

# GERMAN LABOR AND EMPLOYMENT NEWS

## GERMANY'S EQUAL TREATMENT ACT: WHAT WILL BE ITS PRACTICAL IMPACT?

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Cynics say that Germany's politicians tried to pass the controversial Equal Treatment Act (*Allgemeine Gleichbehandlungsgesetz*) quietly during the height of this past summer's World Cup competition. The politicians would have succeeded had Germany's president not held up the matter for a few weeks to review the draft legislation one more time. Regardless, Germany's Equal Treatment Act finally went into effect on August 18, 2006.

It should be no surprise that Germany passed this statute, as it was long overdue. The European Union had required member states to transform two of its four directives into national law no later than 2003. Germany's delay, attributed primarily to political haggling, not only caused the EU to label Germany the "worst offender" in terms of failing to transform the directives into national law, but also prompted the EU to file an action against Germany before the European Court of Justice.

Though the Equal Treatment Act covers various forms of discrimination, *e.g.*, landlord/tenant relationships, discrimination in the commercial sector, discrimination in the military, etc., this article will discuss only discrimination in the private employment arena.

# The Equal Treatment Act includes a number of clauses that

will undoubtedly be subject to court challenges. One such clause is that only Germany's

Termination Protection Act—and not the Equal Treatment Act—is to apply to terminations.

## ■ FOUR DIRECTIVES/ONE STATUTE

One of the many complaints about German employment law is that there are simply too many statutes governing the employee/employer relationship. Therefore, kudos goes to Germany's Parliament for at least combining the four European Union directives into one "user-friendly" statute. Specifically, Germany incorporated the following directives into its national law:

- Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin (2000/43/EC);
- Directive Establishing a General Framework for Equal Treatment in Employment and Occupation (2000/78/EC);
- Directive Amending the Directive on the Implementation of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions (2002/73/EC); and
- Directive Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services (2004/113/EC).

## ■ PURPOSE OF GERMANY'S EQUAL TREATMENT ACT

Section 1 of the Act comprises one sentence. It succinctly states that "the purpose of the statute is to prevent or eliminate discrimination on the basis of race, ethnic origin, gender, religion, beliefs, disability, age or sexual orientation."

It is fair to say that Germany has long lagged behind many Western industrialized countries in terms of proactively preventing or combating actions that would constitute discrimination in other countries. Much of this is because nearly every employee in Germany enjoys a relatively high degree of protection against termination; in addition, works councils and unions are so deeply ingrained in Germany's

employment law that most people did not see the need for yet another form of protection for employees.

## ■ WHAT CONSTITUTES DISCRIMINATION?

Americans reading the Equal Treatment Act will recognize many provisions from U.S. law. For example, under Germany's new statute, sexual harassment—whether a hostile work environment (unwelcome sexual conduct creating hostile working conditions) or *quid pro quo* sexual harassment (using submission to or rejection of sexual advances as a basis for employment decisions)—is a form of discrimination.

Similar to the Americans with Disabilities Act, Directive 2000/78/EC requires employers to take certain reasonable measures to accommodate disabled employees. (Germany did not need to incorporate this particular provision into its Equal Treatment Act, as German law already required employers to take such actions.)

The Equal Treatment Act also requires employers to give greater consideration to older employees when reviewing employees' social factors (such as age) for the purpose of selecting the employees to be terminated for operational reasons. Employers may no longer merely pay a lower severance to older employees simply because they will soon be eligible for a pension. Under the Act, employers must review each layoff individually, taking into particular consideration each employee's chances of finding a new job.

The Equal Treatment Act includes a number of clauses that will undoubtedly be subject to court challenges. One such clause is that only Germany's Termination Protection Act—and not the Equal Treatment Act—is to apply to terminations. This contradicts Article 3(1)(c) of Directive 2000/78/EC,

as it states that the directive shall apply to the private sector in relation to “employment and working conditions, including *dismissals* and pay” (emphasis added). This point seems to be ripe for dispute.

■ **“AFFIRMATIVE ACTION” VS. “POSITIVE ACTION”**

Germany also introduced the concept of “affirmative action” in its Equal Treatment Act. Rather than labeling it “affirmative action,” however, Germany (or rather, the entire European Union) refers to measures intended to counter past discrimination as “positive action.”

