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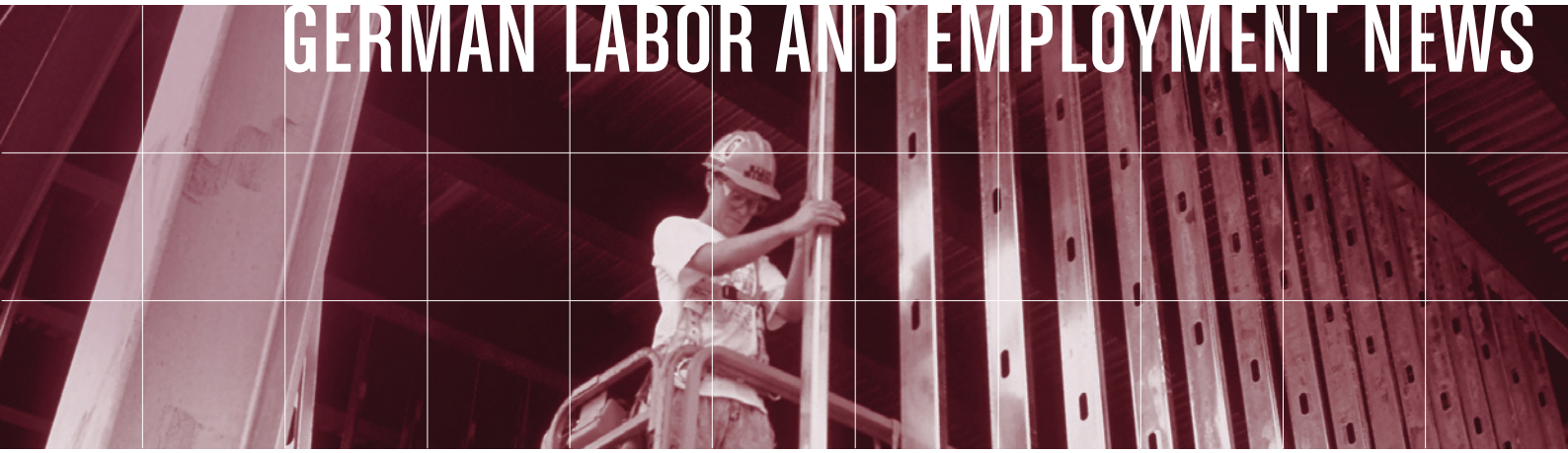
GERMAN LABOR AND EMPLOYMENT NEWS



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UPDATE ON AN EMPLOYEE'S PRIVATE USE OF THE INTERNET OR COMPUTER AT WORK

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In "Always Up to Date: Private Use of the Internet at Work," which appeared in the Second Quarter 2006 issue of our *German Labor and Employment News*, we discussed the trend in case law as to when an employee's private use of the computer or the internet in the workplace may lead to termination.

On May 31, 2007, the Federal Labor Court made a clear statement as to the private use of the computer in the workplace: "Excessive" private use of the internet while at work may constitute a material breach of an employment agreement that may give the employer the right to terminate an employee for misconduct without prior warning. Readers of this holding may assume that the Federal Labor Court provided additional insight regarding situations that may lead to termination. This is true only to a limited extent.

However, the Federal Labor Court did set forth in its opinion a list of factors that could be grounds for terminating an employee for private use of the internet or the computer in the workplace. This list is as follows:

Because the employee can be expected to deny wrongdoing, the employer should be prepared to put forth concrete evidence.

- Unauthorized downloading of a significant amount of data from the internet onto the workplace computer, particularly if this leads to an increased risk of getting a virus or otherwise disturbing the computer network.
- Downloading data that, if traced, could damage the employer's reputation, such as pornography or data downloaded in violation of criminal laws.
- Unauthorized private use of the internet in the work-place that causes the employer to incur additional costs.
- Unauthorized use of the computer.
- Private use of the internet or other resources made available by the employer during working hours, such as by surfing the internet, privately viewing videos, or playing computer games, that prevents the employee from fulfilling his work responsibilities.

