 Pension Package

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On 23 May 2014, the German parliament passed the Law Improving Benefits under the Statutory Old-Age Pension Insurance Scheme; it came into effect on 1 July 2014.

The Pension Package includes three core rulings:

1. Long-term insured persons
In future, long-term insured persons - these are employees with 45 years of contributions to the old-age pension insurance scheme - can retire at the age of 63 without deductions if they were born before 1 January 1953. The age limit for younger long-term insured persons will increase in stages up to 65.

In terms of contributions, this represents a financial gift for long-term insured persons. Normally, early retirement should result in the calculation of actuarial deductions. These will be waived. In addition to periods of employment, other periods of insignificant employment, military/alternative civilian service, caring for relatives, child raising, periods of receipt of unemployment benefit or temporary allowances, periods of further vocational training, incapacity for work, receipt of short-time working benefits etc., will also apply as contribution years. Periods of unemployment will be counted towards the contribution years - without limitation.

Nevertheless - in order to avoid early-retirement models with the help of unemployment benefit - periods of unemployment during the final two years before retirement can only be taken into consideration if they are the result of insolvency or complete discontinuation of the business by the employer.

Persons insured voluntarily will only benefit from this early retirement if they have paid compulsory insurance for at least 18 years.

2. Maternity pension

The second aspect of the Pension Package is the „Maternity pension". Parents whose children were born before 1992 should receive an additional remuneration point for raising each child. The cut-off year 1992 is explained by the 1992 pension reform. This reform introduced this allowance for children born in or after 1992.

3. Pension for reduced earning capacity

Finally, the third aspect of the Pension Package is improved protection against reduced earning capacity, accompanied by improved rehabilitation measures. The budget for this form of rehabilitation measure has been increased, persons retiring early with reduced earning capacity are treated as if they had worked for two more years.

Summary: The Pension Package represents a further shift in the pension factors to the detriment of the younger generations, which are already burdened by demographic developments. These generations now face the possibility of paying more money into the pension system during their working life than they will receive in benefits. This gives cause for concern. The opportunities for early retirement, now available through the pension for the long-term insured despite some statutory bars, are cause for concern from the perspective of society as a whole, but are nevertheless worth considering for employers. It is not without reason that the pension gifts are being called into question - for example by the BDA (Confederation of German Employers' Associations) and the BDI (Federation of German Industries) - with many good arguments.

Compulsory old-age pension insurance for in-house lawyers

Federal Social Court, 3.5.2014, B 5 RE 3/14
among others Media Information No. 9/14
Report on Hearing No. 14/14

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The Federal Social Court (BSG) has decided that company lawyers cannot, as a fundamental rule, be exempt from compulsory contributions under the statutory old-age pension insurance scheme.

On 3 April 2014, the 5th Senate of the Federal Social Court decided in three appeal proceedings whether lawyers in dependent employment (so-called "in-house lawyers") should be exempt from compulsory insurance under the statutory old-age pension scheme. As of today, the only information available on these judgments is the media information and the (more extensive) report on the hearing by the BSG; the full reasons for the decision have not yet been published.

DRV Bund: Four-criteria theory

In the past, the Deutsche Rentenversicherung Bund (DRV Bund) (German Federal Pension Fund) has exempted in-house lawyers from compulsory contributions under the statutory old-age pension insurance scheme if they were involved in legal advising, legal decisions, legal constitutive work and legal brokering (so-called "Four-criteria theory") in a company or association.

Federal Social Court: Double-profession theory

In its judgments dated 3 April 2014, the BSG has now overruled the previous practice of the DRV Bund and fundamentally rejected a right of exemption for in-house lawyers. The pivotal element of the decisions is the question of whether the work as employed in-house lawyer constitutes a function as "lawyer" creating an entitlement to exemption. In the opinion of the BSG, the four criteria, set out by the DRV Bund for checking the work of lawyers in companies, are of no relevance. According to the BSG, persons performing a role in which they are bound by instructions cannot be lawyers. The in-house lawyer is only an independent justice-administration organ - and thus lawyer - in his freelance, insurance-exempt work outside of the employment relationship (so-called "double-profession theory").

Protection of confidence only with current exemption notification

As shown by the available report on the hearing, holders of a beneficial exemption ruling - based on the respective occupation for which exemption has been granted - enjoy protection of status. Provided there is no change of employer or substantial change in work, they remain exempt from compulsory insurance under the statutory old-age pension scheme. Nevertheless, persons who are not in possession of an exemption notification for their current work can no longer obtain exemption in future.

