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GERMAN LABOR AND EMPLOYMENT NEWS

THE *SIEMENS/BenQ* DECISION REVISITED

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If a "transfer of undertakings" is planned, either the current or the potentially new employer must provide certain information to the affected employees prior to the consummation of the transaction, as the employment relationships of these employees will automatically transfer to the new employer by operation of law unless the employees exercise certain rights. For the employees to be able to exercise these rights, the employer must inform them of the consequences of the transfer of undertakings. (The most common form of a "transfer of undertakings" is a merger or a sale of corporate assets as part of an M&A transaction.)

Regardless of whether the current or the potentially new employer provides the notification, that employer must be sure to include all the information required by statute. Otherwise, the employees may exercise their right to object to the transfer of their employment relationship to the new employer for longer than the statutory one-month period.

As again evidenced by the Federal Labor Court's recent *Siemens/BenQ* decision, courts see the notification requirement quite rigidly. In 2005, Siemens offered to sell its unprofitable mobile devices division to BenQ, a company with world

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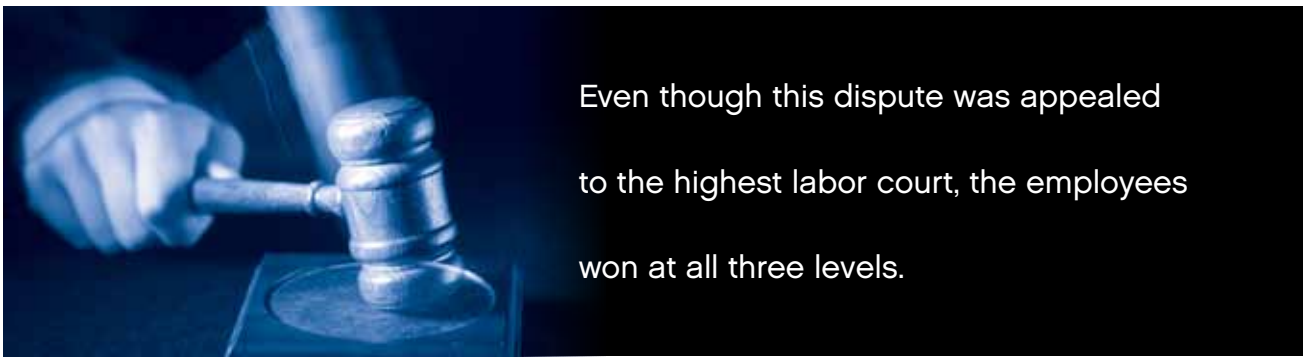

headquarters in Taiwan that specialized in consumer electronics. Unfortunately for Siemens, it made several errors when it notified its employees of the pending transaction. As will be discussed herein, this created a number of difficulties for Siemens.

THE SALE AND THE SUBSEQUENT BANKRUPTCY

As part of the planned transaction, BenQ formed a German general partnership subsidiary in August 2005—BenQ Mobile GmbH & Co. OHG—after Siemens carved out Com MD, the mobile devices division, from the rest of the Siemens entity. According to the acquisition agreement between Siemens and BenQ, certain liabilities remained with Siemens (the seller) so that Siemens actually paid a "negative purchase price" of approximately €350 million. Additionally, BenQ transferred many of the newly acquired Com MD patents—particularly the more valuable ones—to the parent corporation in Taiwan.

Siemens notified its employees of the pending transaction on August 29, 2005. Shortly thereafter, in September, the Com MD division, including a significant part of its assets, was transferred. As set forth under the "TUPE rules" (Transfer of Undertakings/Protection of Employees—Directive 98/50/EC, as amended), the employment relationships of the affected employees were automatically transferred from Siemens to BenQ Mobile GmbH & Co. OHG as of October 1, 2005.

Though it was known that Siemens' mobile devices division was unprofitable, BenQ had hoped to turn it around. Unfortunately, BenQ was unsuccessful in its efforts, and the division became even more of a financial burden. The result was the filing of a voluntary bankruptcy petition by BenQ Mobile GmbH & Co. OHG on January 1, 2007, *i.e.*, within two years of the acquisition.

EMPLOYEE UPRISING

In the autumn of 2006—one year after the consummation of the transaction—1,500 BenQ employees in Germany exercised their legal right to reject the automatic transfer of their employment relationship from Siemens to BenQ Mobile. They argued that they were still employees of Siemens—and, as it turned out, the court agreed.

