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GERMAN LABOR AND EMPLOYMENT NEWS

COMPANY PENSION LAW

by ***Georg Mikes***

Frankfurt
German Attorney at Law; Certified Labor and Employment Lawyer
gmikes@jonesday.com
+49.69.9726.3914

In light of an aging population and the resulting gap between available funds and the benefits promised by Germany's social security system, company pensions are playing an increasingly important role in retiree income. In this context, a decision of the German Federal Labor Court (*Bundesarbeitsgericht*) dated May 15, 2012 (3 AZR 11/10), deserves consideration, since it not only clarifies current uncertainties beyond the individual case at issue, but also reflects the case law regarding changes in company pensions.

DEMOGRAPHIC ASPECTS

Germany's statutory pension insurance is currently in a transition period, during which the statutory standard age for pensioners is gradually being increased from 65 years to 67 as a consequence of the Statutory Pension Scheme Age Limit Adjustment Act (*Rentenversicherungs-Altersgrenzenanpassungsgesetz*). The increase in the age for the statutory pension cannot fail to have an impact on company pension schemes. In the past, pension commitments in company pension plans were often made from the 65th year of age, simply because this corresponded to the age of the statutory pension. Consequently, as of the increase in the statutory pension age, the question has arisen whether the age at which the full company pension may be claimed should be 65, as stated in the company pension plan, or the higher age provided by the new statute. The Federal

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Labor Court ruled in favor of the increased age; i.e., the company pension will not be due until the increased pension age has been reached. The Court substantiated its decision not least with the fact that since 1916, the statutory pension age had been 65 years and that, upon establishing pension plans, employers had no reason to include deviating clauses or simply referred to age 65 in order to be in line with the statutory age.

This decision applies to pension plans made prior to the Statutory Pension Scheme Age Limit Adjustment Act and to current cases involving the calculation of pro rata entitlements in the event of early withdrawal from the company. In the future, it will also be relevant to employees to whom an increased statutory age limit applies but whose company pension plan still provides for the 65th year of age and who intend to retire from work at age 65 by accepting a reduction of the statutory pension. They should be aware that this will most probably be considered *early* retirement even if the age limit expressly specified in the company pension plan has been reached—which raises the question as to whether the pension plan allows for early retirement in the first place and, if so, at what age. At any rate, according to the case law, reductions are imminent because, on the one hand, early retirement means the employee will contribute less to the company's success and, on the other, the company pension, according to statistical expectations, will be received for a longer period.

CHANGE OF COMPANY PENSION COMMITMENTS

The aforementioned judgment also deals with another proposed solution to the "pension gap": the substitution of traditional monthly pension payments with a lump sum, or "capital payment." The Federal Labor Court stated that a one-time capital payment does "not have the same quality" as monthly pension payments, since a single capital payment—even when based on the most accurate projections available as to inflation, mortality, and other actuarial factors—cannot provide a retiree the level of financial security offered by a guaranteed monthly sum. The Court also took into account the fact that a capital payment may result in a higher tax burden on the retiree due to the tax progression. Most troubling, however, is the possibility that providing a one-time capital payment may violate Section 3 of the German Company Pensions Act (*Betriebsrentengesetz*), which held that the purpose of the pension commitment is to provide a secure income for retirees in old age—not to enable them to accumulate capital. The Federal Labor Court consequently concluded that replacing monthly pension payments with a one-time payment should be measured against the existing case law for disadvantageous plan modifications.

The case law essentially consists of a newly confirmed three-level theory, according to which any changes must be justified by increasingly important reasons; in other words, the greater the interference in the promised benefit, the greater the justification for changing the benefit must be. This means that the highest level of interference—interfering in the part of the entitlement already earned by long service to the company—would be subject to what the case law considers "imperative" reasons, such as an economic crisis that threatens the company's solvency. The lowest level—interfering in the mere possibility of increasing the company pension by continued service in the company—would be justified by grounds that are merely "reasonable." Such "reasonable grounds" might include an increase in the

employer's tax burden that would force it to freeze the pension calculation at years of service thus far.

Falling between these two levels is interference in "the dynamics merited on a *pro rata temporis* basis." Simply put, this term typically covers those factors in the pension calculation that refer to the employee's wages prior to retirement. For example, the pension plan of an employee who begins his/her career as an apprentice but retires as a general manager will often be based on the higher wages earned at the end of his/her career. But if a wage freeze takes place during the middle of his/her years of service, the reduction in the employee's pension could be significant. Interventions on this level must be justified by "important" reasons, such as the fact that funding this type of pension plan could endanger the company in the long run. Unfortunately, the case history, in our view, is inconsistent in the application of this three-level theory.

