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CONTENTS

Statutory Quota for Women as Executives: All Just Talk or a Real Possibility? 1

Is It Reasonable to Protect All Whistleblowers Against Dismissal? 3

Mass Layoffs as Part of a Restructuring Plan 5

Germany's Federal Labor Court vs. the European Court of Justice: Revisiting *Klarenberg* 7

Contractual Trust Agreements—a Panacea for Employers and Employees? 8

What Obligations Does an Employer Have When a Job Is Available? 10

STATUTORY QUOTA FOR WOMEN AS EXECUTIVES: ALL JUST TALK OR A REAL POSSIBILITY?

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To put it bluntly, Germany is having a tough time embracing the concept of diversity at the management level. Though there has been a smattering of progress over the past few years in terms of women in corporate-management positions, this "progress" leaves much to be desired. More specifically, 10 years ago, 2.5 percent of the executive-board members of Germany's 30 largest companies were women. Today this figure has increased to a paltry 3.7 percent. Due largely to this lack of progress, German politicians have been haggling for some time over whether a statutory quota needs to be introduced so that more women are represented on Germany's boards.

QUOTA AS LAW

Because women are so poorly represented on Germany's boards, a number of politicians—most notably Ursula von der Leyen, the country's Minister of Labor—have "threatened" to introduce a minimum statutory quota for women on boards and in managerial positions in Germany; a proposal attributed to Ms. von der Leyen holds that women must fill at least 30 percent of all supervisory- and executive-board positions. Not surprisingly, this idea has met with, and continues to receive, a significant amount of resistance in Germany's corporate world.

Dissatisfaction with Germany's ineffectiveness in getting women to the managerial level has increased support for a statutory quota among certain factions of lawmakers.

It seems doubtful that a strict quota as suggested by Ms. von der Leyen will pass. What is not out of the question, however, is the introduction of a more flexible quota. For example, if there is no significant increase in women at the managerial level by 2013, German law may hold that a publicly held corporation or a corporation subject to Germany's codetermination laws (generally one with more than 500 employees) that fails to fill at least 30 percent of its managerial positions with women must announce what percentage of the next round of supervisory- or executive-board members will be female. If the corporation subsequently fails to meet this announced figure, it will be subject to sanctions. Sanctions could include not recognizing the election results. Additionally, if it is determined that the actual makeup of the corporation's supervisory or executive board is different from what it is claiming, the corporation would be subject to a fine of €25,000.

WHAT PROMPTED THE DISCUSSION OF QUOTAS FOR WOMEN?

In the last few years, three actions have been taken that have made German corporations more sensitive to diversity in the workplace. First, the Equal Treatment Act was enacted in 2006. This Act prohibits discrimination, including in the workplace, based on age, race, gender, disability, etc. (The Act is discussed in the 3Q06 and 4Q08 issues of our *German Labor and Employment News*, which are available at www.jonesday.com.) Though the Equal Treatment Act has not been the source of as much litigation as anticipated, it is fair to say that this statute has made many German companies more sensitive to discrimination or to acts that could be perceived as discriminatory. This increased sensitivity includes paying more attention to women's roles in the workplace.

Second, in 2001 the German government drew up an agreement with Germany's largest business associations to promote the advancement of women in the workplace. The "Agreement Between the Federal Government and the Primary Trade Associations of German Business to Promote Equal Treatment for Women and Men in the Private Economy" promoted mentoring for women seeking managerial positions, the institution of flexible work time and telecommuting, the establishment of concrete goals for realizing equal treatment of women in the workplace, etc. This Agreement was actually a political compromise, since the goal of Germany's Minister of Families, Senior Citizens, Women and Youth at that time was to enact a statute to promote diversity in the workplace. That statute did not come to fruition. Not too surprisingly, the Agreement did not have the hoped-for effect. As Viviane Reding, the European Commissioner for Justice, Fundamental Rights and Citizenship, recently said in response to the statistic that 88 percent of the board members of Europe's

largest companies are men, "At this rate, it will take another 50 years to reach a gender balance on company boards."

