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GERMAN LABOR AND EMPLOYMENT NEWS

CONTENTS

WORKING IN GERMANY AS AN AMERICAN—WORK PERMITS AND MORE

By ***Jörg Rehder***

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

Your company—a non-German company—has just completed an acquisition or joint venture in Germany, or maybe, after having relied on sales representatives or distributors over the past few years, you decided to enter the German market directly with your own subsidiary. Whichever of these actions you recently took, you now decide that you want to transfer some of your personnel to work at your new German facility.

This article is a quick how-to for some of the hurdles (often seen as bureaucratic) that the non-German employee will face in order to work in Germany. A quick peek will also be taken at whether the employee needs a German driver's license and, if so, how he can obtain it.

LOCAL REGISTRATION

The first step after arriving in Germany is to register with the local resident registration office (*Einwohnermeldeamt*). Under German law, everybody living in Germany must register with the resident registration office; this applies regardless of whether the individual is a German citizen, a citizen of another EU member

Because Germans and citizens from other EU member states take priority over Americans in filling jobs in Germany, the local labor office will review whether there is an individual from these countries who can fill the job the American wishes to take.

state, or from outside the EU. To complete the registration (a simple procedure), the applicant must (i) appear personally at the local registration office, (ii) fill out a short form (essentially setting forth his name, local address (this may initially be a hotel; the address of the place of work is generally not used, since it will not be in a residential area), marital status, religion, etc.), and (iii) present an acceptable form of identification (generally a passport).

RESIDENCE PERMIT/WORK PERMIT

Except for citizens of EU member states (not including certain eastern and southern European countries that became member states only as of 2004 or 2007, *e.g.*, Bulgaria, Hungary, Latvia, Poland, and Romania), foreigners who wish to work in Germany must obtain a residence and work permit. Citizens from a few "privileged" countries (*e.g.*, the United States, Canada, Japan, and Australia) may apply for the residence and work permit only *after* entering Germany (although they cannot commence working until the work permit has been issued), but most applicants must apply for the permits *prior* to entering Germany by filing an application with the respective German embassy in the applicant's country of residence. This article will focus only on Americans wishing to work in Germany.

For those working in the corporate world, there are essentially two types of resident permits that permit the applicant to work in Germany—a residence permit to engage in work (*Aufenthaltserlaubnis zur Ausübung einer Beschäftigung*) or a settlement permit (*Niederlassungserlaubnis*).

A residence permit to engage in work—a temporary permit (generally for one to three years with the possibility of extension)—is issued in conjunction with the Foreigners' Office and the local labor office. Because Germans and citizens from other EU member states take priority over Americans in filling jobs in Germany, the local labor office will review whether there is an individual from these countries who can fill the job the American wishes to take.

The employer will need to provide the local labor office with information about the open position, the pay, and the general working conditions. If the labor office should conclude that hiring an American will actually be taking a job away from an EU citizen, the labor office can reject the work permit application. The local labor agency will generally look for a suitable EU candidate for six weeks to three months; during this period, the work permit application will be on hold. An American being transferred to a German company should submit evidence to the local labor office that he is uniquely qualified for the position because he not only has the requisite education and experience but is also extremely familiar with the company due to his experience in the United States. Unless an EU citizen can demonstrate a background essentially identical to the American's, it would simply take too long to bring the EU citizen's skill level up to that of the American applicant.

The second form of work permit is a settlement permit. This is a permanent permit, and as a result, the standards are more stringent for this form of permit than for the residence

PRESENTATIONS AND PUBLICATIONS— LOOKING BACK (2008) AND LOOKING FORWARD (2009)

■ LOOKING BACK

The February 2008 edition of the professional journal *Arbeit und Arbeitsrecht* (*Labor and Labor Law*) included an article edited by **Friederike Göbbels**; the article reviewed a book entitled *Nutzung betrieblicher E-Mail- und Intranet-Systeme für gewerkschaftliche Zwecke* (*Use of a Company's Email and Intranet Systems for Trade Union Purposes*). The book provides practical advice to employers on protecting themselves against trade union actions that use a company's electronic communications system.

