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WHAT CHANGES WILL THE NEW GOVERNMENT INTRODUCE TO EMPLOYMENT LAWS IN GERMANY?

By ***Friederike Göbbels***

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

Germany had its federal elections on September 27, 2009. As is generally the case in Germany, none of the five major parties was able to win a majority vote, meaning the parties needed to form a coalition government in order to gain a majority in Germany's Parliament. After a bit of wrangling, the Christian Democratic Union (CDU), the Christian Social Union (CSU), and the Free Democratic Party (FDP) formed a right-of-center coalition government. Angela Merkel, Germany's Chancellor, is a member of the CDU party.

During the coalition agreement negotiations, the FDP pressed for the introduction of a few fundamental changes to Germany's pro-employee Termination Protection Act. But because the other coalition parties refused to accept these proposals, the changes will not be introduced during this legislative period. Nor will a general minimum-wage law, long a source of contention in Germany.

The following is a summary of some of the more significant points included in the coalition agreement as they apply to employment-law matters.

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HIRING A FORMER EMPLOYEE AS A TEMPORARY EMPLOYEE

Currently, an employer may hire an employee temporarily for up to two years without having a reason for entering into a temporary employment relationship rather than a permanent one, provided the two parties did not have a previous employment relationship with one another. This means, for example, that if an employer enters into a three-year temporary employment agreement (without having a legally accepted reason for doing so), the employment relationship, by law, is automatically permanent.

The rigid two-year restriction sometimes causes more harm than good. For example, a person who worked as a temporary employee while in college cannot enter into a temporary employment agreement with the same employer following graduation unless there is a recognized reason for entering into such a temporary relationship.

The new coalition agreement calls for an amendment to the respective statute providing that as long as there is a one-year "waiting period" between the end of the former employment relationship and the beginning of the new one, the parties are free to enter into a temporary employment relationship for up to two years without having a specific reason therefor.

NO UNIFORM FEDERAL MINIMUM WAGE

Germany's constitution sets forth that parties are free to conclude collective bargaining agreements, including wage levels—a provision that takes precedence over a uniform, federal minimum wage. This has been the reason for past rejections of a federal minimum wage. It also makes it more difficult to declare a collective bargaining agreement "generally applicable" (*i.e.*, the collective bargaining agreement may apply to certain industries, even though they may not have specifically agreed to it).

Under current law, Germany's Federal Ministry for Labor and Social Affairs may declare collective bargaining agreements (including wage collective bargaining agreements) generally applicable for entire industries and specific geographic regions. The consequence of such general applicability is that provisions such as statutory minimum requirements apply not only to employers who are expressly covered by a collective bargaining agreement, but also to those not specifically subject to a collective bargaining agreement. The coalition agreement calls for Chancellor Merkel's cabinet to be responsible for general applicability, with the proviso that the respective committee must approve such with a majority vote.

PROHIBITION OF LOW WAGES

The coalition parties have specifically stated that one of their goals is to "act effectively against socially unacceptable conditions in individual sectors." That is why case law prohibiting unethically low wages is to be codified into statutory law.

Germany's Civil Code sets forth that employment agreements calling for unethically low wages are invalid. On April 22, 2009, Germany's Federal Labor Court issued an opinion as to whether certain wages are unethically low. The court's holdings are summarized as follows, but it remains to be seen how this decision will specifically be codified into statutory law:

- If a wage is less than two-thirds of the average wage in that particular sector and geographic region, then there is a clear discrepancy between the work performed and the compensation earned (commonly referred to as the "two-thirds threshold" test).

- An "acceptable" wage pursuant to a collective bargaining agreement can be determined only if at least 50 percent of the employers in the business sector are subject to a collective bargaining agreement or if the employers subject to the collective bargaining agreement employ at least 50 percent of the business sector.

In March 2009 **Georg Mikes** was the speaker at a one-day seminar on labor and employment aspects of company pensions; the seminar was held in Frankfurt and was sponsored by FORUM – Institut für Management.

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

In May 2009 **Georg Mikes** spoke at the annual meeting of the International Pension & Employee Benefits Lawyers Association (IPEBLA) in Athens; he discussed "Company Pension Issues in the Context of Mergers and Acquisitions in Germany."

During the course of 2009, **Georg Mikes** was interviewed by and quoted in such publications as *Capital.de* and *Financial Times Deutschland* on employment and employee benefit matters.