Finally, other European countries have introduced quotas for women. Most notably, Norway has a 40 percent women's quota for supervisory boards. Similarly, both Spain (as of 2015) and France (as of 2017) will have a statutory 40 percent quota for female supervisory-board positions, while Italy will have a 20 percent women's quota as of 2012 (which will increase to 30 percent as of 2015). Sweden, Belgium, and the Netherlands are each engaged in political discussions to introduce a statutory women's quota (either 30 or 35 percent) for supervisory-board positions.

Dissatisfaction with Germany's ineffectiveness in getting women to the managerial level has increased support for a statutory quota among certain factions of lawmakers. For example, Germany revised its Corporate Governance Code in May 2010 to read that executive-board members must take diversity into consideration when filling management-level positions; in particular, they are to aspire to have a reasonable number of women in these positions.

THE CHANCES OF A WOMEN'S QUOTA BECOMING LAW

Whether Germany will introduce a statutory women's quota is currently a question of political gamesmanship. Germany's Labor Minister is in favor of such a quota; the Minister of Families, Senior Citizens, Women and Youth is in favor of introducing a flexible quota if there is no significant increase in women at the management level by 2013; and the Minister of Justice prefers to rely on self-regulation, *i.e.*, to rely on the German Corporate Governance Code. Consequently, it is unlikely that Germany will pass a quota statute prior to the end of next year, if at all. (The only real exception to this statement would be if these three politicians were to strike a deal involving give-and-take among their respective pet projects.) Stepping up the appointment of women to executive-board positions over the next few years also would make it unlikely that Germany will pass a women's quota. Finally, though the European Union has had some discussions about introducing a women's quota, these discussions have not yet gained any real traction.

IS IT REASONABLE TO PROTECT ALL WHISTLEBLOWERS AGAINST DISMISSAL?

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The term "human-rights violation" conjures up notions of arbitrary arrests, police states, and rogue dictators. Fortunately, Germany is not often tied to human-rights violations. In July of this year, however, the European Court of Human Rights ("ECHR") found that Germany did indeed commit certain human-rights violations. The case, which involved the termination of an employee in Germany, went all the way to Germany's Federal Labor Court. The plaintiff even requested that Germany's Constitutional Court hear the case. That court, however, declined to hear the matter.

EMPLOYEE'S WHISTLEBLOWING AND CRIMINAL COMPLAINT AGAINST EMPLOYER

The case involved an employee of a senior citizens' home who had complained about the residents' poor living conditions and their poor treatment. She initially leveled her complaints internally but was not satisfied with the results. She then decided to go public with her complaints by distributing leaflets to the general public with the assistance of a union. The employee also filed a criminal complaint against the employer, alleging that the employer was charging for services that it never actually rendered. These allegations were never proved, and the prosecutor eventually discontinued its investigation.

> The ECHR's rather dubious decision goes to a core issue: How should an employer handle an employee who is making public allegations of wrongdoing?

The employer fired the employee for distributing the leaflets with the false information. The plaintiff-employee took her case all the way to the ECHR, arguing that the German courts had violated her human rights in upholding a firing incurred for exercising the right of freedom of speech.

Though the ECHR did not have the authority to overrule the German court's decision to uphold the termination, it did award monetary damages to the plaintiff, which the Federal Republic of Germany was ordered to pay.

EMPLOYERS TAKE THE BRUNT OF UNPROVEN VIOLATIONS

The ECHR's rather dubious decision goes to a core issue: How should an employer handle an employee who is making public allegations of wrongdoing? Of course, nobody wishes scandals to go undetected; the whistleblowers who alerted the public to the sale of tainted meat by various German meatpackers and meat processors in 2007 and those who revealed the addition of glycol, derived from antifreeze, to a number of German and Austrian wines in 1985 were applauded by the general public. False accusations, however, may be just as damaging; an employee who publicly makes unfounded or wrong allegations against his employer may cause that employer to suffer not only stress and costs, but also an irreparably damaged reputation. The employee may even take it one step further by filing a complaint with the police that causes a formal investigation to take place. Can it really be the case that an employee who has made untrue or unfounded allegations against his employer can expect to escape unharmed—to the extent of being protected against termination?