As one of several Europe-based Jones Day contributors, **Georg Mikes** submitted an article on company pensions in Germany within the context of European mergers and acquisitions. The article was published in *PLC Cross-border Quarterly* in April 2008.

In May 2008 **Jörg Rehder** cotaught a course at the University of Applied Science Würzburg-Schweinfurt entitled "Private Equity and Mergers & Acquisitions in Germany," with a focus on the employment-law aspects of such transactions.

On October 7, 2008, **Friederike Göbbels** and **Georg Mikes** gave presentations in London on German company pension laws.

Jörg Rehder published an article entitled "Business Visas for the United States" in the American Chamber of Commerce in Germany's *Yearbook 2009*. The *Yearbook* was published in November 2008.

■ LOOKING FORWARD

The business magazine *Capital* interviewed **Friederike Göbbels** regarding the reasonableness of managers' compensation and possible methods of reducing compensation in times of financial crisis. The article will appear early in 2009.

On April 4, 2009, **Georg Mikes** will give a seminar in Frankfurt on labor and employment aspects of company pensions. The seminar is sponsored by Forum Institut für Management.

In April 2009 **Jörg Rehder** will coteach a course at the University of Applied Science Würzburg-Schweinfurt entitled "Private Equity and Mergers & Acquisitions in Germany," with a focus on the employment-law aspects of such transactions.

On May 25 and 26, 2009, **Georg Mikes** will give a presentation in London on labor and employment aspects of company pensions as part of a conference sponsored by IPEBLA (the International Pension and Employee Benefits Lawyers Association).

permit to engage in work. Essentially, the employee needs to be able to evidence that he is either (i) a scientist with recognized and unique qualifications, (ii) a professor at a university or a school of applied science, (iii) a researcher, or (iv) an executive who has specialized skills and who earns at least €88,000 (equal to approximately US$110,000); this threshold amount was reduced to €63,600 (approximately US$81,000) as of January 1, 2009.

Focusing on (iv), the Foreigners' Office will want to see evidence that the salary exceeds the above-mentioned threshold (either in the form of an employment agreement or written confirmation from the employer), as well as evidence of the executive's specialized skills. It is also important to submit a resume setting forth the applicant's education and experience and to explain to the Foreigners' Office why this particular individual is being transferred to Germany; important in this regard is the corporate level at which the employee will be hired, the decision-making authority he has in terms of personnel and financial matters, the number of employees he will be supervising, and whether he has the authority to enter into binding transactions on behalf of the company. The answer to these questions, as well as the salary level, will determine whether the applicant will be approved for a settlement permit. Once the applicant has submitted complete information, it generally takes the Foreigners' Office one to two months to render a decision.

DRIVER'S LICENSE

The American will be able to drive in Germany with his U.S. driver's license for six months (or, depending on the situation, for up to one year). If he intends to stay in Germany for longer than one year, he will need to obtain a German driver's license within six months of becoming registered with the local resident registration office. The extent to which the privileges granted by a U.S. driver's license may be recognized in Germany depends on the state in which the U.S. license was issued and, possibly, the German state in which the employee will be residing. Though this is still a work in progress, the American Chamber of Commerce in Germany has been instrumental in getting U.S. driver's licenses from many states recognized in Germany. The American Chamber of Commerce's web site—www.amcham.de/location-germany/drivers-license.htm—is an excellent source of information as to whether a particular U.S. driver's license may be recognized in Germany.

Once all of this has been completed, the American can look forward to confronting the United States–Germany Double Taxation Treaty for income tax purposes ... good luck!

AGE DISCRIMINATION AT THE FOREFRONT OF DISCRIMINATION CASES

By ***Friederike Göbbels***

Munich
German Attorney at Law; Certified Labor and Employment Lawyer
fgoebbels@jonesday.com
++49 89 20 60 42 200

As was surmised by experts, the enactment of Germany's Equal Treatment Act caused age discrimination to move to the forefront of discrimination actions. The following conclusions can be reached from court decisions to date.

