FOURTH QUARTER 2005

GERMAN LABOR AND EMPLOYMENT NEWS

CONTENTS

WHAT TYPE OF NOTICE MUST EMPLOYERS PROVIDE TO EMPLOYEES WHEN TRANSFERRING AN UNDERTAKING?

By ***Friederike Göbbels***

Munich
German Attorney at Law; Certified Labor and Employment Lawyer
fgoebbels@jonesday.com
++49 89 2060 42 200

Employers must observe certain obligations vis-à-vis employees when transferring a business—or part of a business—to another party, or, to use the lingo of the European Union, when "transferring an undertaking." The types of undertaking transfers that typically trigger such obligations are either asset deals or business conversions pursuant to Germany's Transformation Act (*Umwandlungsgesetz*), *i.e.*, a merger, split-off, spin-off, etc.

SECTION 613A OF THE CIVIL CODE

Section 613a of Germany's Civil Code states that if an employer transfers an undertaking, the employees of that undertaking are automatically transferred to the acquirer (*e.g.*, if it is an asset deal, the buyer of the undertaking) by operation of law. However, because employment relationships cannot be transferred without any input from employees, the seller and/or buyer must provide certain information to affected employees so that they can make an informed decision as to whether to accept the transfer of the employment relationship. Failure to provide this information may very well cause the seller and/or buyer to face legal consequences.

Since employers have the burden of proving that they provided adequate information, they must put forth some effort to ensure that the employees are in a position to make an informed decision. Merely using boilerplate language will not suffice. In particular, employers should take care in discussing various rights and obligations of the employees that are to continue after the transaction as well as those that are to be directly impacted by the transaction.

German statutory law sets forth not only the information that employers must provide to employees as part of the transfer of an undertaking, but also the rights of the employees receiving this information.

One fundamental aspect of German employment law is that all employees have the right to choose their employers, *i.e.*, an employment relationship cannot be forced on an employee. As discussed in more detail below, even if an employee's refusal to work for a new employer would lead to the termination of that employee—as is often the case with smaller employers—the fundamental right to choose an employer cannot be taken from an employee.

INFORMATION TO EMPLOYEES

Even though the statutory provision setting forth the information that employers must provide to employees is not even four years old yet, it has been the source of various discussions among legal practitioners. The Federal Labor Court recently interpreted the new legal requirements for the first time, thereby adding clarity to many of the outstanding issues.

According to Section 613a of the Civil Code, so long as an employer provides adequate written information regarding the proposed transaction, employees have one month to decide whether to accept the transfer of their jobs to the buyer. The one-month period does not begin to toll until the employer has provided sufficient written information. If a transaction is to close within one month after the employer has provided the notice, there will invariably be some uncertainty between the seller and buyer; they will not know how many employees will actually work for the buyer, as these employees still have time to object to the

transfer of their jobs to the buyer. This uncertainty will only be exacerbated if the parties are still waiting to see how certain key employees, *e.g.*, those with special know-how, skills, or experience, will react to the transfer of the undertaking to the buyer after the deal has already been closed.

As was confirmed by a May 24, 2005, Federal Labor Court decision, the one-month period fails to toll not only if the employer does not provide the information to the employees, but also if the information provided by the employer is inadequate. This is where it starts to get complicated, because the information required—as specifically listed in Section 613a of the Civil Code—is set forth in relatively ambiguous terms. If an employer interprets these terms incorrectly—which would not be the first time this was done by an employer—then the one-month period would not begin to toll, in essence extending the period during which the employees are entitled to exercise their right to object to the transfer of their jobs.

With this in mind, Section 613a(5) of the Civil Code requires that employers provide the following information:

- The timing of the transfer or, if not precisely known, when the transfer is planned.
- The reason for the transfer.
- How the employees will be affected from a legal, financial, and social point of view as a result of the transfer.
- The measures that the employer plans to take with respect to the employees.

The first two points are straightforward, and employers generally do not have a problem satisfying these requirements. However, the last two points do not provide the same clarity the first two provide.