Consequences for in-house lawyers affected

For in-house lawyers, the new legal position means that they are doubly liable to contributions. Based on their dependent employment in the company, they are obliged to pay contributions under the statutory old-age pension insurance scheme. At the same time, their admission to practice as a lawyer means that they are compulsory members of both the respective bar association as well as of the respective professional pension scheme. Future changes of work or employer need to be well thought out in view of their social-law consequences.

Consequences for employers

On the employer side, the question arises as to whether they are now required to pay old-age pension insurance contributions for their in-house lawyers and, in return, can discontinue their subsidies towards the contribution to the professional pension scheme. It may also be necessary to pay retrospective contributions to the DRV Bund, possibly with late-payment penalties. This is because the debtor of the overall social insurance contribution is the employer, with the result that he alone will be held liable for back payments. The claims to contributions do not become statute barred until four years after the end of the calendar year in which they became due. As such, the overall financial risk per employee can be well in excess of EUR 50,000. The question also arises as to the extent to which employers can reverse process their subsidies towards contributions to the professional pension scheme, paid under the false assumption of effective exemption of the in-house lawyer. However, only the employee is likely to be entitled to reclaim against the professional pension scheme. The employer will have to contact his employee regarding the reimbursement.

Summary: A constitutional complaint has been advised against the much-noticed fundamental decision of the BSG. The professional description of the lawyer, on which the decision is based, is frequently criticised and calls made for statutory clarification for in-house lawyers in the Federal Lawyers' Act. The corresponding E-Petition no. 52222, submitted to the German parliament concerning exemption from compulsory contributions to the old-age pension insurance scheme for in-house lawyers, failed due to the lack of the required 50,000 signatures. The decision of the BSG has far-reaching economic consequences for in-house lawyers and companies. It hinders a change of work by lawyers and results in discontinuity of pension biographies. It is to be hoped that the judgments will be added to the records and published soon, in particular in order to remove the legal uncertainty concerning the protection of confidence to be granted.

Informing employees in the event of transfer of ownership of a company to a newly formed company

BAG, judgment dated 14.11.2013, 8 AZR 824/12

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If a company passes to a newly formed company by way of transfer of company ownership, the employees affected by the transfer of company ownership must be informed explicitly of the fact that the party acquiring the company is not obliged to draw up a social compensation plan; otherwise, the information will be incorrect.

It is for this reason, among others, that the decision of the BAG agreed with an employee who opposed the passing of his employment relationship after a long time, and asserted the continuation of the employment relationship with his old employer. The claimant had been working in a company for a good 20 years as "call-centre agent". The call centre was transferred to a new employer in spring 2008 by way of a transfer of company ownership under Section 613a BGB (German Civil Code). The company taking over had been formed just a few months prior to the transfer of company ownership as so-called shelf company. In January 2008, the claimant received two letters from his previous employer (now the defendant in the legal action), in which he was informed of the forthcoming transfer of his employment relationship. The transfer of company ownership then took place on 1 March 2008.

In the summer of 2010, the party taking over the company announced the closure of the call centre taken over, and served notice of termination of all employment relationships in the call centre - including the transferred employment relationship of the claimant - for operational reasons. It was not until this point that the claimant retrospectively declared opposition to the transfer of his employment relationship - that had taken place a good two years previously - under Section 613a Subsection 6 BGB, and asserted the continuation of his employment relationship with the defendant. His old employer contested this. In particular, it invoked the fact that the opposition was not declared until 2010 and was therefore late, based on the information provided in January 2008. The claimant had by all means forfeited any continuing right of opposition by virtue of having worked for the party taking over the company for several years.

Incomplete information

The Federal Labour Court took a differing view and agreed with the claimant. The Federal Labour Court considered the information provided to the claimant to be incorrect, among other things

because it contained no reference to the fact that the party taking over the company was a company formed only recently that benefited from the privileges of Section 112a Subsection 2 BetrVG (Works Council Constitution Act). Under this regulation, companies cannot, in the first four years following their formation, regularly be obliged by an existing Works Council to draw up a social compensation plan to reduce the economic disadvantages of employees affected negatively (e.g. indemnification in cases of loss of job) in the event of a so-called change in operations (Section 111 BetrVG). The constellation to be decided on by the BAG did not constitute a statutorily envisaged exception for new formations in connection with the legal restructuring of companies and groups of companies. The fact that the formation date of the party taking over the company, and thus also its privileged position under Section 112a Subsection 2 BetrVG, could easily have been deduced from the information, received by the claimant concerning the party taking over the company, is considered by the BAG to be immaterial. Rather, the BAG considers that the information as per Section 613a Subsection 5 BGB must make specific reference to the privileged position under Section 112a Subsection 2 BetrVG. The fact that the party taking over the company had undisputedly not yet planned the subsequent closure at the time of taking over the company - a fact also correctly invoked by the defendant in the case to be decided - is likewise immaterial.