All employees owe a duty of loyalty to their employers. Accordingly, an employee typically must first raise his concerns internally.

CASE LAW TO DATE

It would not be correct to say that German courts merely rubber-stamp the termination of employees who file criminal complaints against their employers or become whistleblowers. Instead, in whistleblowing cases where the employer issues a termination for cause, the courts will review whether it is reasonable to keep the employment relationship intact by weighing the employer's interests against those of the employee. This test is actually codified in Germany's Civil Code.

That an employee's filing of a criminal complaint against his employer will strain an employment relationship is without question. Other issues, however, must also be taken into consideration: for example, was the employer actually engaged in wrongdoing, and did the employee first make an effort to resolve the matter internally?

All employees owe a duty of loyalty to their employers. Accordingly, an employee typically must first raise his concerns internally. Certain exceptions to this general rule may arise if the employer has already made clear that it will not undertake any measures to discontinue its illegal activities or if the employer's actions cause an imminent danger. If an employee goes public with his allegations too quickly, or if the employee did not have sufficient evidence to lodge a complaint against the employer, then the above-mentioned balancing test could indeed tip in favor of the employer. To expect an employer to keep an employee in that type of situation would not be reasonable, meaning a termination for cause would be upheld.

In the case of the employee of the senior citizens' home, the German courts determined that it would be unreasonable to expect the employer to keep the employee. This was because the decisive aspects of the employee's allegations remained unproven. The ECHR took little interest in the outcome of the case, but instead focused on the chilling effect this case would have on other whistleblowers.

To put it colloquially, an employee who wants to "stick it to the Man" really runs very little risk of jeopardizing his employment as long as his complaint involves an allegation that is difficult for his employer to disprove.

POSSIBLE FUTURE DEVELOPMENTS

It is still not clear what direction all of this will take in the future. In 2008—a few years before the above-referenced ECHR decision—some efforts had been undertaken in Germany to introduce a statutory whistleblower provision. One idea in this regard was to permit an employee to go public with his concerns at the outset if the employer was engaged in criminal conduct. Though this provision was not enacted in 2008, the voices in favor of a comparable statutory provision are growing louder.

The above proposal would not have impacted those situations in which the employee is unable to prove his allegations. If the ECHR's reasoning is implemented, it quickly becomes clear that the employer takes the brunt of unproven claims, in that it not only incurs damage to its reputation but also must devote time and money to defending itself—all while the employee continues to work for the employer. To put it colloquially, an employee who wants to "stick it to the Man" really runs very little risk of jeopardizing his employment as long as his complaint involves an allegation that is difficult for his employer to disprove.

Taking this one step further, this actually flies in the face of the basic legal principle that the plaintiff (*i.e.*, the employee leveling the allegation) has the burden of proof. It is hard to accept that this principle does not apply in certain employment-relationship situations. For this reason, it is hoped that neither the German courts nor the German legislature will allow themselves to be influenced by this ECHR decision. The approach that has always been used in the past—*i.e.*, to take the totality of the circumstances into consideration in determining whether it is reasonable to expect the employer to keep the employee—has proved to be fair and workable.

It probably does not make sense to give this ECHR decision too much weight in terms of treating whistleblower cases as human-rights and freedom-of-speech matters. Because this particular case involved the distribution of leaflets, there is some legitimacy to treating it as a freedom-of-speech case. However, a whistleblower must assert facts, not opinions. It is not a human-rights violation to demand that the complainant actually prove his allegations. Failing to do so would open the door for whistleblowers to abuse the system, as too many individuals who see themselves as judge, jury, and executioner could spring into action.