This list is not exhaustive; it provides only examples of the types of activities that may be a basis for termination.

It is important to note that the employer must be able to demonstrate convincingly that the employee truly breached his duties at work while using his work computer for private purposes. Because the employee can be expected to deny wrongdoing, the employer should be prepared to put forth concrete evidence. If this level of evidence is missing, it is likely that the court will not find sufficient grounds for termination.

In particular, the employer needed to evidence in detail (i) when, (ii) how, and (iii) to what extent the employee adversely impacted the employer.

The Federal Labor Court remanded the instant case back to the Court of Appeals. The case before the Federal Labor Court did not provide evidence of sufficient grounds for termination; in particular, the employer needed to evidence in detail (i) when, (ii) how, and (iii) to what extent the employee adversely impacted the employer. From this it once again becomes clear that German courts are generally not fans of hasty terminations. Instead, courts will scrutinize the situation to determine whether the termination issued by the employer was justified, or whether the employer merely has grounds for disciplining the employee.

Rather than terminating the employee at the outset, the employer may decide to issue a warning to the employee. The Federal Labor Court held once again in the instant case that an employer generally may terminate an employee only after a relevant warning had been issued to no avail. This applies also to terminations based on authorized private use of the internet (or other resources made available by the employer) in the workplace. Whether a warning is superfluous will depend on the severity of the employee's breach of his work obligations, and this can be decided only on a case-by-case basis.

BUSINESS TRIPS OR WORKING TIME—TO BE DECIDED ON A CASE-BY-CASE BASIS

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At first glance, there really does not seem to be an issue: The Federal Labor Court has consistently held that a "business trip" is a trip in which an employee travels from his regular place of business to one or more other business locations for business purposes. The prerequisite for a business trip is that the employee performs his work at another location. One issue that arises from a practical perspective, however, is what constitutes "working time" during a business trip, since there is no uniform definition of "working time" in Germany. The following discussion demonstrates the practical consequences resulting from two new Federal Labor Court decisions.

If employers do not give specific instructions to employees as to how to use their travel time, odds are that the employee will not have a claim to compensation for the travel time.

IS THIS PART OF A BUSINESS TRIP OR THE COMMUTE TO WORK?

An employer must pay an employee during the working period; this, of course, does not apply to the time the employee needs to commute to work. The employee may be compensated by receiving wages or having the time credited to his "time account." Business travel that takes place during the employee's regular working hours indisputably constitutes a business trip. Similarly, employees who perform the bulk of their work outside the employer's locations (*e.g.*, sales staff who primarily visit customers) or who are employed primarily as drivers are always to be compensated for travel time. Trips outside regular working hours that arise only so that the employee can perform his job (*e.g.*, the commute to work) are not subject to compensation.

Germany's Working Time Act states that "working time" is the time at work from beginning to end, minus any breaks. The practical application of this definition is left to the courts.

The Federal Labor Court held in its July 11, 2006, opinion that travel time shall constitute a break if the employer sets forth that an employee shall use public transportation for business trips but allows the employee to determine

The Federal Labor Court, however, rejected the works council's argument by holding that the term "working period" as used in the Labor-Management Relations Act (which gives a works council the right of codetermination, including with respect to working-period issues), in the Working Time Act, and with respect to compensation in general is not interpreted uniformly.

for himself how to spend the time in transit. The Federal Labor Court held an employee's pure travel time to be merely the sacrificing of the employee's free time rather than actual working time, since the employee using public transportation did not need to concentrate on "driving" and the employer did not instruct him to perform any particular tasks during the trip. Because the employee's ability to arrange his free time as he saw fit was only restricted, the Federal Labor Court held the travel time to be a break.

DOES THIS STILL MEAN THE EMPLOYER MUST COMPENSATE THE EMPLOYEE?

The related question is, when is the employer required to compensate the employee for travel time? Neither the Working Time Act nor the EU's Working Time Directive provides any concrete answers. Also, but not surprisingly, employers usually do not include this as part of their employment agreements. As a result, parties typically need to rely on the terms of a collective bargaining agreement

or a specific agreement concluded with a works council because these agreements—if they include a respective clause—often set forth whether the employer must pay additional compensation.