Friederike Göbbels published the second edition of her book, *Employment Contracts Using Text Modules*, published by the German media company Haufe. This book, setting forth various form employment agreements and analyzing pertinent labor-court decisions, aims to assist managing directors and HR managers with employment matters.

Jörg Rehder copublished "Germany Strengthens Its Data Protection Act and Introduces Data Breach Notification Requirement" in the January 2010 issue of the BNA International *World Data Protection Report*. This article was based on a *Jones Day Commentary* that Jörg copublished in October 2009, entitled "Germany Strengthens Data Protection Act, Introduces Data Breach Notification Requirement."

- If the typical compensation is below the wages set forth in a collective bargaining agreement, then there is a presumption that this is the common wage level of that business sector.

- Only regularly paid wages (*i.e.*, special payments are not considered) are to be compared, although special circumstances may call for the inclusion of special payments.

- The determination as to whether wages are too low is subject to continuous scrutiny because if the compensation is not adjusted for developments involving the general wages, then it may be determined that unethically low wages are being paid as of a certain time period.

PROMOTION OF "MINI-JOBS"

In an effort to combat unemployment, Germany introduced the concept of "mini-jobs" a number of years ago. "Mini-jobs" are defined as jobs that pay less than €400 (approximately US$285) per month; the employee is exempt from paying taxes and making social security contributions from his earnings, while the employer makes reduced health insurance and pension contributions on the employee's behalf but does not contribute anything for unemployment and disability insurance. Germany's new government is looking to promote mini-jobs by possibly increasing the €400 threshold and extending eligibility to employees who have additional sources of income.

OLDER EMPLOYEES

Since the country's population is aging, the coalition agreement states that the employment of older employees in Germany needs to increase. Accordingly, the new government intends to make "early retirement" less financially attractive. For example, the agreement did not extend the program, which was set to expire December 31, 2009, by which older employees working only 50 percent earned approximately 75 percent of their former income, with the government making up the 25 percent difference. In addition, mandatory retirement ages will be reexamined and possibly repealed (with the added argument that they may actually constitute discrimination based on age).

ETHICS CODES FOR WORKS COUNCILS

Ethics codes of conduct are to be of relevance not only to management, but also to works councils. The coalition agreement lists by way of example the disclosure to employees of the expenses borne by the company for works council members.

EMPLOYEE DATA PRIVACY

The coalition agreement sets forth that the new government intends to include a separate chapter regarding employee data privacy in Germany's Federal Data Privacy Act. This chapter is to provide increased protection for employees, particularly with respect to "monitoring" by employers. One other topic is an increased restriction on the employer's ability to collect and transfer employees' personal data.

PETTY THEFT IN THE WORKPLACE MAY LEAD TO TERMINATION FOR CAUSE

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

If you are an employee in Germany, do not even think about helping yourself to a few of your employer's beef patties without permission. The same goes for the delicious southwestern German specialty of *Maultaschen* (pasta squares filled with meat or spinach). Or, if you discover at work that the battery for your personal cell phone is dead, do not assume that you can merely use your employer's electricity to recharge your battery. Why not? Because, as German courts have confirmed over the last year, each of these actions may be grounds for terminating an employee for cause.

These cases grabbed the headlines in newspapers and news reports throughout 2009. Much of this attention presumably stems from the growing unemployment in Germany; many observers cannot believe that an employer would be so heartless as to terminate an employee for such a "theft." It was estimated that the six *Maultaschen* had a value of US$6 to US$8, while recharging the cell phone battery cost the employer less than a cent. Not surprisingly, the respective unions were up in arms when they heard about these terminations, alleging that the court's decision to uphold the termination of the *Maultaschen* employee was a "disgrace" and that it "opens the gate [for employers] to get rid of unwanted employees without having to deal with the real issue at hand."

THE FACTS

As for "*Maultaschengate*," the employer—according to news reports—had specifically informed employees that no food was to be taken, even if the food was later to be thrown away. The employee ignored these specific instructions. Also, the employee did not eat the *Maultaschen* at work; instead, she put them in a bag to eat at home. As part of the negotiations while at court, the employer offered her a settlement of €18,000 (approximately US$27,000). As labor courts are prone to do in Germany, the court put pressure on the parties to settle the matter, suggesting that the employer increase the amount to €25,000 (approximately US$37,500). Neither party budged, thereby forcing the court to make a ruling. It held that the termination was valid, meaning the employee was not entitled to severance pay or any other form of financial damages.