BURDEN ON EMPLOYERS TO PROVIDE ADEQUATE INFORMATION

Since employers have the burden of proving that they provided adequate information, they must put forth some effort to ensure that the employees are in a position to make an informed decision. Merely using boilerplate language will not suffice. In particular, employers should take care in discussing various rights and obligations of the employees that are to continue after the transaction as well as those that are to be directly impacted by the transaction. For example, how will the proposed transaction affect the various works agreements (agreements between the works council and management) or collective bargaining agreements? How will the transaction affect those provisions that protect certain employees against termination? Also, will the seller and/or buyer be liable for the employer's past and future obligations vis-à-vis the employees?

Examples of measures that employers may take with respect to employees include introducing training programs

INTRODUCTION OF NEW LABOR AND EMPLOYMENT LAWYER IN MUNICH

Jones Day is happy to announce the addition of a new certified Labor and Employment lawyer in our Munich Office. Ms. Friederike Göbbels joined the Munich Office last month from another well-known German law firm, where she headed the "Labor and Employment Law" group. Ms. Göbbels has vast experience in advising clients—both domestic German clients and foreign clients—on employment issues relating to M&A transactions as well as reorganizations. She also works closely with clients on their day-to-day employment law matters, such as drafting and negotiating employment agreements and managing director agreements. Finally, she often appears in court to litigate disputes that the parties were not able to resolve out of court.

to retrain certain employees and concluding an agreement with the works council setting forth the severance payments to be paid to employees to alleviate their financial losses resulting from the transfer of the undertaking, as well as any structural or organizational changes the employer may introduce after consummating the transaction.

INFORMATION MUST BE IN WRITING

So far we have discussed what type of information employers must provide to employees so as not to run afoul of Section 613a of the Civil Code. Another issue is how employers must relay this information to the employees. Employers should note the following:

- The employee must provide the information in writing (e-mail is permissible), and the addressee as well as the information provided must be clear.
- If there is a dispute as to whether the employee received the notice, the employer must be able to prove not only that each employee in fact received the notice, but also when each employee received it. As a result, the employer should always have the employee sign a confirmation of receipt.
- Either the "former" (or still current) employer or the new employer may provide the information, or the two of them may issue a combined notice. So as to avoid any misunderstandings between the two employers, they should clearly agree between themselves—preferably in writing—how the notifications are to take place and who is responsible for what.

TERMINATION OF EMPLOYMENT DESPITE INADEQUATE INFORMATION

Though the Federal Labor Court held in the above-referenced decision that the one-month period does not begin to toll until the employees have received adequate information, failure to provide this information does not restrict the former/current employer's right to terminate an affected employee for business reasons. Of course, the employer must otherwise observe the various employment laws when issuing such a notice of termination.

Accordingly, if an employee exercises his right to object to the transfer of his job to the new employer, that employee must keep in mind that the former/current employer may terminate that employee if there are no suitable positions available with that employer, regardless of whether the employer had provided adequate information regarding the transfer. By way of example, if a pharmaceutical company decides to outsource its entire IT department, and as a result of such outsourcing, there are no IT positions left with the company, then the pharmaceutical company may terminate for business reasons any IT employees who object to the transfer of their jobs. This applies regardless of whether the IT employees received adequate information regarding the pending transfers.

CLAIM FOR DAMAGES BY EMPLOYEES?

Though there is no specific case law on point, an employee who has not received adequate information could also make a claim for monetary damages against the former employer as well as against the new employer if the failure to make the notice actually led to damages. Since Section 613a of the Civil Code permits either the former or new employer to provide the notice, the parties are subject to joint and several liability vis-à-vis any employee suffering such damages. How such damages are divided between the two employers is a matter that they must resolve between themselves.

Employers are well advised to put forth sufficient time and effort to provide adequate information to the employees in accordance with Section 613a of the Civil Code so as to avoid expensive and time-consuming surprises.

BE WARY OF LEASING EMPLOYEES: YOU MAY HAVE HIRED NEW EMPLOYEES WITHOUT EVEN KNOWING IT

By ***Jörg Rehder***

Frankfurt
Attorney at Law; Solicitor (England and Wales)
jrehder@jonesday.com
++49 69 9726-3122

The managing director of a German logistics company determines that software needs to be developed for his company. The company does not have the appropriate personnel or the time to develop this software. The managing director does not wish to hire new employees to create the software, because developing software is not part of the logistics company's core business and it would not make economic sense to hire new employees for this one-time project. As a result, he engages a software consulting com-

German labor authorities concluded that they needed to regulate the leasing of employees, as otherwise it was thought leased employees would probably not enjoy the same working conditions as the employees of the company to which the leased employees were being leased. In short, the labor authorities feared that leased employees would be subject to exploitation. However, many argue that Germany's Leasing of Employees Act is an anachronism, as it applies to any leasing company, regardless of its size and experience in leasing employees.

pany, and the two parties enter into a service agreement whereby the software company contracts to develop, test, and install the requested software.