MINIMUM AGE TO CALCULATE TERMINATION NOTICE PERIODS

Under German statutory law, an employee's years of service with the employer are determinative for calculating the minimum statutory notice period for terminations. The longer the employee has worked, the longer the employer's minimum notice period must be before a termination may become effective; *e.g.*, if the employee has been with the employer for at least two years, the employer must observe a termination notice period of at least one month; if the employee has at least eight years of service, the employer must observe a termination notice period of at least three months; and if the employee has at least 20 years of service, the employer must observe a termination notice period of at least seven months. The statute adds, however, that *any years of service accumulated before the employee reaches the age of 25* shall not be included in calculating the years of service. A court of appeals held that this constituted age discrimination, and accordingly it ignored this statutory provision. For a complete discussion of this decision, see "Can a Young Employee Claim Age Discrimination? In Germany—Yes" in *German Labor and Employment News*, Quarter 4, 2007.

A different court of appeals brought a case with the identical issue before the European Court of Justice, which will determine whether the above-referenced statutory clause is indeed a form of age discrimination or whether this clause can be justified by an employer's compelling reason to have a flexible workforce. But while the European Court of Justice has not yet opined on this issue, a third court of appeals in Germany followed the decision of the first court of appeals; *i.e.*, it held that (i) the matter does not need to be presented to the European Court of Justice, and (ii) the statutory clause is a form of age discrimination and thus is not to be observed when calculating the minimum notice period to be observed.

MINIMUM AGE PURSUANT TO THE COMPANY PENSION ACT

Our article "Are Younger Employees the Victim of Age Discrimination Because of the Age Threshold Set Forth in the Company Pension Improvement Act?" in *German Labor and Employment News*, Quarter 2, 2008, discussed a court of appeals' decision dated January 18, 2008. This decision confirmed that the provisions dealing with age in the Company Pension Act are justified. Specifically, vested interest may accrue only after the employee reaches a certain age. (Prior to January 1, 2001, this age threshold was set at 35; it was reduced to 25 as of January 1, 2009.) This is so that employers are not significantly deterred from offering a company pension. The fact that younger employees are disadvantaged by the relative seniority that an employee must accumulate before he is eligible for a company

German statutory law expressly permits an employer to maintain a "balanced" workforce, in terms of age, when going through a social selection process.

pension is justified by the fact that younger employees still have plenty of opportunities to build a nest egg before retiring.

PAY SCALE BASED ON AGE

The Federal Collective Bargaining Agreement for Public Employees staggers its payment scheme based on age; *i.e.*, the older the employee, the higher the salary. The years of service worked are irrelevant. A labor court of appeals held that the collective bargaining agreement's payment scheme based purely on age constitutes an impermissible form of age discrimination against younger employees. Based on this ruling, a 39-year-old's basic salary was increased to the salary for the oldest employees (those at least 47 years old). It is assumed that this decision will be appealed because of the severe financial impact it may have in the future.

LOWER PAYMENTS PURSUANT TO A SOCIAL PLAN FOR OLDER EMPLOYEES

If a company with a works council intends to engage in a mass layoff, the employer must negotiate a "social plan" with the works council. The social plan sets forth the level of financial compensation the employer must pay the employees for the loss of their jobs. Often, the older employees will receive somewhat higher payments than the younger employees, with the proviso that the compensation received under the social plan by employees who are relatively close to retirement age (*i.e.*, at least 60 years old) will be relatively low (the reason being that these employees do not need a large severance package, since they will be receiving a pension in the not too distant future). A court of appeals held that to award the employees who are relatively close to retirement age a smaller severance package is not a form of age discrimination. To recognize age in this

regard was held to be in line with the General Equal Treatment Act. In fact, the General Equal Treatment Act states that if an employee is to start receiving a statutory pension immediately after ceasing to receive unemployment benefits, that employee can be excluded from receiving any severance under the social plan. According to the labor court of appeals in the instant case, payments under the social plan are designed only to tide the employee over for some time. In general, however, it is assumed that younger employees not only will have an easier time finding a job but can also look forward to a longer career than more senior employees. As a result, the younger employees are less in need of compensation under the social plan than the more senior employees.