No forfeiture

The defendant was likewise not able to successfully invoke forfeiting of the claimant's right of objection. Over and beyond the mere continued work for the party taking over the company up until the announcement of the closure of the company taken over, the claimant had not created any other circumstances which, under the now established case law of the BAG, could have permitted the conclusion that he no longer wished to make use of his right of opposition.

Summary: The decision of the BAG confirms once more that the formulation of information letters under Section 613a Subsection 5 BGB requires extreme care, and that ultimately, from a practical perspective, the risk must always be reckoned with of courts subsequently considering information to be insufficient. In addition to careful preparation of a correct information letter, it is therefore important, in particular for the seller of the company, to whom opposing employees can "return" under Section 613a Subsection 5 BGB, to protect themselves against the economic consequences of any such late oppositions if possible.

Acquisition of holiday entitlement in cases of unpaid special holiday

BAG, judgment dated 6.5.2014,
9 AZR 678/12 Press Release No. 22/14

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Employees continue to acquire statutory holiday entitlement even during unpaid special holiday. A reduction in this holiday entitlement cannot be agreed by contract.

The claimant took unpaid special holiday between 1 January 2011 up until the end of the employment relationship on 30 September 2011. During this period, the employment relationship was suspended. Following her departure, she asked her former employer to compensate her for 15 days holiday for the year 2011.

The Federal Labour Court upheld the claimant's action. The claimant had acquired her statutory minimum holiday entitlement even while the employment relationship was suspended. The employer was not entitled to reduce the holiday entitlement.

No contractual reduction of the statutory holiday entitlement

After a period of service of six months, all employees have a statutory entitlement to paid recuperation holiday of 20 working days (5-day week) in every calendar year.

The creation of the statutory holiday entitlement presupposes only the legal existence of the employment relationship. There is no requirement for the employee to actually work in addition. Consequently, the employee acquires the statutory holiday entitlement even if the employment relationship is suspended. Since, under Section 13 Subsection 1 Sentence 1, Sentence 3 BUrlG (Federal Holiday Act), deviation from this to the detriment of the employee is not possible, individual contractual agreements on a reduction of the holiday entitlement are ineffective. A reduction is only admissible if the law explicitly provides for this - as is the case with parental leave or military service. By contrast, the law does not contain a ruling on reduction during suspension of the employment relationship.

Summary: The statutory minimum holiday entitlement cannot be effectively removed from the contract in cases of unpaid release. This is only possible for the additional holiday agreed by contract.

No lapsing of holiday entitlement upon the death of an employee

ECJ, judgment dated 12.6.2014, C-118/13

Contrary to the previous case law of the Federal Labour Court (BAG), the European Court of Justice (ECJ) has decided that the employee's entitlement to paid minimum holiday does not expire upon the death of the employee. Rather, the entitlement to compensation is inheritable.

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The claimant took legal action against the employer of her deceased husband to obtain compensation for holiday entitlement. Her husband had been unfit for work between 2009 and his death in November 2010 (with interruptions) as a result of a serious illness. At the time of his death, he indisputably had an outstanding annual holiday entitlement of 140.5 days. The claimant demanded compensation from the defendant for the holiday entitlement not taken by her husband. The defendant rejected the claim and expressed doubts concerning the inheritability of the compensation.

Submission of the LAG Hamm

The State Labour Court Hamm was the appeal instance in this matter and submitted the matter to the ECJ for a preliminary decision on whether EU law permits national legal regulations or customs under which the claim to paid annual holiday expires upon ending of the employment relationship through death of the employee, without creating an entitlement to compensation for holiday not taken. The State Labour Court also raised the question of whether any such compensation is dependent on a prior application by the person concerned.

Holiday not taken due to illness must be the subject of financial compensation

The ECJ answered the questions submitted in the negative, as complete expiry of this entitlement upon the death of the employee is incompatible with the Working Time Directive (Directive 2003/88/EC), which provides for an entitlement to minimum annual paid holiday of four weeks. In the opinion of the ECJ, the entitlement to paid annual holiday is a particularly important principle of social law, from which deviation should not be readily permitted. In addition, it should be noted that the entitlements to annual holiday and payment during holiday constitute two aspects of a single entitlement. Against this background, the Court of Justice has also already decided that a violation of EU law is given if, upon ending of the employment relationship, the long-term sick do not receive remuneration for holiday not taken due to illness.