Thus, in this new judgment, the Federal Labor Court confirmed case law that tends to stump legal practitioners. It ruled once again that in the event of pension plan changes, the question of interference in the acquired entitlement rights and the applicability of the three-level-analysis scheme may be clarified only in the individual case and in relation to the result of the case: "In the case of benefit commitments related to the pay at retirement, it can therefore regularly *not be determined before the withdrawal* from the employment whether acquired rights are interfered with by the superseding revision." This means that in the event of a change, such uncertain legal terms as "reasonable grounds" may cause problems, and whether or not the change has been effective will not be apparent until the withdrawal of the employee from employment—i.e., often only many years later. Moreover, the same case might be assessed differently by different employees—or even the same employee—depending on whether the withdrawal took place earlier or later.

VALUATION

Certain clarifying statements in this judgment should offer assistance, even if greater clarity regarding other issues would have been helpful. In general, the statutory pension age and the age stipulated in pension plans will be assumed to be parallel, even if the company plan specifies age 65, and equal actuarial value in the case of a company pension change does not necessarily exempt employers from having to justify the change according to the three-level theory. Whether the reasons required to justify the change in the plan have actually been provided may not be determined with final certainty when making the change, because the Federal Labor Court has quite nonchalantly transferred the assessment date to some point in the future. Case history in this context, however, may provide some guidance. If employers introduce a new pension plan, it is advisable to expressly couple the pertinent pension age for the company pension with the respective statutory standard age instead of specifying a certain age, namely since further increases in the statutory pension age cannot be ruled out. But because such increases are even more probable than the current increase was (it was the first since 1916!), it should not be assumed that the Federal Labor Court will once again find a correlation between the statutory and company pensions unless demographic conditions require it.

EMPLOYER'S QUESTION REGARDING SEVERE DISABILITY

by ***Friederike Göbbels***

Munich
German Attorney at Law; Certified Labor and Employment Lawyer
fgoebbels@jonesday.com
+49.89.20.60.42.200

QUESTION UPON EMPLOYMENT

In the past, an employer recruiting new employees was permitted to ask applicants about any severe disabilities they might have. This was justified by the fact that the employer had to fulfill various obligations in connection with the employment of severely disabled persons; one such obligation required the employer to ensure that 5 percent of his workforce comprised severely disabled employees—or pay an equalization fee.

Since the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, or "AGG") took effect in 2006, "disability" has been one of the criteria triggering legal protection against discrimination. Against this background, it is disputed whether, under normal circumstances, it is still admissible to ask an applicant about severe disability or equivalent status. The predominant opinion in commentaries holds otherwise. A different provision shall apply only if the absence of disability is

required to fulfill the tasks related to the offered position. But the general prohibition of the question regarding disability in the recruiting process has not yet been confirmed by the highest court, and the German Federal Labor Court (*Bundesarbeitsgericht*), in its decision dated July 7, 2011 (2 AZR 396/10), left the question undetermined. Therefore, until greater clarity has been reached in this regard, employers are advised to refrain from asking about severe disability during the recruiting process.

ASKING ABOUT DISABILITY SIX MONTHS INTO THE EMPLOYMENT RELATIONSHIP

A current decision by the Federal Labor Court (dated February 16, 2012—6 AZR 553/10) deals with the legality of asking questions about severe disability in an existing employment relationship. In the case at hand, dismissals for operational reasons were inevitable. In the process, an employee's severe disability had to be taken into consideration as one of four social-selection criteria. The employer wanted to examine all relevant social data available. All the employees were therefore provided with questionnaires in which the employer collected information regarding birth date, marital status, number of children in need of support, and the existence of a severe disability or equivalent status. The plaintiff, untruthfully, denied having a severe disability or equivalent status. As a result of the social-selection process, he was dismissed for operational reasons without prior input from the government agency overseeing the protection and integration of disabled persons. In the dismissal-protection proceedings, the plaintiff unsuccessfully referred to his status as a severely disabled person, which he had not mentioned in the questionnaire.

The Federal Labor Court stated that, in the given situation, the employer had a legitimate interest in the question about the employee's severe disability, since it had to be

taken into consideration during the social-selection process and because official proceedings must take place before notice is given to a severely disabled person pursuant to Sections 86 *et seq.* of the German Social Security Code IX (*Sozialgesetzbuch IX*).

Interestingly, the Federal Labor Court has made a general statement, going beyond the case in question, to the effect that an employer may ask about severe disability after the employment relationship has existed for at least six months, since it is only after this period that special protection against dismissal is extended to severely disabled persons, or persons of equivalent status. According to the Federal Labor Court, asking this question is necessary if the employer is to act according to the law, since there are numerous legal obligations connected with the employment of a severely disabled person or a person of equivalent status. These include the obligations connected with the quota mentioned above and the granting of supplementary vacation, in addition to the aforementioned consideration in the social-selection process prior to dismissals for operational reasons.