Affirmative action and positive action have many similarities. However, applying positive action, employers may, for example, implement quotas and timetables to counter past discrimination; they also may advertise jobs specifically to groups that in the past were underrepresented in specific sectors, offer special training to traditionally underrepresented groups, etc. Concrete measures such as these would not pass constitutional muster in the United States, since a single characteristic—for example, a person’s sex, race, or ethnicity—would be the defining factor. Such actions would be interpreted as a form of discrimination in the United States.

■ **DAMAGES; PUNITIVE DAMAGES**

Employees who have been discriminated against are entitled to money damages. If the victim of the discrimination was not offered the position, but the employer would not have offered the position even without the discrimination, then the money damages are limited to three months of pay that the employee would otherwise have earned. If discrimination was the reason the applicant did not receive an offer, then the damages are not limited to the three months’ pay rule. Regardless, the victim of discrimination does not have a claim to specific performance, *i.e.*, the job for which he applied. Employees must notify the employer of their discrimination claims within two months.

Though the EU directives call for damages to be “dissuasive,” Germany’s statute sets forth that only actual damages are warranted. There was a sigh of relief among employers when it was learned that Germany had not transformed verbatim the directives calling for the sanctions to be “dissuasive,” as many interpreted this to mean that such damages would be punitive in nature. German law does not recognize punitive damages.

## Certified Labor and Employment Lawyer Joins Jones Day



The Frankfurt Office of Jones Day added another Certified Labor and Employment lawyer, Mr. Alexander Engel, to its ranks as of August 1, 2006. Prior to joining Jones Day, Alexander was an associate with a boutique labor and employment firm with offices in Hamburg and Berlin for nearly four years. Alexander gained vast experience in individual employment and labor law matters, particularly with

respect to labor-management issues, collective bargaining law, outsourcing, occupational pensions, and compensation systems, as well as the drafting and negotiating of contracts for board members and managing directors. His practice also includes advising on labor and employment-related matters as they apply to corporate transactions and reorganizations. In addition, Alexander regularly appears in court to represent clients involving employment disputes.



It is not too much of a stretch to predict that all types of training sessions against discrimination will soon be readily available in Germany—of course, at a cost to employers.

### ■ EMPLOYERS MUST TAKE ACTION

What does all of this mean for employers? As can be imagined, employers must take action. They should not think the Equal Treatment Act will be one of the many statutes that play, at best, a nominal role in German employment law. The Equal Treatment Act will play a significant role in German employment law, quite possibly resulting in fundamental changes to employers' (and employees') current practices.

As specifically set forth in the Act, announcements for positions available may not be in violation of the Act; employers may no longer seek a "young team of employees," for example, or limit applicants to those between the ages of 25 and 35 (except in those rare instances where there is an objective and reasonable basis for seeking only young applicants).