Not even death must result in complete loss of the holiday entitlement

The practical effectiveness of the holiday entitlement must also be ensured through financial compensation in the event of ending of the employment relationship through the death of the employee. In the opinion of the ECJ, if the obligation to pay out annual holiday entitlements were to lapse upon ending of the employment relationship through the death of the employee, the imponderable death of an employee would result in retrospective complete loss of the entitlement to paid annual holiday. Against this background, the decision of the ECJ at hand makes it clear that EU law conflicts with national legal regulations or customs which exclude compensation for paid annual holiday not taken in the event of the death of the employee.

Payment for holiday is not dependent on a prior application by the person concerned

The ECJ states furthermore that compensation for holiday in such cases is not dependent on the person concerned having submitted an application in advance. The reason for this is that the Working Time Directive (Directive 2003/88/EC) does not impose additional preconditions for the establishing of the entitlement to financial remuneration for paid minimum annual holiday, other than the ending of the employment relationship.

Summary: Under the previous case law of the Federal Labour Court (BAG), the holiday entitlement of an employee expired upon his/her death and in particular was not converted into an inheritable claim for compensation under Section 7 IV BUrlG (Federal Holiday Act) (BAG, judgment dated 20.9.2011, 9 AZR 416/10, BAG judgment dated 12.3.2013, 9 AZR 532/11). Following the decision of the ECJ, the previous legal practice in Germany concerning statutory minimum holiday is no longer tenable. Given corresponding contract formulation, only the contractual additional holiday entitlement can be excluded from compensation in the event of the death of the employee.

Right of nurses not to be assigned to night shifts

BAG, judgment dated 9.4.2014, 10 AZR 637/13
Press Release No. 16/14

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If a nurse is no longer capable of working night shifts in a hospital for health reasons, this does not mean that she is unfit for work due to sickness. She has an entitlement to employment without being assigned to night shifts.

The Federal Labour Court was called on to decide to what extent a shift worker is unfit for work through sickness because she was no longer capable of working night shifts for health reasons. The claimant was a nurse working shifts. Under her contract of employment, she was obliged to work on Sundays, on public holidays, at nights and in shifts (including alternating shifts) within the scope of justified operational needs. The claimant was unable to work the night shift from 21.45 hours to 06.15 hours for health reasons. This was the result of her need to take medicine that caused her to fall asleep. Following an examination by a company doctor, the claimant was sent home, because she was allegedly unfit for work due to sickness as a result of her unsuitability for night work. The claimant subsequently explicitly stated her willingness to work with the exception of night work; the defendant rejected this.

The Labour Court Potsdam upheld the legal action for employment and payment of the remuneration for the period of non-employment. The appeal by the defendant to the State Labour Court Berlin-Brandenburg as well as the appeal to the Federal Labour Court were unsuccessful.

No incapacity for work

The Federal Labour Court established that the claimant was neither unfit for work as a result of sickness nor had it become impossible for her to work. The claimant was still able to perform all duties of a nurse owed under her contract. She was merely unable to work night shifts as a result of the medication she was required to take. The defendant should therefore have taken account of the health deficits when planning shifts.

Right of employer to issue instructions

The defendant's right to issue instructions was likewise not restricted by the provisions of a works agreement. In particular, the authoritative works agreement provided for equal planning, including in terms of the shift sequence of the staff and taking account of the individual wishes of the employees.

Given the fact that she had correctly declared her willingness to work, the claimant was entitled to demand her remuneration

from the defendant, as the defendant was in default on acceptance following rejection of her offer to work.

Section 106 Sentence 1 and 3 of the Industrial Code (GewO) does grant the employer discretionary powers when organising duty rosters. However, this does not entitle the employer to unilateral determination of duty rosters without taking account of the interests of the employees. Because the employer's assignment of work only constitutes reasonably exercised discretion if the fundamental circumstances of the case have been weighed up and appropriate account taken of the reciprocal interests.

The mere interest of an employer in equal shift assignment cannot, as a fundamental rule, constitute a predominating operational necessity of the employer over a work limitation of an employee that is to be taken into consideration.

Summary: The effects of the decision of the Federal Labour Court can be extremely problematic in practice. This is because the health-related non-availability of an employee for night shifts results in an increased number of night shifts for those employees who are not in possession of any such partial medical certificate of incapacity for work. A decisive question will therefore be at what point the interests of the employer in practising rotating shift assignment predominate, if several employees are not available as a result of unsuitability for night shifts.