INTEGRATION OF LEASED EMPLOYEES

So far everything seems quite straightforward. However, in order to increase efficiency, the two companies agree that three software developers will be needed to develop the software and that they will work on site at the logistics company's offices. Not only will this give the managing director of the logistics company comfort in knowing that the developers are actually devoting their efforts exclusively to developing the software, but also, as questions crop up, the parties will be able to discuss them face to face almost immediately. As the months pass, the three software developers gradually become integrated into the logistics company's operations and begin to take on tasks that were not originally part of the service agreement. Also, the software developers begin to receive their assignments and instructions as to how to complete their duties directly from the logistics company's management as opposed to their own "employer," the software development company.

The above is a classic scenario that many employers in Germany face without realizing the potential consequences. The problem that arises is that the above parties no longer have only the service agreement in place pursuant to which the software development company is creating software; in addition, the software development company has actually leased three employees to the logistics company as "leasing" is defined under Germany's Leasing of Employees Act.

GERMAN LEASING OF EMPLOYEES ACT

Leasing temporary employees, much the way temporary employment agencies do all the time, requires the lessor of employees to obtain a license from the local labor office. German labor authorities concluded that they needed to regulate the leasing of employees, as otherwise it was thought leased employees would probably not enjoy the same working conditions as the employees of the com-

pany to which the leased employees were being leased. In short, the labor authorities feared that leased employees would be subject to exploitation. However, many argue that Germany's Leasing of Employees Act is an anachronism, as it applies to any leasing company, regardless of its size and experience in leasing employees. Large, well-known temporary agencies such as Manpower, Randstad, and Kelly Services are required to obtain and maintain their registration with the local labor office, but so are organizations like the above-referenced software development company, which leased three employees—unknowingly.

Failure to obtain and maintain the requisite licensing can result in a number of undesired consequences, not the least of which is that the leased employees will automatically become employees of the lessee, *i.e.*, the company that took on the employees. This means that in the above scenario, the three leased employees automatically became employees of the logistics company. Accordingly, one of the very things that the managing director of the logistics company had wanted to avoid—hiring new employees—actually occurred unbeknownst to him.

PROTECTION AGAINST UNKNOWN CONSEQUENCES

How can a company protect itself against such consequences? Very simply, check to ensure that the company that is making employees available to you is registered as a temporary employment agency. If not, the agreement for the leasing of the employees is invalid, and the leased employees automatically become employees of the lessee. In order for the lessee to subsequently terminate these employees, the "new employer" will need to observe the various employee-friendly German employment laws; *e.g.*, the social characteristics of all "comparable" employees must be compared to one another, and those employees who are in greater need of protection (taking their ages, years of service, number of dependents living at home, and any disability into consideration) will be protected against termination.

Further, if the leased employees are to be engaged only temporarily (as was the case with the above-referenced software developers, since they were to work with the logistics company only until such time that they completed their assigned tasks of developing, installing, and testing the software) *and* there are objective reasons for the temporary nature of the agreement, then the leased employees will "only" be temporary employees of the lessee, and their employment relationships will end upon the expiration of the temporary period.

IS THE LEASING COMPANY PROPERLY REGISTERED?

From the above, it should be clear that any company that leases employees should first determine whether the lessor of employees is properly registered. This applies not only when doing business with large, well-established temporary employment agencies but, probably more importantly, to atypical leasing situations as was the case with the software developers and logistics company above. Based on experience, these atypical situations often arise in the software and computer sectors as well as in the construction industry.