As mentioned above, another employee (with a different employer than the *Maultaschen* employee) had regularly recharged the battery on his cell phone at work. The costs to the employer were negligible. The employee had apparently also taken a few photographs of his workplace (a manufacturer of gaskets); this was in violation of company policy. The employer terminated the employee. Probably due in large part to the bad PR the employer was getting, the employer subsequently withdrew the termination.

Another case that made the headlines in Germany was that of "Emmely," a cashier at a grocery store in Berlin who had allegedly cashed two bottle deposit slips that a customer

When it comes to theft in the workplace, the value of the item stolen is irrelevant. What is determinative is whether there has been an irreparable breach of trust between the employee and the employer or whether the employer no longer considers the employee to be loyal.

had already cashed; they had an aggregate value of €1.30 (a little under US$2). The employer fired her. The employee lost at the trial-court level but appealed the decision; she lost before the court of appeals as well. (In the meantime, the respective union has formed a national "Solidarity with Emmely" committee.)

DO OLDER EMPLOYEES HAVE A RIGHT TO STEAL?

What is interesting about all the news reports regarding these cases is that they consistently reference the employees' ages. For example, the *Maultaschen* employee was 58 years old, the gentleman who had recharged his battery at his place of work was 51, and the cashier who had cashed the bottle deposit slips was 50.

What does an employee's age have to do with these cases? Nothing . . . absolutely nothing. Being a bit older does not give that employee the right to steal from the employer, however minor the theft may be. Of course, there *does* need to be a correlation between the "crime" and the punishment, but in these hard times, there is undoubtedly some truth to the union's statement that some employers are looking for a way to reduce their number of employees without having to pay a relatively large settlement amount.

IS THERE ANY TRUST LEFT BETWEEN THE EMPLOYER AND THE EMPLOYEE?

German law states that, taking the totality of the circumstances into consideration, an employer may terminate an employee for cause (effective immediately) if it is unreasonable to expect the parties to continue the employment relationship for the otherwise applicable termination notice period. This is generally a high hurdle for an employer to satisfy.

When it comes to theft in the workplace, the value of the item stolen is irrelevant. What is determinative is whether there has been an irreparable breach of trust between the employee and the employer or whether the employer no longer considers the employee to be loyal. If the employer

is able to demonstrate this, then that employer has a strong case for terminating the employee for cause. This concept has not changed over the decades. (In a 1984 case before the Federal Labor Court, an employee of a bakery was fired for eating a piece of cake that had been for sale at the bakery.)

The employer must also weigh the employee's interests against those of the employer; specifically, whether it is unreasonable to expect the employer to continue to employ the employee for the duration of the otherwise applicable termination notice period, taking into consideration such factors as the employee's past conduct and years of service.

"EMMELY" ACCEPTED FOR APPEAL BEFORE THE FEDERAL LABOR COURT

What does all of this mean for the employees mentioned above? Very simply, however minimal a theft may be, if the employer can demonstrate that there was an irreparable loss of trust between the employer and the employee, there may very well be grounds for termination for cause. Although the Federal Labor Court accepted the "Emmely" case for appeal, judging from a comment made by the former cashier's employer ("We have 5,000 employees in Berlin; imagine what would happen if all of them stole €1.30 every day"), it seems pretty obvious that the employer is going to continue to pursue this matter diligently.

CONFLICTS OF LAWS WITHIN THE CONTEXT OF EMPLOYMENT LAW

By ***Georg Mikes***

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

Employment law is not immune from having an international flavor. In fact, most Western countries have statutory provisions on their books as to how domestic laws are to be interpreted if a particular matter also involves the laws of foreign jurisdictions; this is the essence of conflicts of laws as they apply to employment agreements.

Up to now, German conflict-of-law provisions as they apply to employment agreements were covered in Article 30 of the Introductory Act to the German Civil Code, which essentially states that (i) a party's choice-of-law clause may not prevent an employee from being protected by those mandatory applicable laws that would apply in the absence of a choice of law—typically the laws in the country in which he is working—and (ii) if the parties fail to select a governing law, essentially the laws of the country where the employee habitually performs his work services will apply. However, employment agreements entered into after December 17, 2009, are subject not to Article 30 of Germany's statute, but to Regulation 593/2008 of June 17, 2008 (otherwise known as the "Rome I Regulation"). This regulation applies not only to employment agreements, but to all contractual relationships.

THE ROME I REGULATION

Unlike directives, EU regulations are directly applicable, meaning they do not need to be transformed into the laws of the individual EU member states before they apply. Regulation 593/2008 became effective in the EU member states as of December 17, 2009, meaning that it applies to all employment agreements concluded as of that date.