AGE GROUPS FOR THE SOCIAL SELECTION PROCESS

As discussed in previous issues of *German Labor and Employment News*, when terminating employees for operational reasons, the employer must take the employees' ages into consideration. Generally, the older the employee, the greater protection he has against termination. The Federal Labor Court held in November 2008 that creating age groups as part of the social selection process for terminations for operational reasons does not constitute age discrimination. In that case, the employer did not compare all comparable employees (in terms of their jobs) against one another; instead, the employer first formed six age groups, each spanning 10 years, and then compared the employees within each age group against one another. The Federal Labor Court held that there were justifiable grounds for forming the age groups: doing so ensured that the employer was not required to terminate primarily the younger employees, which would have left him with a relatively old workforce. German statutory law expressly permits an employer to maintain a "balanced" workforce, in terms of age, when going through a social selection process.

The consequence is that the inherent added protection that older employees have against termination has actually been weakened to some degree. Using the same rationale, giving that added protection to older employees is also permissible in that these employees need the additional job protection because (i) they will undoubtedly have a more difficult time finding a job than younger employees, and (ii) the added protection they have in terms of age is only one of four factors (the other factors being years of service, number of dependents living at home, and whether they are disabled)—which means the age factor is not given a disproportionate amount of consideration.

THE FINANCIAL CRISIS—COST-SAVING MEASURES WITHOUT TERMINATING EMPLOYEES

By ***Jan Hufen***

Munich
German Attorney at Law
jahufen@jonesday.com
++49 89 20 60 42 200

The current financial crisis is forcing companies to continue to focus on cost-saving measures, one of which is reducing employee wages. Fortunately, the cost of wages can be reduced without terminating any employees. This article will look at the difference between taking time off, imposing company holidays, releasing employees, and introducing reduced hours in the workplace.

PERMITTING VS. COMPELLING EMPLOYEES TO TAKE TIME OFF

Many employees in Germany have working time accounts, meaning they are able to bank overtime hours or take vacation days without impacting their compensation. The employee may make additions (through overtime) or subtractions (through use of vacation days) from this account. Though reducing banked hours on an account will not lead to a direct savings for the employer, if the work levels are low for a certain time period, it makes sense for employees to reduce their banked hours during that period, since the employees would not be able to engage in productive work anyway.

If the working time account agreement does not include specific provisions stating otherwise, it is within the employer's reasonable discretion to require employees to reduce their accounts during slow periods. Even if the working time account agreement sets forth the parameters as to when employees' accounts must be reduced, the employer has greater discretion in this regard than when, for example, unilaterally requiring employees to take vacation days during a slow period. One word of caution: If a

particular employee's working time account falls below zero as a result of taking time off, the employee still has full claim to his vacation.

COMPELLING EMPLOYEES TO TAKE VACATION DAYS

In Germany, nearly all of a company's employees may essentially take their vacations simultaneously; this is referred to as a "company vacation period." This is often a cost-saving measure for the company because it allows the company to essentially be shut down for a couple of weeks rather than continue to operate at a reduced rate. If a company does not have a works council, however, the employer can unilaterally impose a company vacation period only if (i) there is a compelling reason for the introduction of such a vacation, and (ii) the employer balances the company's interests against those of the employees as to when it is most convenient for them to take vacation (*e.g.*, during school holidays). An employer's mere desire to have a company vacation period will not suffice; if, however, the company is in financial straits and a company vacation period would benefit the company from a financial perspective, then it is quite possible that the employer may be entitled to impose a company vacation period.

Having a works council is actually advantageous when introducing a company vacation period because the works council has a right of codetermination with respect to the timing of the company vacation period. If the works council and the employer agree on the specific period, then the employer does not have to take into consideration the individual interests of each and every employee.