There are no mandatory provisions that state that an employer must compensate an employee for the time after he has completed his travels if this occurs outside his regular working hours. In line with this, the Federal Labor Court stated quite emphatically in its above-mentioned decision that only the duration of the trip constitutes time for which the employer must pay compensation.

This decision, however, serves as a precedent only to a limited extent. First, it involves a case from the public sector. Second, the employee did not receive any instructions as to how he was to use his travel time. If the employer had given the employee specific instructions as to how to use his time while traveling, this decision would not have been as emphatic. Lesson to be learned: If employers do not give specific instructions to employees as to how to use their travel time, odds are that the employee will not have a claim to compensation for the travel time.

DOES THE WORKS COUNCIL HAVE A RIGHT TO PARTICIPATE?

Last year the Federal Labor Court was also confronted with the issue of whether a works council has the right of codetermination with respect to business trips. In that case, the works council had argued that the employer is breaching the works council's right of codetermination if an employee's business trip is to begin before his workday begins. The Federal Labor Court, however, rejected the works council's argument by holding that the term "working period" as used in the Labor-Management Relations Act (which gives a works council the right of codetermination, including with respect to working-period issues), in the Working Time Act, and with respect to compensation in general is not interpreted uniformly.

The works council's right to participate is intended exclusively to protect the employees' interests with respect to arranging their free time by participating in the planning of their working time. "Working time," with respect to the works council's participation, means only the time during which the employee must actually perform his job-related services. However—and the Federal Labor Court clearly emphasized this point—the employee is not performing work-related services, and the employer is not receiving work-related services, if the employer permits the employee to commence with his business trip before his regular working period.

WHAT DOES "WORKING TIME" MEAN?

The above discussion demonstrates that there cannot be a uniform and generally applicable definition for "working time." The term is distinguishable from a collective bargaining perspective, working-time legal provisions, and legal-compensation provisions. This means that, from a practical perspective, a business trip may not be part of an employee's working hours from a collective bargaining perspective, but it could be working time under the specific working-time statutory provisions. Each situation must be examined on a case-by-case basis.

BILLIONS OF EUROS IN UNEXPECTED COMPANY PENSION LIABILITIES – AND WHAT MR. ZILLMER HAS TO DO WITH IT

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DEFERRED COMPENSATION AND EMPLOYER LIABILITIES

Until today, the name of August Zillmer (1831–1893), an actuary, has played a major role in the German insurance business: "zillmering" is the allocation of most or all of the administrative costs of an insurance contract—the agent's commission, handling fees, etc.—to the initial period of the contract. The inevitable consequence of this common amortization method is that during those years, the insured person fails to acquire significant coverage capital. This

Despite the problematic outcome, it was the grounds for the decision that raised eyebrows. The court held that the employee's suit was a claim for *unpaid remuneration.*

results in a very low surrender value for the insured person if he wishes to discontinue the policy and get some money back.

Why is that an issue for employers? Employees in Germany are legally entitled to a deferred-compensation company pension plan from their employers and, in this context, employers typically make use of plans offered by insurance companies. However, if an employee leaves the company shortly after starting the plan, the surrender value may be far below the total amount of deferred compensation paid into the plan. In a recent case, an employee who deferred €178 per month for 35 months was offered a surrender value of only €639 from the employer's insurance company upon termination of employment, rather than the expected €6,230.

A lot is at stake, since the Munich Labor Court of Appeals, without actually having a specific reason for doing so, expressed its opinion that employers would be held liable for deferred-compensation zillmering, not only in the context of direct insurance, but also in other pension-funding mechanisms, such as pension funds or support funds.

A WATERSHED DECISION?