A number of the employees had filed for a declaratory judgment against Siemens. These plaintiffs argued that they had the right to reject the automatic transfer of their employment relationship to BenQ Mobile even after BenQ's bankruptcy because the notification provided by Siemens to the employees did not meet the minimum statutory requirements, which meant that the statutory one-month period had not yet begun to toll.

Even though this dispute was appealed to the highest labor court, the employees won at all three levels. The Federal Labor Court held on July 23, 2009, that Siemens' appeal would not meet with success. As a result, the employees continued to have an employment relationship with Siemens beyond the transfer date of October 1, 2005.

Put simply: Siemens' notification to the employees was too vague and inadequate for the employees to make an informed decision as to whether they wished to work for BenQ or remain with Siemens.

WHAT MISTAKES WERE MADE IN THE NOTIFICATION?

The Federal Labor Court pointed out, in particular, that Siemens' notification was inadequate because it failed to provide sufficient information regarding the buyer (BenQ), the reasons why the transaction with BenQ was even taking place, and the legal consequences of the transaction.

For example, the information Siemens provided to the employees did not enable them to form a good picture of BenQ (essentially a company unknown to the German layperson) or the circumstances of the transaction. More specifically, the court held that merely identifying BenQ was insufficient.

In addition to failing to describe the buyer sufficiently, Siemens neglected to describe the purpose of the transaction to the employees. In other words, the employer did not provide information regarding the legal basis of the transaction, *i.e.*, whether it was in the form of a purchase agreement, lease agreement, merger, etc. Siemens' written notification was simply too vague. For example, the term "purchase agreement" was used, even though Siemens did not pay a purchase price (in the traditional sense). Also, Siemens failed to disclose that BenQ intended to transfer BenQ Mobile's key patents to the Taiwanese parent corporation.

Finally, Siemens did not disclose in sufficient detail the legal consequences of the transaction. The court did not accept that Siemens discussed only the "primary aspects" of the transaction. Also, the court noted, Siemens did not inform the employees to what extent the collective bargaining agreements to which Siemens had been a party or the agreements that management had agreed to with Siemens' works councils would remain intact upon the consummation of the transaction. Put simply: Siemens' notification to the employees was too vague and inadequate for the employees to make an informed decision as to whether they wished to work for BenQ or remain with Siemens.

The Federal Labor Court used the *Siemens/BenQ* case as an opportunity to expand the requirements for providing a TUPE notification. As a result, a carefully drafted notification to the employees as part of a transfer of undertakings is key.

ARBITRATION BOARD: TAKE THE INITIATIVE IF A DISPUTE IS BREWING

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As has been discussed in previous editions of our German Labor and Employment News (see, for example, "The Termination of Employees—An Ever-Evolving Topic" in our Fourth Quarter 2008 issue), one of the grounds for terminating employees in Germany consists of "operational reasons." If the employees already have a works council in place or decide to form a works council upon learning of pending dismissals (which they can do relatively quickly), and the terminations constitute a "change in operations" (which is almost always the case), the works council and management must negotiate a social plan and a reconciliation-of-interests agreement.

SOCIAL PLAN VS. RECONCILIATION-OF-INTERESTS AGREEMENT

A social plan sets forth (in colloquial terms) "how much," *i.e.*, how much severance the employer will pay to the dismissed employees. The reconciliation-of-interests agreement has a different purpose. In this agreement, the works council and management set forth the "how, when, and who," *i.e.*, how the pending dismissals (reorganization) will be executed, when the respective terminations will enter into effect, and (possibly) which employees will actually be terminated. (Though it is beyond the scope of this article, management and the works council may agree on which employees will be terminated by attaching their names to the reconciliation-of-interests agreement as an appendix.)

Because so many issues are involved when negotiating the two agreements and emotions are often running high, it is not surprising that management and the works council are frequently unable to come to terms. If that is the case, they may call upon an arbitration board. The purpose of the arbitration board is to reach an agreement on the outstanding issues with respect to the pending "change in operations."

This then raises the question as to why an employer even makes the effort to negotiate a reconciliation-of-interests agreement. The answer, as is often the case, is money.

WHAT IF A RECONCILIATION-OF-INTERESTS AGREEMENT IS NOT CONCLUDED?

The social plan and the reconciliation-of-interests agreement differ not only in purpose, but from a procedural perspective as well. If the parties are unable to reach agreement on the social plan and they call upon the services of the arbitration board, that board—as an arbitrator—has the authority to decide on the content of the social plan. Conversely, the purpose of the arbitration board with respect to a reconciliation-of-interests agreement is to serve only as a mediator; *i.e.*, if the board is unable to mediate the parties' differences, then there will simply be no reconciliation-of-interests agreement.