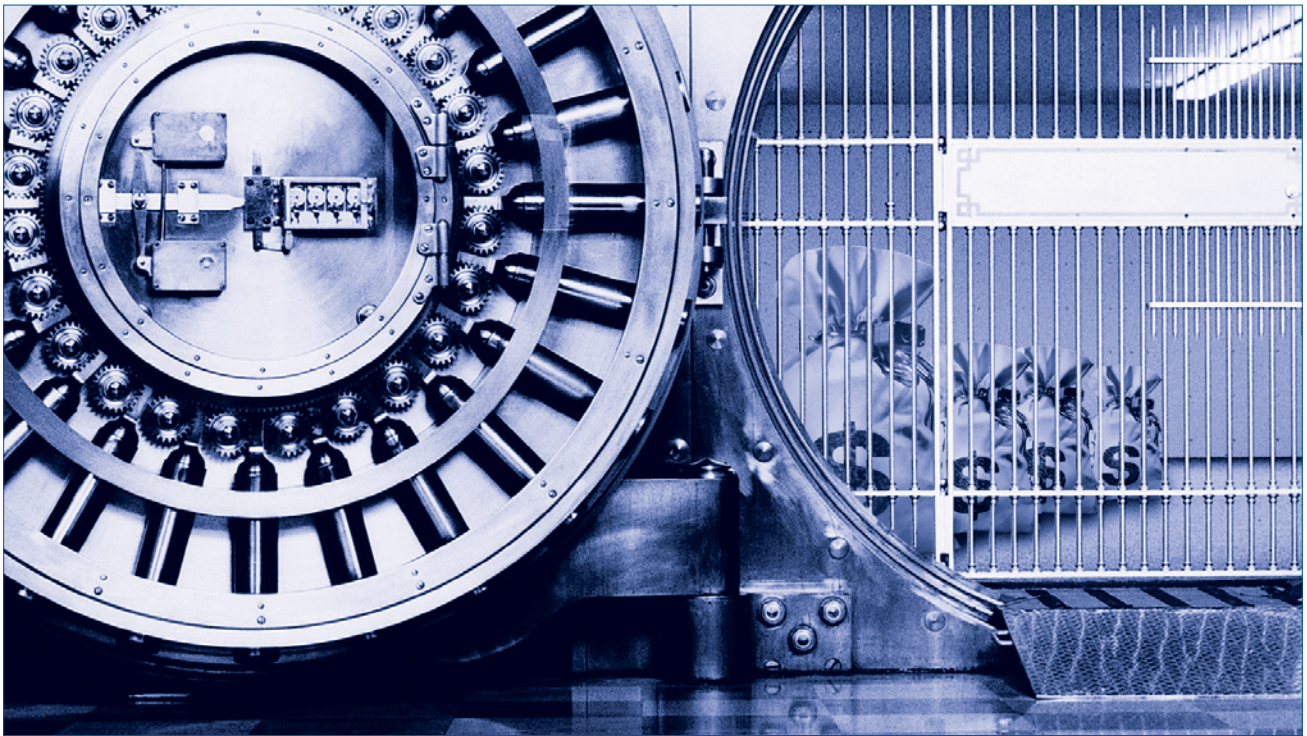
The Equal Treatment Act specifically states that employers are required to take measures—including preventive measures—so that the Act's express purpose (see above) is realized. The regular training of employees is one of the first steps. In fact, as set forth in the Equal Treatment Act, training will give employers one more argument that they were not responsible for discriminatory acts and thus cannot be held liable for them. The training should include special sessions for supervisors and human resources staff. One aspect of the training sessions should be a review of the employer's anti-discrimination policy with the employees. It is not too much of a stretch to predict that all types of training sessions against discrimination will soon be readily available in Germany—of course, at a cost to employers.

Employers should also have a complaint procedure in place so that employees who are victims of discrimination know to whom they can turn for resolution of the problem. The complaint procedure should permit the victim of discrimination to avoid his own supervisor and his reporting management chain, as this may otherwise "chill" the employee's right to seek redress.

Employers should keep good records of their policy distribution, training sessions, complaints received and, of course, decision-making procedures, *i.e.*, why a certain employee was promoted, why an individual was not hired, why an employee was transferred to a different department, etc. These records may be necessary in the future to demonstrate that the employer's decisions were not based on discrimination.

Finally, employers should be prepared to take prompt action when receiving a complaint, including investigating the complaint and taking measures to stop the discrimination—even, if necessary, terminating the individual who engaged in the discrimination.

If an employee should file a claim against an employer, the employee must establish the credibility of his claim. If the employee satisfies this requirement, the burden of proof shifts to the employer, who must show that there was no discrimination.



If the *company* did not have employees who were required to pay into the pension insurance scheme, and if the *company* was providing services to only one party, then and only then was the managing director of that company required to contribute to the pension scheme.

## DESPITE THE FEDERAL SOCIAL COURT'S DECISION, MANAGING DIRECTORS ARE NOT REQUIRED TO CONTRIBUTE TO THE STATUTORY PENSION INSURANCE SCHEME

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The Federal Social Court caused a minor uproar in the German labor and employment field with its decision of November 24, 2005. The essence of the decision is that the managing director of a German company—just like the employees—is required to contribute to the statutory pension insurance scheme (i) unless he directly employs individuals who are subject to the statutory pension insurance scheme and (ii) if he works only for the one company for which he is serving as managing director.

### ■ CONDITIONS FOR CONTRIBUTING TO THE STATUTORY PENSION INSURANCE SCHEME

Under German law, “self-employed individuals” must pay into the pension insurance scheme if:

- They do not have any employees who are required to pay into the statutory pension insurance scheme; and
- They are working permanently and solely for one company/client.

### ■ THE FEDERAL SOCIAL COURT'S DECISION

In the past, when determining whether persons—especially managing directors who were also majority (if not sole) shareholders of the company, meaning they could dictate the company's decision making—were required to contribute to the pension insurance scheme, the test was whether the company where the managing director served satisfied the two above conditions, rather than whether the managing director himself satisfied these conditions. If the



Therefore, though managing directors themselves are still subject to the two-pronged test, the end result will generally be that they are not required to contribute to the statutory pension insurance scheme.