The above-referenced employee went to court, but instead of suing the insurance company for the difference, she sued her former employer. In May 2007 the Labor Court of Appeals in Munich approved her claim and awarded her €5,591. Despite the problematic outcome, it was the grounds for the decision that raised eyebrows. The court held that the employee's suit was a claim for *unpaid remuneration*; *i.e.*, in the court's view, it did not matter that the employer had previously transferred to the insurance company the amount of €178 per month from the employee's gross salary—the employer was still treated by the court as if it had not paid the employee's full salary. The court referred to a provision in Germany's Company Pension Act stating that in case of deferred compensation, the value of company pension benefits must be equal to the deferred amount. Further, the court deemed the deferred-compensation agreement between the employer and employee to be subject to the scrutiny of the principles of the General Terms and Conditions legislation, and it held that the agreement was "intransparent"—a disadvantage for the employee, who would be unaware of the low surrender value if the employment agreement was terminated relatively early. The court concluded that the agreement was invalid, without questioning whether the employer itself knew about this or whether the wording of the deferred-compensation agreement had actually come from the insurance company. Last but not least, the court deemed the low surrender value that resulted from the zillmering to be a violation of the statutory principle of transferability, under which an employee is entitled to transfer his insurance to another employer.

Another consequence of this decision is that if the employer actually has to pay the awarded €5,591 as *remuneration*, it must also pay the social fees attributable to such salary—another unpleasant surprise, since amounts that are subject to deferred compensation are usually exempt from social charges. In this respect, the decision of the Labor Court of Appeals is even less palatable to employers than a similar decision of a Stuttgart labor court in January 2005. That court, which had concluded that an employer in a comparable situation had violated its fiduciary duty vis-à-vis the employee by not explaining the consequences of zillmering, had awarded only *damages*, which are not subject to social fees.

Employers should take care that new agreements avoid not only zillmering, but any amortization method that allocates too much of the administrative costs to payments during the first years.

DOES AN APPEAL OFFER ANY HOPE?

The Labor Court of Appeals' decision is not yet binding because the employer appealed the matter to the Federal Labor Court. Whether the Federal Labor Court offers much hope is doubtful, primarily because, on an earlier occasion, the chairman of the Federal Labor Court's third senate (which decides such company pension matters) publicly voiced his disapproval of zillmering. The zillmering principle had also been deemed inappropriate by the Federal Court of Justice and other courts in relation to life insurance, an area unrelated to employment matters.

A lot is at stake, since the Munich Labor Court of Appeals, without actually having a specific reason for doing so, expressed its opinion that employers would be held liable for deferred-compensation zillmering, not only in the context of direct insurance, but also in other pension-funding mechanisms, such as pension funds or support funds. Since zillmering is common in Germany, the total liability nationwide, according to actuaries, would amount to tens of billions of euros.

WHAT EMPLOYERS CAN DO

For the time being, it looks as though employers can do relatively little with respect to existing insurance relationships that are affected by zillmering, except hope that their employees stay long enough to build up coverage capital or that the Federal Labor Court rules in their favor (a remote possibility). Barring this, whether it will ever be possible to hold an insurance company liable for potential damages caused by the new case law is up in the air.

Things may be different with respect to future insurance agreements. Employers should take care that new agreements avoid not only zillmering, but any amortization method that allocates too much of the administrative costs to payments during the first years. The next-best option is to see that potential liability for zillmering, to the greatest extent possible, rests with the insurer (or any other type of external pension provider); that, of course, will be of help only if the insurer is not insolvent should the issue ever arise. Finally, if any of the foregoing options fail, the employer should at least inform the employee of the risks associated with zillmering. This last option may help if the Federal Labor Court eventually aligns itself with the Stuttgart labor court rather than with the Munich Labor Court of Appeals.

EMPLOYERS MAY NOT BE REQUIRED TO PAY AN EMPLOYEE EVEN IF THEY ASSIGN WORK NOT CONTEMPLATED BY THE EMPLOYMENT AGREEMENT

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Until recently, an employer in Germany who refused to accept the performance of services offered by an employee was in default and owed that employee "default compensation" for the duration of the default. This same principle applied when an employer demanded that an employee

The issue before the Federal Labor Court was how to resolve the fact that the employer was asking the driver to perform a new job during the employee's termination-notice period.

perform a particular service not specifically contemplated by the employee's employment agreement and the employee refused to do so. The Federal Labor Court introduced a change to these scenarios by virtue of its February 7, 2007, decision.