Contract of employment as Director with third-party company - no termination of the employment relationship

BAG 24.10.2013 - 2 AZR 1078/12

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The conclusion of a contract of employment as Director with a company other than that of the employer does not result in termination of the employment relationship. There is no agreement between the parties to the contract of employment that satisfies the requirement of the written form under Section 623 BGB.

The claimant had been employed with the defendant, a central organisation of the company health insurance funds, since 1989. In 2008, the defendant formed a joint company, B GmbH, together with several substitute private health insurance funds and company health insurance funds, and appointed the claimant as its Director. The claimant concluded a contract of employment as Director with B GmbH with effect as from 1 September 2008. By letter dated 12 March 2010, the defendant terminated the employment relationship with the claimant extraordinarily and immediately, as well as serving ordinary notice of termination as a contingent measure. The corresponding legal action for unfair dismissal was successful in all instances.

Violation of the written form

The BAG stated clearly that the employment relationship had not ended as of the time of the notice of termination dated 12 March 2010, despite the conclusion of a contract of employment as Director with B GmbH. In the opinion of the court, this contract did not include any agreement between the parties concerning the termination of the employment relationship that satisfied the requirement of the written form under Section 623 BGB. With reference to its previous case law, the court stated that the conclusion by an employee of a contract of employment as Director does, in case of doubt, constitute the implied termination of the previous employment relationship, and that this regularly satisfies the requirement of form under Section 623 BGB. However, this only applies if the parties to the contract of employment as Director are simultaneously the parties to the contract of employment. Otherwise, there is no written legal transaction between the employer and the employee which could constitute an agreement on termination of the employment relationship. According to the BAG, there was no room for the assumption that the contract of employment as Director on which the decision was based was a three-page contract or that the defendant had been represented by B GmbH at the time of conclusion of the contract, particularly as Section 126

Contract parties

BGB requires the naming of the parties and any representation relationships in the contractual document. This was not the case in the matter at hand, with the result that the employment relationship was still valid at the time of notice of termination.

Practical tip

Through the decision at hand, the BAG has further developed its previous case law concerning the ending of employment relationships through the conclusion of contracts of employment as a Director, and limited the possibility of implied termination of the employment relationship to - written - agreements involving the parties to the contract of employment. In practice therefore, particular attention must be paid to ensuring that the termination of the employment relationship is explicitly regulated and that the corresponding contract document - irrespective of whether this is a separate termination or a three-page agreement - is correctly signed by the parties to the employment contract, stating any representation relationships.

Summary: In the event of „promotion“ of an employee to Director, a written agreement should always be made between the employer and the employee concerning termination of the employment relationship, in order to prevent resurrection of the employment relationship - and the related protection against dismissal - following ending of the work as Director.

Bonus budget must be consistent with reasonably exercised discretion

BAG, judgment dated 19.3.2014, 10 AZR 622/13

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Employers mainly pursue differing purposes when granting variable remuneration elements. It is only natural to set employees performance incentives. Frequently, however, employers also wish to retain sufficient flexibility to enable them to react to surprising developments. The BAG was called upon to decide on bonus entitlements that an employee "can" receive "as voluntary benefit without a legal entitlement" under his contract of employment and in accordance with the respectively applicable works agreement.

The claimant is an employee of a bank that required extensive government support during the banking crisis. Following losses of approx. 5 billion EUR (2008) and 2.6 billion EUR (2009), the bank had decided not to pay bonuses in these two financial years. A bonus budget of 25 million EUR was made available for the year 2010, with the result that the claimant received approx. 45% of the payment asserted by him. The year 2011 closed with a loss of 328 million EUR, as a result of which no bonus budget was made available. The BAG dismissed the legal action concerning the years 2008 and 2009. However, no final decision was yet possible for 2010 and 2011, for which reason the matter was referred back to the State Labour Court.

Right of the employer to determine benefits

The BAG initially made it clear that a formulation in the contract of employment under which the employee "can" be entitled to a bonus, without specifying the level and detailed conditions and which refers to the provisions of the respectively applicable works agreement in other respects, does not create an unconditional contractual entitlement to a bonus that is independent of the regulations of the works agreement. In this respect, it can be admissible for the works agreement to grant the employer a unilateral right to decide on benefits, as defined in Section 315 BGB, for determination of the bonus budget. This is by all means the case if the contract does not regulate a bonus level and the company parties are not themselves required to specify the dimensions of the volume to be distributed.

