

GERMAN LABOR AND EMPLOYMENT NEWS

RECENT AMENDMENTS TO GERMANY'S DATA PRIVACY ACT AS THEY RELATE TO EMPLOYEES: REALLY MUCH ADO ABOUT NOT MUCH

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

Due largely to a number of data privacy scandals that have rocked Germany for the past few months (one of which involved the Deutsche Bahn and was discussed in the previous edition of *German Labor and Employment News*), the debate continues as to whether a data privacy statute that applies specifically to employees is necessary. Many are arguing that the recent scandals should be evidence enough that Germany's Federal Data Privacy Act does not sufficiently protect employees against illegal monitoring by employers (in particular the monitoring of emails, telephone calls, and internet usage) or an employer's unauthorized use of employees' personal data and that the statute does not sufficiently protect whistleblowers.

■ NEARLY 10 YEARS WITHOUT MUCH CHANGE

The enactment of a data privacy statute specifically for employees has been discussed for almost 10 years—at both the national and the European Union levels. Regardless, despite the recent scandals and the resultant firepower currently enjoyed by protagonists of a separate data privacy act applying only to

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employees, the German legislature has made very little progress on enacting such a statute. Cynics stated that it would be naïve to expect the German legislature to debate and enact such a fundamental statute in 2009, *i.e.*, shortly before Germany's federal elections in late September.

Regardless, the Data Privacy Act was amended, effective as of September 1, 2009. Germany's Federal Minister of the Interior was quoted as saying that these amendments were to make clear that the Data Privacy Act "applies also to employees." Of course they apply to employees; no amendment was necessary to clarify this point.

■ MINIMAL IMPACT OF RECENT AMENDMENTS

Though the Federal Data Privacy Act was recently amended, the practical impact these amendments will have with respect to data privacy in the workplace will be limited. Specifically, a new provision was added to the Data Privacy Act essentially stating that an employer may process or use an applicant's personal data if this is necessary to

determine whether to hire that particular individual or if it is necessary as part of the employment relationship or upon the ending of the employment relationship. This provision really does not add anything to the pre-existing provisions that permit the processing or usage of personal data "if this serves to pursue the consummation of a contractual relationship with an individual or a relationship similar to a contractual relationship." The difference is that as opposed to talking about "contractual relationships," the amended statute now refers specifically to "employment relationships."

The amended provision adds a clause stating that an employer may use an employee's personal data to determine whether the employee committed a crime as long as there is sufficient evidence that the employee was in fact involved in criminal activities and the use of such data is not unreasonable. This is indeed a new provision and undoubtedly adds some concreteness to those limited situations where an employee is involved in criminal activities.

■ ADDITIONAL PROTECTION OF DATA PRIVACY OFFICIALS

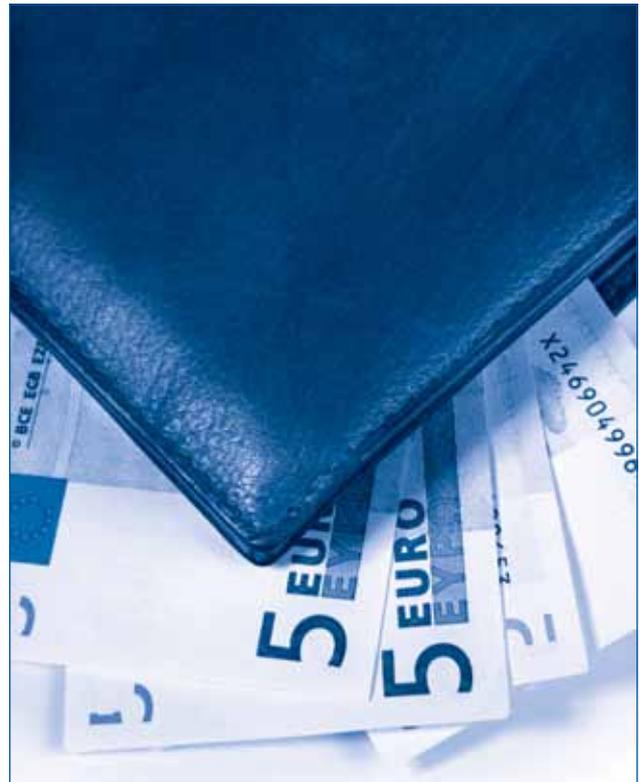
Certain employees in Germany enjoy special protection against termination, most notably the disabled, pregnant women, and works council members. Data privacy officials have now also been added to this list. Companies are required to engage a data privacy official—the individual may be either an employee or an external consultant—essentially if at least 10 employees are involved with the automatic processing of personal data (or if at least 20 employees are involved with the nonautomatic processing of personal data) or (as of September 1, 2009) if any employees are engaged in the automatic processing of personal data for market research.