FACTS OF THE CASE

In the instant case, the employer's only truck had been stolen, causing the employer to hire outside trucking companies for deliveries. The employer issued a notice of termination to the only truck driver on the payroll, but simultaneously agreed that this termination would not be triggered if the truck driver accepted another offered position with the company. The issue before the Federal Labor Court was how to resolve the fact that the employer was asking the driver to perform a new job during the employee's termination-notice period. The employer did not dispute that it did not have the unilateral right to assign the employee a new job, as this was not contemplated by the employment agreement. The employee refused to take on the new job, but instead continued to offer the employer his services as a driver (though there was no truck to drive!) during the termination-notice period.

WHAT CONSTITUTES "REASONABLE" WORK?

If the services demanded by the employer are not contemplated by the respective employment agreement and the employee refuses to perform such services, then, according to the Federal Labor Court's decision, the employer is deemed to be in default vis-à-vis the employee. Much to the relief of employers, however, German statutory law permits employers to set off any amounts that an employee would have earned had he not, in bad faith, refused to perform.

The issue then becomes whether it is reasonable, under German law, to expect the employee to perform the services requested by the employer. What is new as a result of the Federal Labor Court's decision is that work not specifically contemplated by the employment agreement is not automatically deemed to be "unreasonable." The Federal Labor Court is thus distancing itself from previous decisions. It is illogical to argue that an employee cannot, on the one hand, refuse to perform the work requested by an employer but simultaneously be required to perform such work or otherwise face a claim of refusing to work in bad faith.

The extent to which an employee must consider an employer's situation depends on why the employer is asking the employee to perform work not contemplated in the employment agreement, *i.e.*, why the employee's job is no longer available.

The determinative factor with respect to a claim for compensation while the employer is in default is not the duty to work—as this does not exist if the employer assigns work not contemplated by the employment agreement—but rather the employee's obligation to take into consideration the employer's interests; *i.e.*, the issue is whether the employee must take the employer's perspective into consideration and therefore be open to accepting a reasonable alternate job from the employer.

The extent to which an employee must consider an employer's situation depends on why the employer is asking the employee to perform work not contemplated in the employment agreement, *i.e.*, why the employee's job is no longer available. In the instant case, the truck formerly driven by the employee was no longer available, as it had been stolen. The reason for the employer's assignment of a different task must be weighed against the employee's right to be assigned only work contemplated by the employment agreement.

WHERE DOES THIS LEAVE US?

The Federal Labor Court's decision makes things a bit easier for employers if the person's job is no longer available. Before this most recent decision, employers always had to worry that if the employment agreement did not contemplate a particular job, this could very well lead to a claim for compensation, even though the employee refused to perform that job; now if a position disappears, the employer may assign the employee a new position (with the threat of being terminated if the employee does not accept this position) and request that the employee immediately accept this change in assignment. If the employee refuses to perform the newly assigned tasks during the termination-notice period, the employer still may not force the employee to take on the newly assigned tasks or terminate the employee for breaching his (no longer existing) work obligations, but at least the employer has a chance of avoiding a compensation claim if the employee refuses to perform the new tasks.

TEMPORARY EMPLOYMENT RELATIONSHIPS: THEY MAY BE "PERMANENT" BEFORE YOU KNOW IT

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Temporary employment arrangements in Germany are the exception rather than the rule because German law essentially states that an employer may terminate an employee only if (i) the termination was for cause, (ii) the termination for business reasons was socially justified, (iii) the termination was based on the employee's conduct (*e.g.*, the employee breached his duty of confidentiality), or (iv) the termination was for personal reasons relating to the employee (*e.g.*, extended absenteeism due to an illness). Except as discussed below, the "expiration" of an employment relationship (as is the case when a temporary employment relationship expires) is generally not an acceptable form of ending an employment relationship in Germany.

Though temporary employment arrangements are nothing out of the ordinary in England or the United States, they are often still viewed with skepticism by decision makers in Germany. This is changing over time.