MASS LAYOFFS AS PART OF A RESTRUCTURING PLAN

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An employer files for bankruptcy. A potential buyer is interested in acquiring the assets out of bankruptcy as long as the employee head count is significantly reduced. The buyer, however, wants to avoid issuing the notices of termination himself because: (i) it costs time and money; (ii) the procedure is complicated if it constitutes a mass layoff, which requires negotiating with the works council a compromise-of-interests agreement and a social plan, notifying the local labor office of the proposed mass layoff, and obtaining the consent of various agencies for the termination of individuals who enjoy special protection against termination (works-council members, women on maternity leave, disabled employees, etc.); and (iii) the buyer does not want the first real action he takes to be a mass

So that the bankruptcy trustee can issue the notices of termination prior to the transfer of the undertaking, the buyer should already have put forth a binding restructuring plan.

layoff, which would strain the relationship with the remaining employees at the outset and undoubtedly have an adverse impact on the work environment for some time to come. The buyer would much prefer acquiring a company that has already completed a mass layoff, as this would allow him to begin with a clean slate.

PROHIBITION ON TERMINATION UPON THE TRANSFER OF AN UNDERTAKING

Under Germany's Transfer of Undertaking / Protection of Employees (or "TUPE") rules, an employer may not terminate any employees "as the result of" the transfer of an undertaking. This does not prevent an employer from terminating employees for other reasons; it just means that the terminations may not be *the result of* the transfer of the undertaking. The employer still has the right to terminate employees for cause, for unacceptable conduct, and for poor performance. The fact that a company (or part of a company) is being bought out of bankruptcy does not change this. Accordingly, any termination that a bankruptcy trustee issues because of a pending transfer of an undertaking is invalid.

The above-mentioned prohibition against termination is always triggered when a buyer simply wants to take over fewer employees. In Germany, unlike in the United States, a buyer cannot cherry-pick employees, getting rid of those it does not want due to age or disability or those who are too expensive or just "not good enough."

ACQUISITION PLAN: FEWER EMPLOYEES

If a buyer puts forth a viable restructuring plan that contemplates fewer employees, the bankruptcy trustee may issue notices of termination based on this plan prior to the actual transfer of the undertaking. In this situation, the terminations are not issued *as the result of* the transfer; *i.e.*, the transfer is not the motive for the terminations, only the consequence.

A restructuring can take place in any number of ways: by spinning off certain assets, selling assets or discontinuing their use because they are unprofitable, concentrating on the core business, introducing fundamental changes in operations, closing or reducing specific divisions, merging certain business operations, reducing the employee head count, or getting rid of entire levels of management. Regardless of what steps are taken, however, one aspect is a given: employees will be terminated.

So that the bankruptcy trustee can issue the notices of termination prior to the transfer of the undertaking, the buyer should already have put forth a binding restructuring plan. In practice, this means that the buyer's restructuring plan should be in place at the time the underlying deal is signed.

ALTERNATIVE METHODS OF EMPLOYMENT: THE SOCIAL-SELECTION PROCESS

One issue remains open: When looking for an alternative to the terminations and when going through the social-selection process, does one need to look at the condition of the seller only—or at that of the buyer as well?

The notices of termination issued by the bankruptcy trustee (on behalf of the seller) cannot serve as a circumvention of Germany's mandatory social-selection process. Accordingly, the social-selection process must be performed in such a manner that it is assumed the buyer is actually the one terminating the employees. This way, comparable employees of both the seller and the buyer are considered as part of the social-selection process. The practical irony is that this may mean the bankruptcy trustee must terminate some of the buyer's

pre-transfer-of-undertaking employees in lieu of "keeping" some of the newly acquired ones.

GERMANY'S FEDERAL LABOR COURT VS. THE EUROPEAN COURT OF JUSTICE: REVISITING *KLARENBERG*

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What actually constitutes the "transfer of an undertaking"? Germany's Federal Labor Court and the European Court of Justice ("ECJ") have each provided guidance—unfortunately, the guidance provided by these courts is not always uniform.

THE FACTS OF *KLARENBERG*

In 2009, the ECJ caused a bit of an uproar with *Klarenberg* (C-466/07). In that case, a buyer acquired some of the production tools and product lines of a division being divested by an industrial automation company. The buyer took over four employees as part of the transaction. These employees had all been part of the same division while working with the seller. Once they became employees of the buyer, however, the four were subject to a different organizational structure and as a result no longer all worked for the same division. This also meant that they all no longer reported to the same individual.