This then raises the question as to why an employer even makes the effort to negotiate a reconciliation-of-interests agreement. The answer, as is often the case, is money. If the employer does not make a *good-faith effort* (as is required by law) to conclude a reconciliation-of-interests agreement with the works council, the dismissed employees have a claim for their financial losses. This can be quite expensive for the employer, as the "losses" may amount to up to one year's compensation for each employee (and if an employee is at least 50 years old and has 15 years of service to his credit, the amount may be up to 15 months of compensation; if the employee is at least 55 years old and has 20 years of service to his credit, the amount may be up to 18 months of compensation). The actual amount the employer owes lies within the discretion of the court.

The purpose of threatening employers with such payments is twofold. First, it is to penalize those employers who fail to observe the requirement of negotiating a reconciliation-of-interests agreement in good faith. Further, it is to compensate those employees who will suffer financially from losing their jobs.

NOMINATING THE CHAIRMAN OF THE ARBITRATION BOARD

The arbitration board comprises an equal number of employee-friendly representatives and employer-friendly representatives. These representatives then mutually decide upon a chairman of the arbitration board, who may *not* be one of the individuals already named to the board. Surprisingly, the chairman of the arbitration board initially does not have voting rights. Instead, he acts purely as a mediator and puts pressure on the works council and management to reach agreement among themselves. If this

fails to occur, the representatives—except for the chairman—will vote on the matter. Because there is an even number of employee and employer representatives, they often reach gridlock. Only then does the chairman have a right to vote. It is clear that the role of chairman is crucial.

VARIOUS PROCEDURES FOR APPOINTING A CHAIRMAN OF THE ARBITRATION BOARD

If the representatives are unable to reach agreement as to who is to serve as chairman, the respective labor court will make the selection. The quirky part is that whether the chairman is "neutral" may very well depend on the German federal state in which the dispute is located. This is because any challenge to the appointment of the chairman may be made only at the highest labor court at the state level—not at the Federal Labor Court. Labor courts at the state level are not necessarily uniform in terms of resolving a dispute as to the selection of the chairman. By way of example, the courts of the states of Schleswig-Holstein and Baden-Württemberg have held that if the representatives cannot agree on the chairman, then a third party (typically the labor court) will make this selection. Conversely, the state labor courts of Hamburg and Bremen have held that the representatives who initially brought the matter before the arbitration board (typically the employee representatives) have a right to make the first proposal for the chairman. Only if the other party can submit actual evidence showing that the nominee is prejudiced will the nominee fail to be approved.

In a case before the Berlin-Brandenburg state labor court, the management of an individual store of a national retail chain with more than 15,000 employees decided that payments made in accordance with a new collective bargaining agreement in lieu of higher compensation for working a late Saturday afternoon shift were to be deposited into the employees' pension rather than their comp-time accounts. The employer decided to make payments that increased the employer contribution to the pension scheme because he believed that operational regulations regarding comp-time accounts did not exist. The works council disagreed with management's decision and asked that the matter be resolved before an arbitration board. Because the works council had requested resolution before an arbitration board and there were no "verifiable concerns" regarding the works council's nomination of the chairman of the arbitration board, the Berlin-Brandenburg court upheld the works council's nominee. This court added that the fact that the proposed chairman had a different legal perspective was not sufficient grounds for the labor court to reject the nomination. (Management had argued that the chairman proposed by the works council tended to favor employees' rights.) This case demonstrates the importance of taking the initiative if a dispute is brewing with the works council.

LOWER TAX MAY APPLY IF SEVERANCE PAYMENT IS MADE OVER A TWO-YEAR PERIOD

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Under German tax law, if an employer makes a full severance payment to a laid-off employee within one calendar year, then the severance is subject to lower taxation. According to the holding of a Cologne tax court earlier this year, however, the reduced-taxation rules may also apply to a severance payment split over two years if only a minimal amount of the severance payment is paid to the employee in one of the two years.

In the Cologne case, in 2005 the employer made an advance payment of 5 percent of the total severance. The remaining amount was subsequently paid in 2006. The court held that the nominal payment made in 2005 did not preclude the application of the above-referenced reduced tax. This case does not yet serve as precedent, as an appeal has been filed.

GERMANY ENACTS STATUTE ON GENETIC DIAGNOSTICS

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Man continues to make progress decoding the genetic make-up of humans and researching the causes of diseases on the basis of this information. But while this information can be invaluable from a medical perspective, it also involves certain risks.