Bonus budget "zero"

In exceptional situations, the bonus budget can be set at "zero" without errors of discretion. The BAG assumed such a situation for the years 2008 and 2009, but not for 2011. In this context, not all negative results justify such exercising of discretion. Nor-

mal fluctuation margins, which can also mean losses, are not sufficient.

In the case at hand and under the works agreement, the bonus for the years 2010 and 2011 was supposed to be based on both individually agreed targets as well as on the earnings position of the bank. Against this background, a bonus budget to be determined should - depending on the earnings position - assume dimensions that respect the performance context of the bonus system and are sufficient to enable appropriate reward for performances, striven for through the conclusion of target agreements and actually achieved. In the opinion of the BAG, it was not yet possible to determine whether the budget level for 2010 corresponds to reasonably exercised discretion in this respect.

Reservation of voluntary nature

According to the BAG, the so-called reservation of voluntary nature agreed in the contract of employment ("as voluntary benefit without a legal entitlement") does not stand in the way of an entitlement of the employee. This is a contractual condition as defined in Section 305 Subsection 1 BGB. A "reservation of voluntary nature" in a contract of employment that can be understood as meaning that the employer reserves the right to decide freely in terms of "whether" to grant the bonus, irrespective of the provisions of the applicable works agreement, violates the direct and obligatory effect of works agreements and is therefore ineffective. A "reservation of voluntary nature" is also inappropriate and thus ineffective if it is intended to reserve the right of the employer to also decide freely in terms of "whether", even if he applies a variable remuneration system for a financial year through the prior conclusion of a target agreement.

Summary: Claims to variable remuneration elements (profit sharing, bonuses) can have differing legal bases. In addition to agreements in contracts of employment, collective wage agreements or works agreements, variable remuneration can also be derived from company practice or the principle of equal treatment. Each form has its special aspects and own pitfalls. When granting such benefits and when choosing the form of implementation, employers must therefore check very precisely whether the desired flexibility is actually given.

Non-binding prohibition to compete in the absence of determination of the level of compensation

BAG, judgment dated 15.1.2014 – 10 AZR 243/13

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If a post-contractual prohibition to compete leaves the level of compensation to the discretion of the employer without agreeing the minimum level, the prohibition to compete is not binding on the employee.

The BAG was required to decide on the obligation of the defendant to pay compensation for a period of restriction. The claimant worked for the defendant as export sales employee. The contract of employment included a ruling under which the employee was to be forbidden from working for a competitor company for a period of two years. The defendant undertook to pay compensation for the duration of the prohibition to compete; this compensation was left to his discretion. The ruling did not make reference to the statutory rulings on post-contractual prohibitions to compete (Sections 74 et seq. HGB (German Commercial Code)).

The defendant terminated the employment relationship ordinarily, upon which the claimant declared that he would comply with the contractual prohibition to compete and expected payment of compensation for the period of restriction, at least in the statutory amount. The defendant refused payment stating that the prohibition to compete was null and void.

The Federal Labour Court - like the previous instances - awarded the claimant the requested compensation in the statutory amount. The contractual prohibition to compete was not null and void; rather, it was only non-binding for the employee. If the employee decided to comply with the prohibition to compete, the employer had to pay the compensation for the period of restriction.

In the opinion of the BAG, the prohibition to compete is not null and void on the grounds of non-specification of the level of compensation. In the case to be decided, the ruling on compensation was not completely missing, a fact that would indisputably lead to the nullity of the prohibition to compete (established case law, most recently BAG, judgment dated 28.6.2006 – 10 AZR 407/05, marginal note 11).

Rather, the parties had agreed that the claimant should receive compensation and merely left the level of this to the discretion of the defendant. Based on the interpretation of the ruling, it was therefore clear that the claimant would receive compensation -

No nullity of the prohibition to compete

at a level still to be determined. The determination on the basis of reasonably exercised discretion (Section 315 BGB) does not also entitle the defendant to set the compensation for a period of restriction to "zero".

In the opinion of the BAG, nullity likewise does not result from the absence of the written form, as the parties had laid down the essential content of the prohibition to compete in a document signed by both parties in their own handwriting. According to the BAG, the level of the compensation for a period of restriction is not material. The only thing that needs to be set out in writing is that compensation is to be paid at all. The parties had satisfied this requirement.

Non-binding nature of the prohibition to compete

Nevertheless, the BAG considered that the agreed prohibition to compete was not binding on the claimant. Under Section 74 Subsection 2 HGB, a prohibition to compete is non-binding if it provides for excessively low compensation for a period of restriction. If the prohibition to compete is non-binding, the employee can decide whether he considers himself bound by it or not. If an employee complies with the prohibition to compete, he can also claim compensation for any period of restriction.