RELEASE OF EMPLOYEES

An employer's unilateral release of an employee during an employment relationship requires the employer to consider the employee's interests. If, however, there is little work available for the employees during a slow period, the employer's interest will usually outweigh other interests. The employer is required to pay the regular compensation during the release period; the works council does not have a right of codetermination with respect to whether an employee may be released.

Despite the current financial crisis, works councils are most prone to accept reduced working hours when the employees are eligible to have their resultant lower earnings offset by public monies. As a result, employers need to keep a close eye on when employees are eligible for this form of financial aid.

REDUCED WORKING HOURS

"Reduced working hours" means a temporary reduction of the employees' normal working hours and a corresponding reduction in compensation. Though German statutory law provides for public moneys to make up for the lost compensation, the employees, of course, earn a reduced salary because they receive only 60 percent of the net difference (or 67 percent of the net difference for employees who have dependent children) from public funds.

The introduction of reduced working hours is a deviation from the general principle that an employer bears the risk of operating a company and that an employee still has a claim to his regular compensation even if not fully utilized. As a result, reduced working hours may be introduced only if a certain legal condition is satisfied: this must be with either the consent of the individual employees, authorization by the local labor office as well as collective bargaining agreements, or agreements reached with the works council.

The authorization from the local labor office is limited to a situation in which the agency does not permit the employer to engage in a mass layoff of employees within a certain period. Unless a collective bargaining agreement covers the introduction of reduced working hours, the conclusion of a works agreement is the most common method of introducing reduced working hours. The works council has a right of codetermination with respect to the duration and extent of the reduced working hours; such a works agreement is binding on the individual employees. However, despite the current financial crisis, works councils are most prone to accept reduced working hours when the employees are eligible to have their resultant lower earnings offset by public monies. As a result, employers need to keep a close eye on when employees are eligible for this form of financial aid.

There is a two-step procedure to introduce reduced working hours and the corresponding financial assistance. First, either the employer or the works council must submit to the local labor office a calculation of the reduced working hours, as well as the reasons therefor. This submission must also include the views of the works council. The local labor office then responds within a very short time period as to whether it is in agreement with the proposed reduced working hours. Only then is the second step undertaken; though the individual employees are the beneficiaries of the financial assistance, only the employer and the works council are authorized to file the request. This means it is actually the responsibility of the employer to ensure that the employees' claims to financial assistance are pursued.

The employee has a claim to financial assistance if (i) a proper application was submitted to the local labor office, (ii) there is at least one employee who satisfied the conditions for receiving the financial assistance, and (iii) there will be a significant reduction of work with financial consequences (*i.e.*, the gross salary of at least one-third of the employees decreases by at least 10 percent).

Though Germany's Federal Ministry of Labor may grant financial assistance for up to one year, the general rule under German law is that financial assistance may be available for only up to six months. As of January 1, 2009, public funds may be paid for up to 18 months if the claim results from a recent case. If an employee does not receive financial assistance for a period of at least three consecutive months, then the employee is again eligible for this type of assistance.

The fact that Germany's Federal Ministry of Labor increased the period for which an employee may receive financial assistance is evidence that the government hopes many

employees will be able to survive the current financial crisis by being subjected to reduced working hours. With some advance planning, an employer will be able to save a good amount of money by granting employees time off, releasing employees from work, imposing company vacations, and introducing reduced working hours. Simultaneously, the employees will not necessarily have to take the brunt of the hit.

GREATER TAX BENEFITS FOR STOCK OWNERSHIP OF EMPLOYEES

By ***Alexa Clauss***

Frankfurt
German Attorney at Law
aclauss@jonesday.com
++49 69 9726 3939

With the intent of increasing employee stock ownership in Germany, the German legislature amended various tax and investment statutes, effective April 1, 2009, by providing for greater tax benefits and financial incentives.