*company* did not have any employees who were required to pay into the pension insurance scheme, and if the *company* was providing services to only one party, then and only then was the managing director of that company required to contribute to the pension scheme.

The Federal Social Court did an about-face, however, ruling that “self-employed persons” must be natural persons rather than legal persons. A company is, of course, a legal person. So the managing director himself became the subject of the above test.

#### ■ LEGAL CONSEQUENCES

The Federal Social Court raised eyebrows among many managing directors, for the simple reason that a managing director (i) generally does not himself have employees who are required to contribute to the pension insurance scheme, and (ii) generally provides his services only to the one company with which he has a managing-director agreement. As a result, managing directors were suddenly required to make pension insurance contributions,

effective immediately as well as retroactively for the period during which they had not contributed in the past. Seeing that the contributions are 19.5 percent of gross income, this would have been an expensive undertaking for managing directors.

#### ■ 2006 AMENDMENT TO LEGISLATION

The German legislature, however, had a heart. Rather than subjecting managing directors to such payments, the legislature amended the respective statute so that the company’s employees and contractual partners would be deemed to be those of the managing director. Therefore, though managing directors themselves are still subject to the two-pronged test, the end result will generally be that they are not required to contribute to the statutory pension insurance scheme. Fortunately for the managing directors, the German legislature went one step further, making the amendment effective retroactively. As a result, managing directors will not be required to make contributions for the period between the Federal Social Court’s decision and the statutory amendment.

# FUNDAMENTAL CHANGE IN POLICY TO CLAUSES THAT REFER TO COLLECTIVE BARGAINING AGREEMENTS

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Though it went largely unnoticed, a recent Federal Labor Court decision will require many employers to rethink their standardized employment agreements. Employers in Germany use standardized employment agreements because doing so generally simplifies matters. Of course, there are various types of provisions even when it comes to standardized employment agreements, not only in terms of salary and the duties of a particular employee, but also whether a certain employee is entitled to a company car, to whom an employee is to report, whether an employee is subject to a post-termination noncompete period, etc. One provision, however, that is consistently found in German standardized employment agreements is reference to a collective bargaining agreement.

For example, a typical clause found in a standardized employment agreement for employees working for a company that is subject to the metal workers' collective bargaining agreement is that "the provisions of the metal workers' collective bargaining agreement, as amended, shall apply to this employment agreement in all other respects." Employers will include such a reference clause to avoid having to detail every single aspect of the employment relationship in the employment agreement, to avoid having to amend the employment agreement every time the collective bargaining agreement is amended and, in particular, to ensure that unionized and nonunionized employees are treated equally.

Employers beware: The Federal Labor Court recently announced that it will not interpret such reference clauses in the same "generous" manner as it had in the past.

## ■ APPLICABILITY OF A COLLECTIVE BARGAINING AGREEMENT TO AN EMPLOYMENT RELATIONSHIP

A collective bargaining agreement will apply directly to a particular employee in Germany only if (i) the employee is



# EMPLOYERS BEWARE:

**The Federal Labor Court recently announced that it will not interpret such reference clauses in the same "generous" manner as it had in the past.**

a member of a union, *and* (ii) the employer is a member of an employers' association. (Employers' associations are the employers' counterpart to unions in that employers' associations generally negotiate and conclude collective bargaining agreements with unions; employers' associations are typically organized according to region and industry.) If both elements are satisfied, it would be superfluous to include a reference clause like the one above, since the collective bargaining agreement, as amended, would apply to the employment relationship anyway.

Unlike employers in the United States, employers in Germany generally do not know whether particular employees are members of unions, nor may employers ask employees whether they are union members. Strictly from

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a legal point of view, an employer may treat nonunionized employees differently from unionized employees by not permitting the former to enjoy the protection of a collective bargaining agreement. This, however, is theoretical because the employer does not know whether a particular employee is a member of a union, and if in fact an employer excluded nonunionized employees from enjoying the benefits of the respective collective bargaining agreement, those employees would invariably join the union. Thus, because the reference clauses cause unionized and nonunionized employees to be treated equally, they are often simply referred to as “equal treatment clauses.”

#### ■ COURTS' INTERPRETATION OF EQUAL TREATMENT CLAUSES

In the past, German courts have often interpreted reference clauses to be equal treatment clauses. This was welcomed by employers. Often courts interpreted these reference clauses as equal treatment clauses even if the precise wording of the clause stated otherwise.