AS IF TERMINATING EMPLOYEES IN GERMANY WERE NOT DIFFICULT ENOUGH, GERMAN COURTS INCREASE BURDEN ON EMPLOYERS

By ***Georg Mikes***

Frankfurt
German Attorney at Law; Certified Labor and Employment Lawyer
gmikes@jonesday.com
++49 69 9726-3939

German courts held for decades that employers were permitted to terminate an employee if the employee could not continue to be employed under different conditions, *e.g.*, a different position in the company, different pay rate, etc. If such different employment came into consideration for the employee who was otherwise to be terminated, then the employer was required to offer this new employment before terminating the employee. However, as set forth in two April 21, 2005, decisions that were just recently published, Germany's Federal Labor Court has now increased—and quite significantly—the burden on employers when terminating employees.

THREE RESPONSES TO "EMPLOYMENT UNDER DIFFERENT CONDITIONS"

If an employer offers an employee "employment under different conditions," this is, in essence, a combination of (i) an offer to continue the employment under different conditions, and simultaneously (ii) a notice of termination if the employee does not accept the aforementioned offer. Basically, the employer wants the employee, for whatever

reason, to work under materially different conditions. The employer does not have the right merely to impose this new employment on an employee. Instead, the employer must follow a certain procedure so as not to infringe upon the employee's basic rights as set forth under German law.

An employee has three options when receiving an offer for "employment under different conditions" from an employer. First, the employee may simply agree to the employment under different conditions and leave it at that. Second, the employee may flat-out reject the employment under different conditions, in which case the second aspect of the employer's offer, *i.e.*, the termination, is triggered. In such a case, however, the employee still has the right to challenge the termination in court by claiming that the termination was, for example, socially unjustifiable.

The employee's third option is to accept the employment under different conditions with the proviso that the employee wants a court to review whether this revised employment, as offered to the employee, is socially justifiable. If an employee opts for this alternative, the employment relationship continues; however, the terms of the employment relationship will be subject to review by a court. If the court finds that the revised employment as offered to the employee is justifiable, then the employment relationship will continue under the revised terms. Conversely, if the court concludes that the employment under different conditions is not socially justifiable, then the employment relationship will continue in its former form.

INCREASED BURDEN ON EMPLOYERS

The two above-referenced April 21, 2005, court decisions do not impact the fundamental concept that an employee has three alternative responses available when receiving an offer for employment under different conditions. Instead, the court has put a greater burden on employers to provide employment under different conditions to employees before issuing a notice of termination to an employee. As a result of these recent decisions, employers will increasingly find themselves offering employment under different conditions as a precautionary measure before terminating any employees. To be safe, employers should offer such employment under different conditions *even if the employee had previously indicated that he would not want to take on such different employment*. If employers do not take the extra step of offering employment under different conditions before terminating an employee, there is now a greater risk that a court will hold the termination to be invalid.

The court held that employers are generally required to make an offer for employment under different conditions if a position is available, even if the employees had previously indicated that they would not accept such employment. Only in "extreme cases" would such an offer for employment under different conditions be superfluous.

This was precisely the case in the two above decisions. In each case, employees had, independently of one another, challenged their respective terminations. The employer had failed in each case to formally offer to the employees who were to be terminated employment under different conditions. Each time, the employer had terminated the employees after relying on the employees' previous "informal" indications that they would not accept the employment under different conditions.

The court held that employers are generally required to make an offer for employment under different conditions if a position is available, even if the employees had previously indicated that they would not accept such employment. Only in "extreme cases" would such an offer for employment under different conditions be superfluous. The Federal Labor Court cited the example of a human resources director being offered the position of a security guard as such an "extreme case." However, the court also said in almost the same breath that it is for the employee—rather than the employer—to decide whether this threshold has been reached. Accordingly, it is generally not for the employer to decide whether employment under different conditions

would be suitable for a particular employee. This decision must be left to the employee.

In its decisions, which are very similar to one another, the Federal Labor Court also put the burden on employers to create revised employment conditions so that the employees could reasonably accept the offers. If several positions are available, the employer must offer the position that comes closest to the employee's current position.

WHAT OPEN POSITIONS MUST AN EMPLOYER OFFER?

In one of the Federal Labor Court cases, the court stated that the employer should have offered the employee in question, who had been the head of the IT department, with a salary of approximately EUR 140,000, a position as the process coordinator for environmental and technical affairs, where he would have earned about half as much as he had earned before. In the other case, the employer should have formally notified the employee that he had the option of accepting the new position with the proviso that this should be reviewed by a court (listed as the third alternative in the above discussion), even though the new position entailed significantly reduced hours (and, of course, a significant pay reduction). The Labor Court ruled that the employer did not meet its legal obligations vis-à-vis the employee by informing the employee that he could only "accept or reject" the new job. The employer should have also informed the employee that there was a third alternative.