Though the temporary employment agreement in its entirety is not required to be in writing, the temporary nature of the relationship must be in writing. (As a practical matter, nearly all temporary employment agreements—just like any other employment agreements in Germany—are in writing.)

EMPLOYEES CAN BENEFIT FROM TEMPORARY EMPLOYMENT

Because employees may actually benefit from being able to enter into temporary employment relationships—it is often said, for example, that temporary employment arrangements facilitate many women's ability to enter or to stay in the workforce while simultaneously focusing on family commitments—the German government permits such arrangements under certain circumstances. Though temporary employment arrangements are nothing out of the ordinary in England or the United States, they are often still viewed with skepticism by decision makers in Germany. This is changing over time.

WHEN MAY A TEMPORARY ARRANGEMENT BE CONCLUDED?

Germany's Part-Time and Temporary Employment Act sets forth that an employer may conclude a temporary agreement with an employee only under one of the following conditions:

- If there is a legal basis for the temporary employment relationship. (Examples include being hired for seasonal work, to complete a particular project, or to replace an employee who is on maternity leave.)
- If the temporary employment relationship is not longer than two years, then the employer does not need to have a legal basis for the temporary arrangement. (Though the temporary employment relationship may be extended up to three times, it may not exceed two years in the aggregate; the one general exception to this rule is if the temporary employment is with a newly formed entity, in which case the temporary arrangement may be for up to four years.)
- If the employee at issue is at least 52 years old, and immediately prior to entering into the temporary employment relationship, that employee was unemployed for at least four months, the temporary relationship may be for up to five years without having a separate legal basis therefor. This alternative has been available since April 2007, at which time Germany amended its Part-Time and Temporary Employment Act in response to a European Court of Justice opinion holding that the former version of this statute violated EU law. (See "European Court of Justice Rules Against German Statute Permitting Temporary Employment Agreements for Employees Only at Least 52 Years Old" in the First Quarter 2006 issue of our *German Labor and Employment News*.)

If the employer is unable to satisfy any one of these requirements, then the employer runs the risk of having concluded an employment agreement for an indefinite period of time, meaning this arrangement can be terminated only for one of the four reasons set forth in the first paragraph of this article. Invariably, the employee will bring this to the attention of the employer shortly before the temporary arrangement is to expire.

MUST BE IN WRITING AND REFLECT THE FACTS

Though the temporary employment agreement in its entirety is not required to be in writing, the temporary nature of the relationship must be in writing. (As a practical matter, nearly all temporary employment agreements—just like any other employment agreements in Germany—are in writing.) As one German employer recently found out the hard way, failure to document the temporary nature of the employment relationship in writing will not cause the employment relationship to be invalidated; instead, the employment relationship automatically becomes an arrangement for an indefinite period of time.

For reasons of convenience, the parties may decide to put the temporary relationship in writing some time *after* the employment relationship has already commenced. Concluding such a written agreement after the employee begins working will not "cure" the failure to put the relationship in writing, meaning this too will lead to an arrangement for an indefinite period of time.

Assuming there is a legal basis for the temporary relationship, there is some question whether the employer must set forth this reason in writing. Because German case law does not provide a definite answer, employers are advised to put forth the reason for the temporary nature of the relationship. As was recently made clear by a Labor Court of Appeals decision, however, the basis set forth in the agreement must be described accurately. In that case, the employee was to assume the job of another employee during the latter's maternity leave. As it turned out, the temporary employee was performing tasks different from those performed by the employee on maternity leave; *i.e.*, the basis for the temporary relationship apparently did not reflect the actual situation. This led the court to rule not only that there was no basis for the temporary relationship, but also that the employment relationship automatically became an employment relationship for an indefinite period of time.

TEMPORARY EMPLOYMENT AGREEMENTS: BE CAREFUL

Because temporary employment agreements are still generally frowned upon in Germany, employers need to be careful when entering into these types of relationships. Most important, the temporary nature of the relationship must be set forth in writing *before* the employee begins performing his duties, and the actual reason for the temporary relationship, if included, must be set forth accurately in the agreement.

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