For example, let us assume that the parties concluded an employment agreement 20 years ago and in their agreement expressly referred to a specific collective bargaining agreement of Industry A. Over time, the company changed its production methods, which eventually led it to become part of a different industry—Industry B. Even though the parties had

explicitly referred to the collective bargaining agreement of Industry A, courts would now interpret this as a reference to the collective bargaining agreement of Industry B since the company's employees were now part of Industry B. In other words, the court's interpretation would not be in line with the *actual wording* of the parties' agreement.

It may initially be thought that this would apply only in those relatively rare situations where a company's line of business evolved over the years. Keep in mind, however, that this may also be the case where a division is spun off or as part of an M&A transaction.

Regardless, one element must always be satisfied in order for the above to take place. The employer must have intended the clause to be treated as an equal treatment clause. This can only be the case where the employer was a member of an employers' association at the time it concluded the employment agreement. If this is not the case, there can be no equal treatment between unionized and nonunionized employees.

This changed as of December 14, 2005. On that date, the Federal Labor Court announced that in the future it will indeed interpret such clauses strictly, meaning courts will no longer interpret these clauses other than in accordance with their precise wording. This change will not be favorable to employers.

This change in policy is the result of a January 1, 2002, amendment to the Civil Code, which states that any “unclear” provisions in standardized agreements—including employment agreements—are to be interpreted against the party that introduced the standardized agreement (of course, it is typically the employer that puts forth the first draft of an employment agreement in the form of a standardized agreement).

#### ■ WHY IS THE POLICY CHANGE SO IMPORTANT FOR EMPLOYERS?

The Federal Labor Court's change in policy will have no impact on employment relationships that are directly subject to a collective bargaining agreement. However, if, for example, an employer decides to opt out of an employers' association (as is becoming increasingly common in Germany) or if a different collective bargaining agreement applies to an employer because that employer's product line has changed, then the Federal Labor Court's change in





If the agreements include a reference clause that states that a specific collective bargaining agreement “as amended” is to apply to the employment relationship, then employers should be aware that any subsequent changes to that particular collective bargaining agreement will indeed apply to the employment relationship; *i.e.*, such amendments will “travel with” the employees, regardless of whether this is still the appropriate collective bargaining agreement for the employer’s business.

policy may have a drastic effect. In situations such as these, employers need to review the wording of their standardized employment agreements. This change in policy may also impact companies engaged in an asset deal in the form of (to use the parlance of the European Union) a “transfer of an undertaking.”

If the agreements include a reference clause that states that a specific collective bargaining agreement “as amended” is to apply to the employment relationship, then employers should be aware that any subsequent changes to that particular collective bargaining agreement will indeed apply to the employment relationship; *i.e.*, such amendments will “travel with” the employees, regardless of whether this is still the appropriate collective bargaining agreement for the employer’s business. This reference then may include such things as salary levels, the prohibition of terminating

employees over a certain age, vacation entitlements, the payment of Christmas bonuses, etc.

The Federal Labor Court is well aware that it cannot apply this new case law to employment agreements concluded prior to January 1, 2002, *i.e.*, the effective date of the amendment to Germany’s Civil Code. However, the Federal Labor Court opened itself to criticism by not using December 14, 2005, as the determinative date. Some legal commentators have argued that employment agreements concluded between January 1, 2002, and December 14, 2005, should be treated in the same manner as those concluded prior to January 1, 2002. There seems to be some merit to such an opinion, especially when one considers that the Federal Labor Court continued with its former interpretation until making its announcement on December 14, 2005.



Regardless, employers need to pay more attention to their references to collective bargaining agreements in employment agreements if there is any chance that the employing entity will subsequently become subject to the collective bargaining agreement of another industry. In the future, it simply might not be possible to escape such references, and the unwanted reference might become a permanent problem. If an employer intends to introduce an equal treatment clause, this should be referred to in more detail than has been necessary in the past.

## THE INTRICACIES OF POST-TERMINATION NONCOMPETE CLAUSES IN GERMANY

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Too often companies are caught off guard when confronted with post-termination noncompete clauses. For example, a company may be surprised to learn that it must pay compensation as a result of a noncompete clause or that a noncompete clause with a former employee who has extensive know-how about the company is invalid.