Prior to the two above cases, German courts had consistently held that an employer could issue a notice of termination without offering employment under different conditions if the employer had given the employee one week to decide whether to accept the revised employment and had simultaneously informed the employee that if the employee rejected this position, it would lead to a termination. Under the new case law, the Federal Labor Court says that though the employer is not required to always make an offer for a new position before issuing a notice of termination, the employer must satisfy a high burden when issuing a notice of termination if this is not done in conjunction with offering employment under different conditions. The significant point for the Federal Labor Court is that the previous one-week period for the employee to consider his options is no longer acceptable because the statutory minimum period for an employee to consider a formal offer of employment under different conditions is three weeks. The different time period for essentially the same decision, the court concluded, violates the "principle of proportionality."

Also, an employer cannot rely on an employee's *indication* that he would not accept the other employment. But the employer may rely on the employee's *statement* that he would not accept the revised employment, provided this statement is clear and unequivocal. Accordingly, the employer is generally required to make an offer for different terms of employment *despite* the earlier indication from an employee that he would reject the offer. If an employer issues a notice of termination merely relying on such a previous indication from an employee, courts may very well hold the termination to be invalid.

UNEQUIVOCAL REJECTION BY EMPLOYEE

It is only in those rare instances where an employee unequivocally rejects an offer and in connection therewith clearly states that he is not prepared under any condition to continue the employment relationship—*even with the proviso that a court should review the employer's offer*—that an employer has the right to issue a notice of termination. The employer, of course, has the burden of proving that the employee's unequivocal rejection of the offer reached this threshold. One issue that remains unanswered is how an employer may respond if an employee's declaration is made before the expiration of the above-referenced three-week period.

We assume that the Federal Labor Court's decisions will have the following consequences: Employers who intend to terminate an employee for business reasons, but who also have a position available that the employee *may* accept if offered, cannot merely inquire as to whether the employee would accept the available position. Instead, the employee would need to state unequivocally that he would not accept the employment under different conditions.

Also, employers should not rely on an employee's statement if the three-week period has not yet expired. As a result, employers will often be forced to weigh the risk of not allowing the three-week period to expire against delaying the termination until it does expire. As a result, employers will often, by way of precaution, offer employment under different conditions rather than merely issuing a notice of termination, even if the initial indication from the employee

was that he would not accept the employer's offer. Employers will tend to follow this strategy even if it is seen as being quite aggressive vis-à-vis the employee—and possibly deteriorating the work environment to some degree.

AMENDING THE TERMS OF A SOCIAL PLAN

By ***Angela Autenrieth***

Frankfurt
German Attorney at Law
aautenrieth@jonesday.com
++49 69 9726-3977

If a company with more than twenty employees decides to introduce a so-called change in operations, such as closing a facility or moving the facility to another site, the company is required to conclude a "social plan" with the works council. If the company does not have a works council, such a social plan is not necessary; however, it is well known in Germany that if management announces a change in operations, the employees will often form a works council very quickly thereafter (as they have a right to do).

The purpose of the social plan is to set forth the compensation that the company will pay to its employees to compensate for, or at least alleviate, the financial consequences the employees will suffer as a result of the change in operations. The parties to the social plan are management and the works council. Because management may not commence with introducing the change in operations until the social plan has been concluded, the works council has a certain amount of leverage during the negotiations.

If management and the works council are unable to agree on the terms of the social plan, they may present it to a so-called conciliation board. The conciliation board is comprised of an independent chairman and an equal number of representatives from the company and the works council. However, it is rare that a social plan is left to a conciliation board, as experience has shown that doing so will delay the conclusion of the social plan significantly.

Of course, it is quite possible that the actual financial consequences the employees suffer may be different from what the parties had presumed at the time they negotiated the social plan. The following is a quick discussion of the alternatives for amending a social plan after it has been concluded.

If a party terminates the permanent provisions of a social plan, according to Germany's Labor Management Relations Act, these provisions nevertheless continue to apply until such time that a new agreement is reached governing those issues covered by the terminated provisions.