APPLICATION OF TUPE

The ECJ opined that the fundamental change in the organizational structure and the fact that the employees no longer reported to the same individual did not prevent the application of TUPE. (TUPE, which stands for "Transfer of Undertaking / Protection of Employees," is the statutory provision in all EU member states setting forth that employment relationships are automatically transferred by operation of law from a seller to a buyer if the buyer is acquiring an undertaking or part of an undertaking.) Indeed, if "the retention of such a functional link between the various elements transferred allows the transferee to use them, even if

The ECJ held that introducing a fundamental change in the organization of an existing undertaking does not automatically exclude the applicability of TUPE.

they are integrated, after the transfer, in a new and different organizational structure," the takeover might constitute the transfer of part of an undertaking and consequently would be subject to TUPE.

After *Klarenberg*, a number of commentators wondered whether every single act of succession constituted the transfer of an undertaking or part of an undertaking. The ECJ held that introducing a fundamental change in the organization of an existing undertaking does not automatically exclude the applicability of TUPE. What the ECJ was doing by way of *Klarenberg* was to buttress its stated goal of not leaving any room for parties to circumvent TUPE. Parties often prefer to avoid having TUPE apply, as otherwise there is a presumption that any terminations are "the result of" the transfer of an undertaking. (See "Mass Layoffs as Part of a Restructuring Plan" in this issue of *German Labor and Employment News*.)

THE FEDERAL LABOR COURT AND *KLARENBERG*

Later in 2009, but subsequent to *Klarenberg*, Germany's Federal Labor Court tried to clear things up through its holding in a case in which a buyer acquired equipment from a seller but used it only partially and integrated it into an organizational structure that differed from that of the seller. Specifically, the buyer acquired the facility and equipment of a company cafeteria. The type of food the buyer offered, however, was different from what the seller had been offering. While the seller had been selling fresh, individually cooked meals, the buyer sold precooked meals. This change in concept, as well as a fundamental change in the cafeteria's operations and personnel, was determinative for the Federal Labor Court to opine that this transaction did *not* constitute the transfer of an undertaking and thus was not subject to TUPE.

Klarenberg has now landed on the Federal Labor Court's table. The Labor Court of Appeals had ruled that, applying the ECJ's above reasoning, there was a transfer of an undertaking. The employer appealed the case to the Federal Labor Court, but this court adroitly avoided the operational-change issue. In an October 13, 2011, decision (which to date has been discussed only as part of a press release), the Federal Labor Court held that whether the transaction constituted a transfer of an undertaking did not play a role in the instant case. The transfer-of-an-undertaking test failed for the simple reason that the assets that were transferred did not actually constitute part of an undertaking because the buyer could not have continued to operate them as a separate unit.

The Federal Labor Court was able to avoid a conflict with the ECJ's watered-down test for the buyer to continue the operations of an acquired unit. According to the Federal Labor Court, the assets that were transferred did not constitute a business unit which constituted part of an undertaking that could itself be integrated into the buyer's business. The buyer had acquired only a few of the seller's product lines and the corresponding rights to software, patents, customers, and suppliers. Why the acquisition of only specific product lines with the corresponding rights and know-how does not constitute "part of an undertaking" will presumably become clearer once the court's opinion is actually published. In fact, this opinion may quite possibly serve as more kindling for the ever-burning *Klarenberg* question. To be continued!

CONTRACTUAL TRUST AGREEMENTS—A PANACEA FOR EMPLOYERS AND EMPLOYEES?

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It used to be quite common for employers to provide company-sponsored pensions to employees as an employee benefit. Times, however, have changed. Why? As it turns out, accruals were often insufficient or the eventual cash payouts to retired employees were too high for companies to maintain.

CONTRACTUAL TRUST AGREEMENTS

To improve their debt/equity ratios, more companies in Germany are shifting their pension obligations to contractual trust agreements ("CTAs"), whereby the company transfers its pension obligations to a third party and off its own books. Because CTAs allow the accrual of future liabilities to be kept off a company's balance sheet, the company can improve not only its debt/equity ratio, but also its ratings.