If the data privacy official is an employee, that employee is now protected against termination unless there are grounds for terminating the employee for cause—a high burden for employers to overcome. This added protection against termination also applies for one year after the employee's service as the data privacy official has ended.

The rationale for this added protection is that Germany's legislature wants to ensure that data privacy officials are not the subject of retribution should they diligently enforce the data privacy laws at their place of work. The (presumably unintended) consequence is that employers will invariably prefer to engage external data privacy officials in the future as opposed to employee data privacy officials, as the former will be easier to remove. As a side note, to ensure that they stay abreast of all developments in the data privacy field, data privacy officials now also have a statutory right to attend data privacy seminars or conferences at the employer's expense.

■ WHAT DOES THE FUTURE HOLD?

Employers have consistently pushed back on the enactment of a separate data privacy statute for employees, as they fear it will lead to more administrative measures they must implement and, as a result, higher costs of doing business. Regardless, Germany's recently elected coalition government has already announced that it will add still more data privacy provisions specifically with respect to employees in the Federal Data Protection Act.



CONTINUED PAYMENT UPON AN EMPLOYEE'S ILLNESS

By **Friederike Göbbels**

Munich

German Attorney at Law; Certified Labor and Employment Lawyer

fgoebbels@jonesday.com

++49 89 20 60 42 200

Germany's Continued Remuneration Act states that an employer must pay an employee's salary for six weeks during the employee's absence due to illness. If the employee's illness exceeds six continuous weeks, the employer is no longer required to pay the employee his salary; instead, the employee's health insurance company—whether private or statutory—pays the employee his benefits. This seems like a straightforward provision, and since the amount the employee receives from his health insurer depends on the employee's monthly fixed salary, it is also simple to apply from a practical perspective. Regardless, controversies often arise as to contractually agreed benefits.

■ PRIVATE USE OF THE COMPANY CAR

One issue that often arises is how an employer is to treat a company car that the employee was permitted to use for private as well as professional purposes. Must the



According to a Federal Labor Court decision from May 2009, an employee loses his claim to vacation pay if payment of the vacation pay hinges on whether the vacation was actually taken and the employee fails to take his vacation.

employee return the car to the employer upon the expiration of the six-week period if his illness exceeds six weeks? In a case argued before a labor court of appeals in July 2009, an employer did indeed demand return of the company car. The employee did not share the employer's view and filed damages for loss of the use of the car.

Although the court confirmed that the monetary aspect for private use of a company car must continue during the initial six-week period, it dismissed the employee's claim. Strictly from a statutory perspective, as soon as an employer is no longer required to make salary payments (*i.e.*, upon the expiration of the six weeks), the employer is also no longer required to provide for use of the company car.

Of course, an employment agreement may state otherwise. For example, the employer may have contractually agreed to the employee's private use of the company car

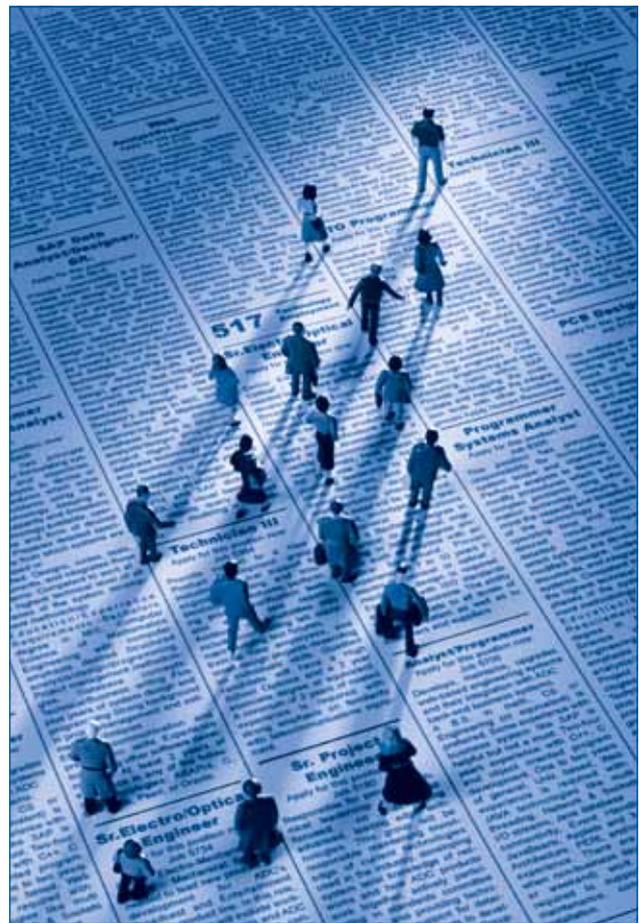
for the duration of an illness regardless of whether the employer is required to continue to pay the employee's salary. Employers are well advised to proceed with caution because such an "agreement" can be made implicitly or by way of a "company practice" (generally defined as repeated actions by an employer which lead an employee to eventually conclude that this practice will continue, thereby creating a legal claim). To avoid this, employers should take care to include an express clause in the employment agreement regarding private use of a company car—e.g., that the employee must return the car as soon as the employer is no longer required to make salary payments.