To begin, the German government subsidizes certain employee investments—*e.g.*, to acquire shares in the employer, for life insurance, and for home-building savings agreements—under the Accumulation of Capital Act. As of April 1, 2009, the rates for these subsidies will be increased from 18 percent to 20 percent of the investment. Simultaneously, more employees will be able to take advantage of these financial programs, as they are now available to those who earn up to €20,000 per year (or €40,000 for joint filings); this threshold amount was increased from €17,900 per year (€35,800 for joint filings).

Further, under Germany's Income Tax Act, the threshold for benefits when granting employee stock will be increased from €135 to €360, meaning employees will be exempt from income tax and social security contributions for employee stock as long as the annual benefit from granted stock does not exceed this increased threshold.

Finally, as the result of an amendment to the Investment Act, additional financial incentives will be available for stock held through an employee profit-sharing fund; in particular, the fund's managing investment company will be permitted to acquire interests in nonlisted companies, including silent partnerships as well as nonsecuritized receivables of these entities. One proviso: Only funds that guarantee a capital reflow of 75 percent qualify for this financial incentive; this is to ensure that employees of small and medium-sized businesses can also participate in employee stock ownership. The investment company may redeem the shares up to two times per year but must do so at least once annually.

THE TERMINATION OF EMPLOYEES– AN EVER-EVOLVING TOPIC

By ***Georg Mikes***

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

Not surprisingly, Germany is not immune to the current financial crisis. As a result, employers are finding themselves faced with the need to terminate employees. This article will discuss some of the recent developments with respect to the termination of employees in Germany.

TERMINATION AND EMPLOYERS' "BUSINESS DECISIONS"

Many employers have concluded that their permanent employees are relatively inflexible; this is in large part because the introduction of longer or reduced working hours is generally subject to a works council's right of codetermination. In an attempt to circumvent this—or at least minimize it—employers have tended to make greater use of independent contractors or temporary employees through the use of temp agencies.

In a Federal Labor Court decision of March 13, 2008, the court was faced with a case in which an employer decided that certain work was no longer to be performed by the permanent employees but by temporary employees hired through an agency. Unlike in the typical business-related termination, the employer could not argue that the actual workload had decreased; instead, he could merely argue that such work was no longer to be performed by the permanent employees. The court held in his favor, stating that the employer's decision to use temporary employees through an agency constituted a "business decision."

Of course, not every decision rendered by an employer falls within the purview of a "business decision"; this principle is reserved for those fundamental and essential employer decisions that are also constitutionally protected as a right to private property. For example, an employer's decision to close a facility qualifies as a business decision (even though the works council has a right of codetermination); the resultant decision to terminate the employees, however, is not a business decision but a regular managerial decision. German law distinguishes between business decisions and managerial decisions, as the former are reviewed only to determine whether they were made in an arbitrary or capricious manner. Such a limited review is to an employer's benefit, because it means the employer will typically be able to justify the resultant terminations, even if they are reviewed as managerial decisions.

TERMINATION OF ENTIRE LEVEL OF EMPLOYEES—A "BUSINESS DECISION"?

Similarly, the Federal Labor Court held in its February 13, 2008, ruling that an employer's elimination of an entire level of employees also qualified as a business decision. This ruling essentially confirmed earlier case law by holding that it is largely within the employer's discretion to decide whether to remove an entire level of employees. Oddly enough, by holding that an employer may decide to remove an entire level of employees, the court actually limited an employer's discretion with respect to such a decision because the court added that the employer has a higher burden to meet when facing litigation for such terminations. Specifically, the employer must be able to present evidence that either (i) the work being performed by the terminated employees no longer exists, or (ii) the employees either one level higher or one level lower are able to perform the work and that the performance of such work does not violate the terms of those employees' employment agreements. Though this decision does not eliminate in its entirety a court's tendency to conduct only a limited review of business decisions, it does modify existing case law because the elimination of an entire level of employees does not in itself justify the termination of the employees.