In today's world, an employee often prefers to defer part of his compensation (*e.g.*, a percentage of his annual bonus),

The downside to this type of pension is that the employer cannot commit to a specific pension amount, for the simple reason that it does not know how much money will accrue over the years. The result: an economic risk to the employer.

not only to build up his pension, but also to reduce his immediate tax burden; the money an employee defers (plus any earnings generated on the deferred income) is not taxed until it is eventually paid out to that employee, meaning the employee can accumulate capital on a gross-income basis.

KEEPING EMPLOYERS' RISKS LOW

Though not yet used much by German employers, these "contribution-based pension commitments"—specifically permitted by Germany's Company Pension Act—actually benefit employers in two ways: first, an employer can offer this to its employees without risking eventual insufficient accruals; and second, the accrued employee pension does not appear on the company's balance sheet.

The downside to this type of pension is that the employer cannot commit to a specific pension amount, for the simple reason that it does not know how much money will accrue over the years. The result: an economic risk to the employer. As of late, however, a number of regional tax offices in Germany have changed their practices, permitting an employer to avoid this risk by: (i) allowing it to procure reinsurance coverage—in the form of either pension insurance or a CTA—for the full amount of the pension ("congruent coverage"), thereby removing the liability from the company's books; and (ii) limiting the amount to be paid out (the "defined amount") to the reserves actually accrued through the respective employee's date of retirement.

DEFINED-CONTRIBUTION PLANS

The congruently covered pension schemes not only are suitable for current employees, but may be used for other types of pensions as well. For example, an employer may promise to pay to an employee the amount actually paid during the course of the employment relationship (plus any appreciation in the pension's value). By procuring reinsurance coverage, the employer avoids any risk of loss, and simultaneously, the pension is fully funded. This model is comparable to the defined-contribution plan used in many other countries.

Another benefit of the contribution-based pension commitment is that the employer is not required to pay a cost-of-living adjustment as would otherwise be required under German pension law.

As stated above, an employee may make contributions to his pension by deferring his annual bonus. One advantage for the employee is that he may individually change the

amount he wishes to defer each year and, accordingly, contribute to his pension. This does not impact the employer, because from its perspective, the contributions are cost-neutral and do not impact its cash flow.

THE ACT FOR THE MODERNIZATION OF BALANCE SHEETS

As a result of Germany's Act for the Modernization of Balance Sheets, enacted in 2009, pension accruals and any assets acquired with the pension contributions no longer appear on a company's balance sheet; this is in line with the company's reporting on the basis of U.S. GAAP or IFRS. Pension obligations based on age may now, under certain circumstances (*e.g.*, where the fiduciary acts for both the employee and the employer), be set off against assets. This too is now in line with international standards. The pension liabilities and the pension assets (*i.e.*, the insurance or CTA) are set off against each other and no longer appear on the balance sheet, resulting in an improved debt/equity ratio.

INDIVIDUALITY OF CTAS

Individual accounts are maintained for each employee for the CTA or insurance coverage. They show each employee's contributions and the earnings generated from these contributions. When reaching retirement age, the employee may, depending on the provisions of the particular pension plan, choose between a one-time payment or installment payments.

Depending on the type of pension plan, the employer may supplement an employee's deferred-compensation contributions by making its own contributions. In certain situations, the employee may even direct the type of investment to be made with his contributions, thereby directly impacting the level of his eventual payouts.

NO INCOME TAX UNTIL PAYOUT

During a pension's accumulation period, neither the contributions made from the deferred compensation nor the earnings on such contributions are subject to income tax. Just as with other company pension schemes, income tax is levied only at the time of the payouts. Tax-law restrictions with respect to payments to German pension plans that are comparable to U.S.-style 401(k) plans ("direct insurance"), pension funds, or retirement funds do not apply to this model. Technically, these contributions are direct commitments from the employer, meaning contributions can be made in any amount.

ATTRACTIVE FOR NON-U.S. EMPLOYEES

These deferred-compensation models are especially attractive to employees receiving one-time annual payments and seeking to reduce their immediate tax burdens. These models are also attractive to U.S. conglomerates. Since some deferred-compensation schemes of U.S. conglomerates are not available to non-U.S.-resident employees for U.S. tax purposes, a U.S. conglomerate may consider this form of pension for its non-U.S.-based employees so that these employees are put on an equal footing (from a pension perspective) with their U.S. counterparts.