Equal treatment of excessively low compensation and discretionary compensation

The BAG is of the opinion that, if an employee cannot recognise from the agreed ruling whether he has been assured compensation for a period of restriction in the amount prescribed by law, this is equivalent to the agreement of excessively low compensation. Uncertainty of this nature is given here, as the ruling makes no reference to either the statutory regulations or to a specific level.

Level of compensation for periods of restriction

Under Section 315 Subsection 1, 2 BGB, Section 74 Subsection 2 HGB, the compensation payment left to the discretion of the defendant should have been set at 50% of the contractually-conform benefits last received. Neither of the parties was able to put forward sufficient reasons for deviation from this statutorily prescribed standard.

Summary: The non-determination of the level of the compensation for periods of restriction does not result in the nullity of the prohibition to compete. Rather, it is left to the employee to decide whether he/she wishes to comply with the prohibition to compete. In case of doubt, the compensation then payable will be based on the statutory rulings of Sections 74 et seq. HGB.

Employment reference can mention release as member of the Works Council

State Labour Court Cologne,
judgment dated 6.12.2013, 7 Sa 583/12

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An employee cannot ask the employer to conceal the fact in a qualified employment reference that the employee was released fully from his work duties in the last years of his employment, in order to exercise his office on the Works Council.

The claimant had been employed by the defendant's company since 1998. Between 2005 and 2010, the claimant was released fully from his professional work as a result of his status as member of the Works Council. Upon ending of the employment relationship, the employer issued him with a qualified reference which included the following wording:

"In the period between [...] and the ending of the employment relationship, Mr V. was released from his professional duties due to his membership of the Works Council. His conduct towards superiors and colleagues was appropriate as a rule."

The claimant demanded complete and final deletion of the passage concerning his release as member of the Works Council as well as replacement of the final sentence of the reference with the following formulation: "His conduct towards superiors and colleagues was impeccable at all times."

In its judgment dated 17 January 2012, the Court ordered the employer to reformulate the final sentence of the reference, whilst dismissing the remainder of the legal action.

The LAG Cologne upheld this legal interpretation in the 2nd instance. By so doing, it agreed with the prevailing opinion, according to which work for the Works Council, or the mere membership of the Works-Council body, must fundamentally only be mentioned in the employment reference if the employee expressly wishes this. However, this situation must be assessed differently if the person concerned is a member of the Works Council who is released fully from his/her work duties as a result of the duties assumed under the Works Council Formation Act.

In such a case, the LAG Cologne assumes that statements on the performance and conduct when carrying out employment-contract duties are not possible as long as the primary employment-contract duties are suspended.

If the employee was released for part of the overall duration of his/her employment relationship due to his/her Works Council activities, the complete concealment of this fact results either in a falsified impression on the part of the neutral reader of the reference contrary to the principle of truthful references, or creates a critical information gap that is ultimately also detrimental to the employee. This is because any such information gap could lead to speculation on the part of the reader of the reference as to what actually happened during the period not mentioned, e.g. long-term illness of the employee or the serving of a prison sentence.

Summary: The judgment of the LAG Cologne must be regarded as correct. It is in line with the previous case law on the mentioning of de-facto periods of absence during the employment relationship. For example, the BAG decided through judgment dated 10 May 2005 (9 AZR 261/04) that, in the case of a cook „employed" for four years and two months, absence for a child-raising period of almost three years can be mentioned. On the one hand, a reference should be characterised by the principle of favourable consideration, i.e. the employer must not put obstacles in the way of the employee's professional advancement. On the other hand, the principle of truthful and complete references applies. Consequently, any extended de-facto interruption must be stated. It is therefore clear that it is not possible to assess the employee's work conduct over the period concerned. It cannot then be a matter of the reason for the absence, e.g. parental leave, extended illness or release as member of the Works Council.

Recuperation assistance (only) for members of trade unions

BAG, judgment dated 21 May 2014, 4 AZR 50/13, {ut}4 AZR 120/13 among others

The employment-law principle of equal treatment is not applicable if employer and trade union reach an agreement, within the scope of collective wage negotiations, to the effect that specific supplementary benefits are to be provided for trade-union members.