EVIDENCE IN A WRONGFUL DISMISSAL ACTION AND FORM REQUIREMENTS

German statutory law requires an employee not only to observe a short statute of limitations if the employee decides to file a wrongful dismissal action (three weeks from the date of receipt of the termination), but also to present all of the arguments for his belief that the dismissal was invalid. An employee filing such an action recently learned the hard way that the Federal Labor Court applies this provision rigidly. Though the employee had filed his action within the statutory three-week period and had

Though the works council will accept a name list only begrudgingly, since it sets forth the extent to which individual employees are protected against termination, the employer should pursue the conclusion of such a name list.

referred to the applicable collective bargaining agreement in his complaint, he failed—until reaching the Federal Labor Court—to argue specifically that the collective bargaining agreement sets forth that an employee with his years of service and age may generally not be terminated (except for cause). The Federal Labor Court held that this argument should have been presented earlier and accordingly refused to change the lower courts' rulings.

In another case, an employer received the brunt of the Federal Labor Court's adherence to form when he failed to follow certain statutory form requirements to a T. Under German law, the termination of an employment relationship must be in writing; the notice of termination must include the original signature of the employer (or his representative). Caution: Do not try to terminate your employees by way of email or fax—this is invalid in Germany. The employer at issue, however, had a different problem. Though he had issued an original termination letter, the employer merely initialed the letter rather than sign his full name. The Federal Labor Court held that an employer's initializing a termination letter fails to meet the statutory requirements. Though the signature does not necessarily need to be legible, the notice of termination must evidence that the signatory intended to sign with his full name. The court held the notice of termination at issue to be invalid. Accordingly, employers are well advised to put in at least a minimum of effort when signing a notice of termination.

NAME LIST TO A RECONCILIATION OF INTERESTS AGREEMENT

If an employer intends to engage in a major restructuring in a plant that has a works council, he will first need to negotiate a "social plan" and a "reconciliation of interests agreement" with the works council. To put it colloquially, the social plan sets forth "how much" (in terms of severance payments to be made to the employees) and the reconciliation of interests agreement sets forth the "why, how, and when" of the reorganization.

To facilitate the entire negotiations, German law permits an employer to negotiate a "name list" with the works council. Though the works council will accept a name list only begrudgingly, since it sets forth the extent to which individual employees are protected against termination, the employer should pursue the conclusion of such a name list. As discussed below, this will be to the employer's benefit.

An employer in Germany must typically justify any terminations of employees for business-related reasons by demonstrating to a labor court not only that there was indeed a valid business reason for the terminations, but also that the employer selected the correct employees to be terminated. In order to select the correct employee(s) to terminate, the employer must group together all the employees who are comparable in terms of position, type of work, and hierarchy and then determine which of those employees are least in need of protection based on four characteristics (age, seniority, number of dependents, and whether they are disabled). This procedure leaves a lot of room for mistakes; nevertheless, the selection procedure is subject to strict scrutiny by the courts if challenged.

In a name list, employers and works councils agree on those employees who, in their collective opinion, are to be terminated, as they are deemed to be less in need of protection against termination based on their social characteristics. If the employer and works council agree on a name list, and the terminations are subsequently challenged because the employer made the incorrect choices based on the employees' social characteristics, the court's review is limited to whether there were any "gross mistakes" on the employer's part. Further, the court must assume that the employees were, in fact, terminated for valid business reasons.

A new Federal Labor Court decision has now explicitly confirmed that there is a high threshold for labor courts to conclude that an employer made a "gross mistake" in terms of creating the groups based on the employees' social characteristics. In that case, the employer had considered only employees of one agency instead of considering also the comparable employees of the other agencies. This "incorrect" social selection process, however, was "cured" by the name list that had been prepared; the Federal Labor Court held that the employer had not made a gross mistake, and the terminations were valid. This case underlines the tremendous value a name list may have for employers. Additionally, the mere existence of a name list will invariably reduce the risk of litigation, as employees will know that the burden they must meet to overcome the terminations is high.

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 20 60 42 200
Fax: ++49 89 20 60 42 293

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

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