WHAT OBLIGATIONS DOES AN EMPLOYER HAVE WHEN A JOB IS AVAILABLE?

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Before taking on a new employee in Germany, an employer has certain duties. For example, if the company has a works council, the employer must inform it in a timely manner of the new hire. Also, if the new employee is unemployed or disabled, the employer must notify the respective agencies that it is hiring such an individual. But what happens if an employer fails to observe these requirements? The Federal Labor Court recently discussed this issue in connection with the hiring of a disabled individual.

CURRENT LEGAL SITUATION

If an employer has a position available, German law requires the employer to inform the local labor office, to ensure that unemployed disabled individuals are made aware of the opening. In the past, an employer's failure to take this step was sufficient to presume (though this presumption was rebuttable) that discrimination based on disability had occurred. The Federal Labor Court has held over the years that the requisite connection between disability and discrimination has been established if the discrimination was tied to or motivated by the disability. Accordingly, the Federal Labor Court has always been

This lack of causation, however, did not concern the Federal Labor Court. Instead, the court made clear that the employer's failure to notify the local labor office was sufficient in itself to conclude that there had been indicia of discrimination based on the employee's disability.

of the opinion that an employer's failure to notify the local labor office of an opening was sufficient indicia of discrimination based on disability. (The Equal Treatment Act—Germany's primary statute covering discrimination based on age, race, gender, disability, etc.—sets forth that the plaintiff must demonstrate "indicia" of discrimination to be able to proceed with his claim.)

RECENT DECISION OF THE FEDERAL LABOR COURT

In its October 13, 2011, decision, the Federal Labor Court extended the protection of the disabled by holding that there may be indicia of discrimination even if the disabled applicant failed to disclose the disability during the application process.

In that case, the disabled individual had applied for a job with the defendant, a municipality that had advertised the available position. The municipality did not go through the process of determining whether a disabled person could fill this position. The municipality also failed to notify the local labor office of the job opening. The municipality did not hire the disabled plaintiff, causing the applicant to sue under the Equal Treatment Act. This statute calls for damages of up to three months of the salary that would have been earned if the plaintiff had been hired. The Federal Labor Court ruled in the plaintiff's favor.

The Labor Court made clear in its decision that an employer has the duty to review whether a disabled employee can fill an open position and to contact the local labor office accordingly. The employer, the court continued, *always* has this obligation, whether or not a disabled person applies for the position.

What makes this case noteworthy is that to make a claim for damages under the Equal Treatment Act, it is actually irrelevant whether a disability was disclosed during the application process. In the instant case, the employer's failure to notify the local labor office of the opening was not the reason this particular applicant was not hired, because the employer did not even know of the disability. Since the defendant-municipality did not know that the applicant was disabled, its decision not to hire the applicant would not have been different—even if it had informed the local labor office.

This lack of causation, however, did not concern the Federal Labor Court. Instead, the court made clear that the employer's failure to notify the local labor office was sufficient in itself to conclude that there had been indicia of discrimination based on the employee's disability.

CONCLUSION

Considering the Federal Labor Court's past decisions, employers must be made aware that an applicant who has been rejected for an available position—regardless of whether he disclosed a disability during the application process—can still make a claim for damages under the Equal Treatment Act if the employer does not notify the local labor office of the job opening. As a result, employers are well advised to take this step when looking for new employees.

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JONES DAY GLOBAL LOCATIONS

ATLANTA	DALLAS	LOS ANGELES	NEW YORK	SHANGHAI
BEIJING	DUBAI	MADRID	PARIS	SILICON VALLEY
BOSTON	FRANKFURT	MEXICO CITY	PITTSBURGH	SINGAPORE
BRUSSELS	HONG KONG	MILAN	RIYADH	SYDNEY
CHICAGO	HOUSTON	MOSCOW	SAN DIEGO	TAIPEI
CLEVELAND	IRVINE	MUNICH	SAN FRANCISCO	TOKYO
COLUMBUS	LONDON	NEW DELHI	SÃO PAULO	WASHINGTON