AMENDMENT BY MUTUAL CONSENT

Management and the works council may, of course, mutually amend the social plan at any time. This is also the case if the company had since been acquired by a new company. The acquirer may still amend the social plan negotiated by the previous management if the works council agrees to such an amendment. Management and the works council may also amend the terms of a social plan even if it had originally been concluded by a conciliation board.

If the parties amend a social plan, it is not surprising that the terms of the amended social plan will prevail over the original terms. This is the case even if the amended terms are less favorable to employees than the original social plan. The parties may also undertake the extreme measure of striking the social plan in its entirety; however, since a company may not introduce a change in operations without having concluded a social plan, this will only mean that a new social plan needs to be negotiated.

One proviso: Even if the parties mutually agree to amend a social plan, the amendments cannot impact those employee rights that were already accrued by the employees under the original social plan. Any amended terms that are less favorable to employees will apply only to the future.

TERMINATION

A social plan generally cannot be the subject of an ordinary termination. However, management and the works council may include a provision in the social plan allowing for its termination. Without such a provision, only the so-called permanent provisions of a social plan may be terminated. Permanent provisions are those that provide for ongoing benefits for an indefinite or fixed time period to mitigate the adverse consequences suffered by the employees as a result of the change in operations.

If a party terminates the permanent provisions of a social plan, according to Germany's Labor Management Relations Act, these provisions nevertheless continue to apply until such time that a new agreement is reached governing those issues covered by the terminated provisions. As is the case with mutual amendments to the social plan, the new provisions can apply only to the future, *i.e.*, rights already accrued by employees may not be lessened.

If, and to what extent, a party may terminate a social plan for cause remains unanswered. However, under German law, a party may generally terminate an agreement for cause if it governs continuing obligations and it would be unreasonable for that party to continue performing these obligations. However, this principle does not necessarily apply to social plans because social plans usually do not provide for continuing obligations. Instead, social plans govern the consequences of a single event, namely a change in operations. Just as with respect to ordinary terminations of social plans, the only exception is if it involves a "permanent provision" in a social plan. Since, as discussed above, such provisions are subject to ordinary terminations, they may certainly also be terminated for cause.

PURPOSE OF SOCIAL PLAN DISAPPEARS

If the basis for the social plan no longer exists, and it would no longer be reasonable to expect one of the parties to observe the terms and conditions of the social plan, the party affected has a legal argument to revise the social plan so that it is appropriate for the changed circumstances. Having the basis for the social plan to disappear could arise, for example, if both parties were mistaken as to the financial compensation that could be made available under the social plan at the time of its conclusion. The party making the argument that the basis for the social plan no longer exists undoubtedly has a high burden, but if it satisfies this burden, it can demand of the other party the renegotiation of the social plan. If the parties are unable to reach an agreement on the amendment, they may engage the above-referenced conciliation board.

In contrast to the case of a mutual amendment or the termination of a social plan, if the basis for the social plan no longer exists, an employer may change rights that employees had already accrued, even though this may reduce these accrued rights. As a result, employees cannot rely on their accrued rights if the basis for the social plan disappears.

LAWYER CONTACTS

FRANKFURT
Hochhaus am Park
Grüneburgweg 102
60323 Frankfurt am Main
Germany
Tel.: ++49 69 9726 3939
Fax: ++49 69 9726 3993

Georg Mikes
German Attorney at Law;
Certified Labor and
Employment Lawyer
gmikes@jonesday.com

MUNICH
Prinzregentenstr. 11
80538 Munich
Germany
Tel.: ++49 89 2060 42 200
Fax: ++49 89 2060 42 293

Friederike Göbbels
German Attorney at Law;
Certified Labor and
Employment Lawyer
fgoebbels@jonesday.com

JONES DAY GLOBAL LOCATIONS

ATLANTA
BEIJING
BRUSSELS
CHICAGO
CLEVELAND
COLUMBUS
DALLAS
FRANKFURT
HONG KONG
HOUSTON
IRVINE
LONDON
LOS ANGELES
MADRID
MENLO PARK
MILAN
MOSCOW
MUNICH
NEW DELHI
NEW YORK
PARIS
PITTSBURGH
SAN DIEGO
SAN FRANCISCO
SHANGHAI
SINGAPORE
SYDNEY
TAIPEI
TOKYO
WASHINGTON