### ■ RECENT FEDERAL LABOR COURT DECISION

A decision by the Federal Labor Court from earlier this summer involved a company that learned that its noncompete

Under German law, a post-termination noncompete clause is not binding on the employee

unless the company pays the employee at least 50 percent of the most recently earned compensation for the duration of the noncompete period.

clause did not have the desired effect. The company had terminated an employee who had a one-year post-termination noncompete clause as part of his employment agreement. The termination took effect during the six-month probationary period. After the brief termination notice period expired, the employee observed the terms of the noncompete clause and demanded that in return, the company pay compensation in the amount of 50 percent of the most recently earned compensation. Under German law, a post-termination noncompete clause is not binding on the employee unless the company pays the employee at least 50 percent of the most recently earned compensation for the duration of the noncompete period.

The employer refused to pay the compensation, arguing that the post-termination noncompete clause would have become due only if the employee had survived the probationary period. The employee saw this differently. The court held that, yes, the parties may agree that the noncompete clause will enter into effect only after the employee survives the probationary period; however, if this is not expressly set forth in the agreement, then the noncompete clause is effective as of the first day of the employment relationship. Since such a provision was not part of the employment agreement, each party was required to observe the one-year noncompete clause. Ergo, the company was required to pay the noncompete compensation even though it may not have had a true business interest in keeping the employee from competing because the employee had been with the company for only a short time.

## ■ WAIVER OF A NONCOMPETE CLAUSE

The requirements for a valid post-termination noncompete clause are set forth in Germany's Commercial Code. These provisions of the Commercial Code are mandatory, meaning even if an employee waives his rights as set forth in the Commercial Code, such a waiver would be invalid. If a noncompete clause is not binding, the employee (not the employer!) has two options: (i) observe the terms of the noncompete clause and be entitled to the termination compensation, or (ii) ignore the invalid clause, with the understanding that the employer is not required to pay the noncompete compensation.

## ■ MAKING SURE THE NONCOMPETE CLAUSE IS VALID

Employers should always keep the following in mind when concluding a post-termination noncompete clause:

- The company must pay compensation to the employee for the duration of the noncompete period (the reasoning for this is that every employee in Germany has a fundamental right to work; if this right is restricted, then the employee must be compensated therefor).
  - The compensation must be at least 50 percent of the most recently earned compensation. This does *not* mean 50 percent of the most recently earned basic salary, but 50 percent of the total compensation package, including, for example, performance bonuses, commissions, the monetary value of the use of the company car for private purposes, stock options, etc. It is also not permissible to merely use the average compensation earned.
  - If the promised termination compensation does not satisfy the legal requirements, then the noncompete clause is invalid and the employee has the option of observing the clause and being paid therefor or ignoring the invalid clause and competing immediately after the employment relationship ends.
  - The noncompete clause must be in writing, and each party must sign the original. The employer must be able to prove that the employee received an original version of the agreement as signed by the employer. Accordingly, an employer should always require an employee to confirm in writing that he received an original version of the agreement.
- The noncompete clause must be reasonable in terms of geographic scope, duration, and industry. This is to ensure that the employee's right to be gainfully employed is not restricted more than is necessary.
  - Employers often wish to include a clause stating that the employer may waive the noncompete clause effective immediately. Such a clause is not valid under German law. The employer may, however, insert a clause permitting the employer to waive the noncompete clause at any time before the termination date of the employment relationship. Such a waiver by an employer is not effective immediately vis-à-vis the employee; instead, the employer is required to pay the noncompete compensation for 12 months, even though the employee may begin competing as of the date the employer waived the post-termination noncompete clause. Were this not the case, the employer could essentially pull the rug out from under the employee by merely waiving the noncompete clause once the employment relationship ended. If the employee refrains from looking for a competing position until the employment relationship ends because he originally thought he would not be able to compete, the employer can safely assume that it will be a matter of a few months before the employee actually begins his new competing job. For all intents and purposes, the employer subjected the employee to noncompetition without compensating the employee therefor.
  - If the employer terminates the employee due to the employee's conduct, particularly if it is a termination for cause, the employer has the right to waive the noncompete clause effective immediately. In such a case, all rights and obligations with respect to the noncompete clause cease to apply, so that the employer is not required to pay any compensation. However, it is important to note that the employer must notify the employee of this waiver within a month of the termination. If the employer fails to observe this one-month period, the employer may no longer waive the noncompete clause.

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