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Within the framework of collective wage negotiations at Adam Opel AG, restructuring measures were agreed which also included provisions for a lowering of wages under the collective agreement. The IG Metall trade union made its consent conditional on privileged treatment for its members. The employer side complied with this request. Adam Opel AG joined the so-called Saarverein (Saar Association) which, under its constitution, provides so-called recuperation assistance to members of IG Metall. The joining agreement provided for payment by Adam Opel AG of an amount of 8.5 million EUR. The Association gave an assurance that it would pay recuperation assistance of 250 EUR gross per annum to the members of IG Metall employed at Adam Opel AG. The claimants in the proceedings pending before the Federal Labour Court were not members of IG Metall. They did not receive recuperation assistance. They took legal action against Adam Opel AG and based their claim to payment on the employment-law principle of equal treatment.

No violation of the principle of equal treatment

The Fourth Senate of the Federal Labour Court dismissed the action as had the Hesse State Labour Court in the previous instance (judgment dated 19 November 2012, 17 Sa 285/12, 17 Sa 134/12). The reasons for the decision are not yet available. In the press release, the Court explained its decision essentially by stating that the matter does not concern the area of application of the employment-law principle of equal treatment: The joining agreement was part of a restructuring package with the involvement of the parties to the collective wage agreement. Collective agreements of this nature are not to be measured against the employment-law principle of equal treatment. This is the case irrespective of whether or not the benefits, to be enjoyed only by trade union members, have been regulated in a collective wage agreement or in a coalition agreement governed by the law of obligations. Given the assumption of the appropriateness of contracts of associations capable of being a part of collective agreements, no check will be made on the basis of the employment-law principle of equal treatment.

Recuperation assistance as concealed collective-wage-agreement bonus

The decision shows the (indirect) methods now used by the parties to collective wage agreements to obtain a collective-wage-agreement bonus for trade union members. However, even if the route via the Saarverein had not been chosen and the recuperation assistance had been regulated in a collective wage agreement as employer benefit to trade union members, this would have been admissible. The system of the law on collective bargaining is aimed at differentiating between trade union members and employees not bound by collective wage agreements (so-called outsiders). Under the case law of the highest court, a collective-wage-agreement bonus for trade union members should be admissible, provided the collective wage agreement does not prevent the employer from creating equal treatment for outsiders, and does not result in any excessive pressure to join the union which would violate the negative freedom of association of the outsiders. In the case at hand, both would have to be answered in the negative given the level of the recuperation assistance.

Summary: Reference to the collective wage agreement in contracts of employment is ever-present in day-to-day company practice. This devalues membership of trade unions. As a consequence, trade unions have discovered the so-called collective-wage-agreement differentiation clause, aimed at ensuring exclusive benefits for their members, in recent years. This has revived the debate as to whether and, if applicable, what differentiation clauses are admissible. Legal and collective-agreement-policy considerations have resulted in further developments in the formulation of collective wage agreements. The new method of involving an association sympathetic to the trade unions has been approved by the Fourth Senate.

Practical examples
Employment Law

Heuking Kühn Lüer Wojtek uses regular events as well as lectures and publications by our lawyers from the Practice Group Employment Law to provide information on employment-law subjects of everyday relevance to clients. The following pages also provide an overview of the latest personal data and distinctions of our Practice Group Employment Law.

Publications

Christoph Hexel wrote the entire Part 5 - Employment Law in the "Handbuch Cloud Computing" (published by Hilber) which first appeared in April 2014.

Bernd Weller has drawn attention to Compliance risks during the period following Works Council elections for the Federal Association of Compliance Managers.

Fabienne Grun and **Bernd Weller** wrote a paper in the "Personalmagazin 5/2014" on the challenges faced by employers when "members of the Works Council who have been voted out of office" return to the working world.

Bernd Weller has commented for the Federal Association of Compliance Managers on the possible effects for employers of ongoing anti-trust proceedings and misconduct of employees in terms of German or foreign anti-trust legislation.

Bernd Weller commented in "AuA 2014, 183" on a ruling of the BAG dated 13 March 2013 concerning the ineffectiveness of special-allocation collective-wage agreements under Section 3 BetrVG.

Lectures

On 26 and 27 June 2014, **Bernd Weller** delivered a presentation for the Beck Academy at the seminars "Works Council Constitution Act for Beginners or Professionals" in Hamburg. The presentation will be repeated in Frankfurt on 22/23 September 2014.

Astrid Wellhöner and **Bernd Weller** will speak at the "Summer course Employment Law", organised by the Beck Academy on 6-8 August 2014 in Munich.

Regina Glaser, LL.M. will speak on the subject of "Social Media/Data Protection within the Employment Relationship" at the Euroforum Personnel Manager Conference, to be held on 18/19 November 2014 in Munich.

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