Probably the most significant provision of Regulation 593/2008 is Article 8, which states in pertinent part that

> [a]n individual employment contract shall be governed by the law chosen by the parties . . . [s]uch a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that [would otherwise apply].

Based on this, it is clear that Regulation 593/2008 does not result in any material changes to the above-referenced Article 30.

In general, the laws of the jurisdiction where the "employee habitually carries out his work in performance of the contract" will continue to govern for employment agreements within an international context. This is also the case if the employee is employed only temporarily in another country. It is possible, of course, that an employment relationship actually has a closer nexus to a country other than where the employee "habitually carries out his work"; if that is the case, then that country's laws will govern with respect to the employment relationship.

NO DEPRIVATION OF FUNDAMENTAL RIGHTS

Parties in Germany have always been free to choose the law that will govern their employment agreement, with the proviso that a court can review whether the law chosen would deprive an employee of rights that automatically apply in the country where he performs his services. This is to ensure that a choice-of-law clause does not result in an employee's being deprived of certain fundamental rights; *e.g.*, a pregnant woman working in Germany will typically be subject to the maternity laws of Germany regardless of the law the parties chose for their employment relationship.

An issue that still needs to be discussed, however, is how the comparison between the otherwise applicable law and the law chosen by the parties is to be applied. It is agreed that one cannot merely compare the laws of the two jurisdictions in their entirety and then select between the two. Instead, a comparison will probably need to be made on specific topics (*e.g.*, termination-of-employee provisions or statutory vacation provisions). Regardless, employers will not have the unfettered right to select a certain jurisdiction's laws that would otherwise not apply, because an employee will be able to insist on the applicability of the laws that are most advantageous to him—either the laws expressly chosen or the laws where he performs his work.

The introduction of the Rome I Regulation will have an impact only on specific issues—if it has any impact at all.

As long as the employment relationships of the transferred employees continue to be governed by their "home country," the temporary nature of their transfer to Germany will prevent them from counting towards the threshold.

WHAT IS A "WORKS"?

Under German law, whether an employee is able to rely on Germany's pro-employee termination protection provisions depends on whether (i) the employee has been employed for at least six months, and (ii) the respective "works" has more than 10 employees. Unless both of these requirements are met, the Termination Protection Act does not apply.

Though the term "works" is continuously used in various German statutes, it is often difficult to determine what precisely it constitutes. Typically the legal entity itself—the company—encompasses the "works" of an employer, though a company may (and often does) encompass more than one works, depending on the number of production facilities, branches, or independent sales offices within the company, as each of these may constitute a separate "works."

Though it does occur on occasion, employees of different companies generally do not constitute a single "works" within the meaning of the Termination Protection Act. In certain situations, a joint venture involving two or more companies that is subject to a single management organization may lead to an intercompany works (whether by implication or expressly). According to the Federal Labor Court, the human-resource activities of the "single management organization" must comprise the identical administrative body, such as the same managing director.

The term "works" can also be of relevance to conflict-of-law issues. It is quite easy to accept that the Federal Labor Court holds that Germany's Termination Protection Act applies only to works located in Germany. Based on a January 17, 2008, decision of the Federal Labor Court, however, this is not because Germany can make decisions only with respect to Germany due to the principle of territoriality; instead, the Termination Protection Act applies only to employees in Germany because of the use of the term "works." This fact alone, however, would not rule out the possibility that a joint venture with a presence in Germany would also count the joint venture's employees outside Germany to determine whether it satisfied the above-mentioned threshold of 10-plus employees.

DO FOREIGN EMPLOYEES COUNT TOWARDS A WORKS?

The Federal Labor Court was confronted with precisely this issue in March 2009. It concluded that the foreign employees (in this case, employees of a Danish parent corporation of the German joint venture) should not be counted. The court reasoned that employees whose employment relationship is not governed by German law cannot be included as part of a single works (as was held in a 2008 opinion). The court opined that if a company's branch employees, whose employment relationship is governed by laws other than Germany's, are not included when determining the threshold, the same logic should apply to joint ventures.

The Federal Labor Court's decision is to some extent an indirect recognition of the possibility of a cross-border joint-venture works. This is also in line with Article 8 of the Rome I Regulation. One can presumably conclude that transferring employees from a non-German parent corporation will not enable a works to meet the requisite number of employees set by the Termination Protection Act. As long as the employment relationships of the transferred employees continue to be governed by their "home country," the temporary nature of their transfer to Germany will prevent them from counting towards the threshold.

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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