■ VACATION PAY DURING AN ILLNESS

If an employer grants "vacation pay" (a sort of bonus to be paid in connection with an employee's vacation), it can be difficult to gauge how this should be treated if the employee goes on long-term disability. Vacation pay often takes the form of an additional month's salary that the employer pays during a traditional vacation period, e.g., during a summer month. German law, however, permits the employer to reduce such a payment in proportion to any period of illness as long as this reduction does not cause the payment to fall under the minimum continued payments the employer must make.

According to a Federal Labor Court decision from May 2009, an employee loses his claim to vacation pay if payment of the vacation pay hinges on whether the vacation was actually taken and the employee fails to take his vacation. In this case, the agreement between the employee and employer was that the payment was "additional money for vacation," to be paid "simultaneously with the vacation." The employee, whose long-term disability prevented him from taking his vacation for an entire calendar year, sought payment of the vacation pay. The court held that the employer was not required to make the payment, as it was dependent on the employee actually taking the vacation. This never occurred.

As is often the case, the devil is in the details or, more specifically, the precise wording of the employment agreement—one more reason to take care when preparing and concluding an employment agreement.



NEW COURT DECISIONS REGARDING MASS LAYOFFS

By **Georg Mikes**

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

Though there are many indications that the German economy is on an upswing, mass layoffs remain an issue in Germany. Mass layoffs in Germany are different from individual terminations in that they are subject to a number of specific additional obligations in order to be valid. For this reason, it is necessary to know what exactly constitutes a mass layoff.

■ DEFINITION OF "MASS LAYOFF"

To put it simply, a mass layoff occurs if a company aggregates a certain number of terminations for business reasons within a 30-day period. Whether an aggregation constitutes a mass layoff depends on the total number



of employees as well as the number of employees to be terminated. Specifically, a mass layoff occurs if, within a 30-day period:

- A works with 21 to 59 employees intends to terminate more than five employees;
- A works with 60 to 499 employees intends to terminate at least 10 percent of the regular employees or at least 25 employees; or
- A works with more than 500 employees intends to terminate at least 30 employees.

Germany formerly distinguished between an employer's issuance of a termination notice and the effective date of the termination. (Depending on an employee's years of service and/or the terms of his employment agreement, the employee's notice period could be six months, 12 months, or an even greater length of time.) When applying the above thresholds in terms of the number of employees to be terminated, the date the termination was actually effective was the determinative date. Employers were sometimes able to avoid the cumbersome mass-layoff procedure by

staggering the effective dates of termination over a longer period of time so that the above thresholds were not met.

However, using the effective date of termination—rather than the date the employer issued the notice of termination—was not in line with European Union law, specifically the EU's Mass Layoff Directive (or, in EU parlance, the "Directive on Collective Redundancies"). Accordingly, in 2005 the European Court of Justice held in *Junk v. Kuhnel* that Germany's interpretation of the directive was not in conformance with EU law. Rather than using the effective date of termination as the determinative date, employers were required to use the date the employer issued the notice of termination. Despite *Junk*, German lawmakers did not find it necessary to amend Germany's Termination Protection Act to reflect this change; instead, when the word "termination" was used in the statute, courts merely interpreted this to mean the date an employer issued a notice of termination rather than the effective date of termination.

■ **JUNK, HOWEVER, WAS NOT THE PANACEA . . .**

Germany's Termination Protection Act sets forth that employers must give the local labor office advance notice of a pending mass layoff. Should an employer fail to observe this step, the terminations are invalid.

Also, according to the Termination Protection Act, mass layoffs that are subject to such a notice requirement "are valid prior to the expiration of one month after receipt of the notification at the local labor office only with [the local labor office's] approval." This one-month period has sometimes been the source of confusion. Some commentators, as well as one labor court of appeals, have interpreted this to mean that the termination notice period that an employer must observe (because of either a provision in an employment agreement, a collective bargaining agreement, or the statutory minimum notice period) cannot begin to toll until the expiration of this one month.