At least from a legal perspective, the primary risk is that this information can be used in a discriminatory manner or in such a way that it violates an individual's right to self-determination. It is for this reason that Germany enacted the Statute on Genetic Diagnostics, which begins by setting forth that one of its purposes is to prevent discrimination and to protect each person's right to self-determination.

Though this statute is not an employment statute per se, it does include a number of sections that refer specifically to genetic testing in the employment arena. It became effective for the most part on February 2, 2010.

One of the key anti-discrimination provisions of this statute is found in Section 4, which states that no individual may be discriminated against due to his genetic characteristics, an examination (or the refusal to submit to an examination) of his genetic make-up, or the analysis or results of such examination.

DEFINITIONS WITHIN THE STATUTE

The Statute on Genetic Diagnostics defines "genetic examination" as an analysis to determine genetic characteristics. More specifically, the statute defines "diagnostic genetic examination" as an examination to clarify an existing illness or a health issue or to determine whether a person has genetic characteristics that, if combined with other factors, could explain an illness or the response to specific medical treatment. Some employers would undoubtedly like to have access to this type of information on their employees to help in guesstimating how long, for example, a particular employee may be ill.

Though the definition is not surprising, the statute also defines the term "employer." It is worth mentioning that if an employee is leased by an employment agency, under the statute both the "lessee" and the "lessor" of the employee constitute an employer. The statute adds that it applies not only to employees, but also to "employed persons"; this

Specifically, it states that employers may not discriminate against employed persons on the basis of genetic make-up.

includes apprentices, persons in relationships comparable to an employment relationship, and—very importantly—job applicants. In its inclusion of job applicants, the Act clearly has some similarities to the Equal Treatment Act (see "Germany's Equal Treatment Act: What Will Be Its Practical Impact?" in the Third Quarter 2006 issue of our *German Labor and Employment News*), as that statute also applies to job applicants.

WHAT AN EMPLOYEE MAY AND MAY NOT DO

Section 19 of the Statute on Genetic Diagnostics states that the employer of an "employed person" may not request genetic examinations or analyses prior to beginning an employment relationship or at any time thereafter. Further, the employer may not request, receive, or use information about any such examination or analysis that may have already been undertaken in a different context; this includes any unsolicited information about a person's genetic make-up that the employer may have access to or receive for whatever reason.

Section 21 of the statute includes a broad prohibition on discrimination in an employment relationship. Specifically, it states that employers may not discriminate against employed persons on the basis of genetic make-up. This includes agreements or arrangements with respect to the commencement of an employment relationship, a promotion, instructions from an employer, or the ending of an employment relationship.

The Statute on Genetic Diagnostics also discusses precautionary medical examinations within the context of an employment relationship. Though such examinations could theoretically serve a real purpose, Section 20(1) of the statute states that such information may generally not be used. The reason for this is that the door should not be open for employers to be able to select only those employees with a "robust" genetic make-up for the more demanding, labor-intensive jobs.

However, in certain situations, employers may use analyses of genetic products, particularly nucleic acids. Such an analysis can be used to determine whether an employee's genetic make-up is such that the employee could become seriously ill if he performs a particular job. The statute states that even in these types of cases, however, employers must view genetic testing as a secondary tool that they may implement only if there is no other measure available that is just as effective in protecting the employee's health and safety in the workplace.

CONSEQUENCES OF AN EMPLOYER'S VIOLATION

As stated above, there is some connection between the Equal Treatment Act and the Statute on Genetic Diagnostics with respect to anti-discriminatory provisions. Specifically, the Statute on Genetic Diagnostics states that Sections 15 and 22 of the Equal Treatment Act (which discuss damages and the burden of proof to make a claim, respectively) shall apply to civil claims under the Statute on Genetic Diagnostics. Using Section 21 of the Equal Treatment Act as the premise, employed persons may make a claim for monetary damages if they can demonstrate an "indication" of discrimination under the Statute on Genetic Diagnostics. If the employed person can satisfy this threshold, then there is a presumption that the employer engaged in discrimination which it must then be able to refute.

The Statute on Genetic Diagnostics sets forth penal provisions and administrative offense provisions. The penal provisions will presumably not play a significant role in the employment arena. Violations of Section 19 (genetic examinations and analyses before and after an employment relationship) or Section 20 (genetic examinations and analyses for health and safety in the workplace) of the Statute on Genetic Diagnostics may, however, subject the employer to a fine of up to €300,000.

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