



## The Tricky Issue of Repayment of a Bonus under German Law

***Some employers like the concept that employees must repay a bonus if the employee is no longer employed as of a certain date. This may be permissible in Germany, but only under narrow circumstances.***

On June 27, 2018, the Federal Labor Court (*Bundesarbeitsgericht* or "BAG") decided on a case in which a bonus provision provided for a bonus payment no later than December 1 but also repayment if the employee left before March 31 of the following year. Among other things, the bonus was intended to reward previous work (not just loyalty into the future) and was based on a collective bargaining provision.

In this case, the employee was paid a bonus equivalent to one month's salary in November, although, at his own instigation, he had filed notice of termination in October and left the company after expiration of the notice period by the end of January of the following year. The employer claimed repayment of the bonus. In the resulting litigation, he lost the first and second instance.

Not so at the BAG. The BAG held that while the questionable provision on repayment does negatively affect the constitutional right to freely choose one's workplace, it still is valid. However, this is the case only because the clause is part of a collective bargaining agreement applicable to the employment relationship (i.e., an agreement concluded between an employers' organization and a trade union). The BAG also noted that it would have been acceptable had the collective bargaining agreement provision been referenced only in the employment agreement.

In contrast, the clause would not have been valid had it been merely a contractual provision in the employment agreement. The BAG pointed out that collective bargaining, similar to statutory law, is not subject to the court's scrutiny applied to contractual employment provisions; the latter count as "terms and conditions," and employees are deemed "consumers" who must not be deprived of remuneration for work already rendered. Employers' organizations and trade unions have more autonomy and wider discretion than employers with their standardized employment provisions.

The decision demonstrates that where a bonus is, at least in part, intended to reward work already performed and repayment linked to continued employment beyond the payment date, enforceability can be expected only in specific circumstances. In the typical instances, where the respective provision would qualify only as a contractual arrangement in the employment agreement, it would be held invalid and thus should be avoided.



Georg Mikes  
Frankfurt



Friederike Steininger  
Munich



Markus Kappenhagen  
Düsseldorf

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm Worldwide<sup>SM</sup>.

**Disclaimer:** Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.