In particular, the Berlin-Brandenburg Labor Court of Appeals held on February 23, 2007, that the respective termination notice period does not begin to run until this one month has expired. In practice, this would mean that all employment relationships would be extended by at least one month. The only exceptions would be if the local labor office reduced the one-month period upon request or,

conversely, if it extended the period to two months (as is specifically permitted by the Termination Protection Act in case of extenuating circumstances).

■ PRO-EMPLOYER HOLDING BY THE FEDERAL LABOR COURT

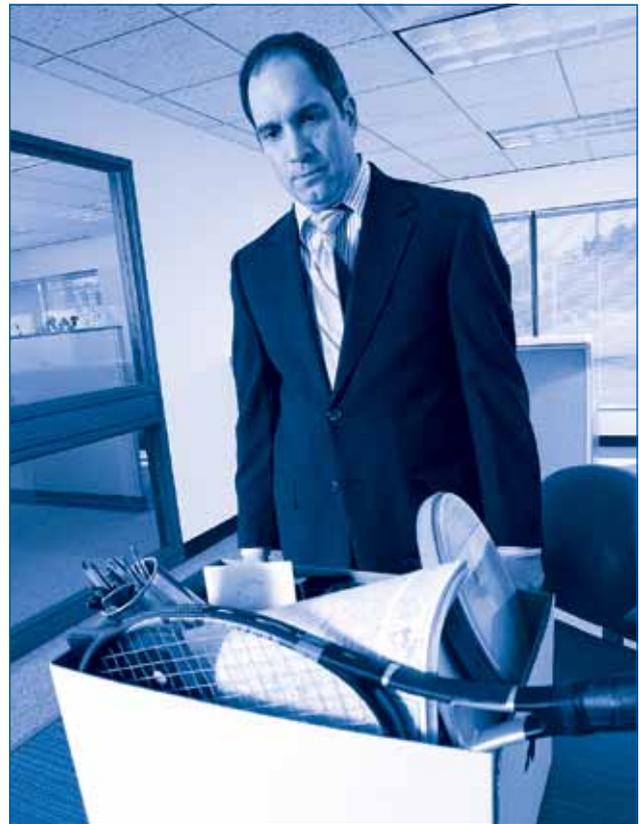
Fortunately for employers, the Federal Labor Court, in a November 6, 2008, ruling, did not share this interpretation. Making specific reference to *Junk*, the Federal Labor Court opined that the individual termination notice period, as well as the one-month period to be observed vis-à-vis the local labor office, may indeed overlap.

This employer-friendly holding adds clarity to the following issues:

- Germany's Termination Protection Act permits the issuance of a notice of termination prior to the expiration of the one-month period as it relates to the notification of the local labor office.
- Terminations—including those with an ordinary notice to the local labor office—can generally not be considered effective without observing a notice period of at least one month.
- Mass layoffs are generally subject to a notice period of at least one month; the practical impact, however, is minimal, as most employees enjoy at least a one-month termination notice period anyway, established by the individual employment agreement, a collective bargaining agreement, or statute.
- The Federal Labor Court held that an employee's termination notice period can begin to toll before the one-month notice period vis-à-vis the local labor office has lapsed.

■ THE WORKS COUNCIL'S INVOLVEMENT

The inclusion of the works council often leads to other complications with respect to the application of the mass-layoff provisions. That issues arise here should not be too surprising; a mass layoff—almost by definition—means that an “operational change” is being introduced. Management must always consult with the works council when seeking to implement an operational change.



In one case, individual plaintiffs sought monetary damages by arguing that one of the prerequisites for a valid mass layoff is that the works council must have an opportunity to express its views regarding the pending layoff. They inferred that the mass-layoff notification of the local labor office may be made only *after* an agreement had been reached with the works council regarding the terms of the layoff. The Federal Labor Court did not buy this argument.

The court held that it is necessary only for the works council to be consulted; it is not necessary to have reached a formal agreement with the works council prior to notification of the local labor office. The court based its decision on the fact that the EU Directive on Collective Redundancies requires only advance consultation with the works council; it states merely that an employer “shall begin consultations with the workers' representatives in good time *with a view* to reaching an agreement” (emphasis added). The European Court of Justice has never imposed an obligation to first reach an agreement with the works council. Nevertheless, when actually executing a mass layoff, employers are well advised to try to reach an agreement with the works council in advance to avoid potential complications.

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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