According to the Federal Labor Court's assessment, this result does not conflict with legal data-protection issues. Despite the fact that such data is sensitive and subject to special protection, it is not generally exempt from data collection and processing and may be admissible if specific justification exists. The collection of this data may be necessary "to assert, exercise or defend legal claims" within the meaning of Section 28 par. 6 no. 3 of the German Federal Data Protection Act (*Bundesdatenschutzgesetz*), which includes the employer's obligations with a view to the protection of severely disabled persons. Justification via the Federal Data Protection Act, according to the Federal Labor Court, does not lead to the violation of an employee's basic right to self-determination regarding private information.

The plaintiff's allegation of discrimination on the basis of disability, as prohibited by the AGG and allegedly triggered by the questionnaire, was clearly denied by the Federal Labor Court. The question unambiguously served to "protect the rights and interests of the severely disabled employee but not to disadvantage him compared to non-disabled employees."

CONCLUSION

Whether it is admissible to ask about severe disability or equivalent status during the recruiting process is as yet undetermined. The predominant opinion opposes the employer's right to ask such questions if the position has no specific requirements that justify the employer's interest in this information.

However, in order that it may act according to the law, the employer is generally allowed to ask about a severe disability or equivalent status after the employment relationship has existed for six months, although the question must not be connected to a certain occasion; i.e., the reason for the question must not be disclosed to the employee.

JONES DAY LABOR LAW SEMINAR

"EUROPEAN LABOR & EMPLOYMENT-RELATED COMPLIANCE ISSUES"

On June 21 we organized a client seminar in Paris, as well as a webinar in which we examined compliance matters with reference to labor law from the point of view of different European jurisdictions (Germany, France, Belgium, England, Spain, and Italy). In this context, we took into consideration the influence of EU provisions as well as the perception of the United States, examining laws that have an international impact, such as the Sarbanes-Oxley Act and the Foreign Corrupt Practices Act. Our labor law team has prepared comprehensive documentation of the seminar. If you were unable to attend but are interested in this documentation, please let us know, and we will send it to you either by mail or in electronic form.

BGH: DISCRIMINATION PROVISIONS APPLY FOR THE BENEFIT OF MANAGING DIRECTORS, TOO

by ***Dr. Markus Kappenhagen***

Düsseldorf
German Attorney at Law; Certified Labor and Employment Lawyer
mkappenhagen@jonesday.com
+49.211.5406.5500

For the first time, the German Federal Supreme Court (*Bundesgerichtshof*, or "BGH") has decided that the antidiscrimination provisions set forth in the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) apply for the benefit not only of employees, but of managing directors as well. In its judgment of April 23, 2012 (II ZR 163/10), the BGH awarded damages to a 62-year-old managing director.

After his five-year contract expired, the managing director wanted to negotiate for a renewal, but his employer hired a 41-year-old instead. The chairman of the supervisory board justified this action in the local press by stating that the company was aiming for an age limit of 65 for executive positions and thus had chosen an applicant who could run the company for the long term. According to the BGH, this statement was an indication of age discrimination and thus an unlawful prejudicial treatment, which justified the plaintiff's claim for damages. The BGH considered the two months' salary awarded by the lower court to be insufficient and remanded the case to the higher regional court (*Oberlandesgericht*).

The judgment should not be overrated in practice. It is definitely not the case that shareholders' freedom to appoint and dismiss managing directors or to allow their contracts to expire is limited. However, the statements by the chairman of the supervisory board proved to be the company's undoing. Companies should therefore learn from this decision that the failure not only to extend employment offers but also to renew employment contracts will have to be carefully justified in the future.

PARTICIPATION OF THE WORKS COUNCIL IN MASS DISMISSALS

by ***Julia Zange***

Frankfurt
German Attorney at Law; Certified Labor and Employment Lawyer
jzange@jonesday.com
+49.69.9726.3939

If an employer plans to carry out a mass dismissal, special information and consultation duties must be carried out vis-à-vis the works council. The employer must provide the works council with pertinent information in due time and notify it in writing of the reasons for the planned dismissals; the time of the dismissals; the number of, and types of jobs held by, the employees to be dismissed; and the criteria used to select them. In addition, the employer has to consult with the works council about options for avoiding the dismissals and mitigating their consequences. The opinion of the works council is to be enclosed with the notification of mass dismissal that is sent to the employment agency. If the employer fails to involve the works council, or if it fails to do so correctly or in due time, it may generally not validly announce the mass dismissal to the employment agency, and consequently, it may not give notice of termination. For this reason alone, the utmost care is to be exercised with respect to the participation of the works council.

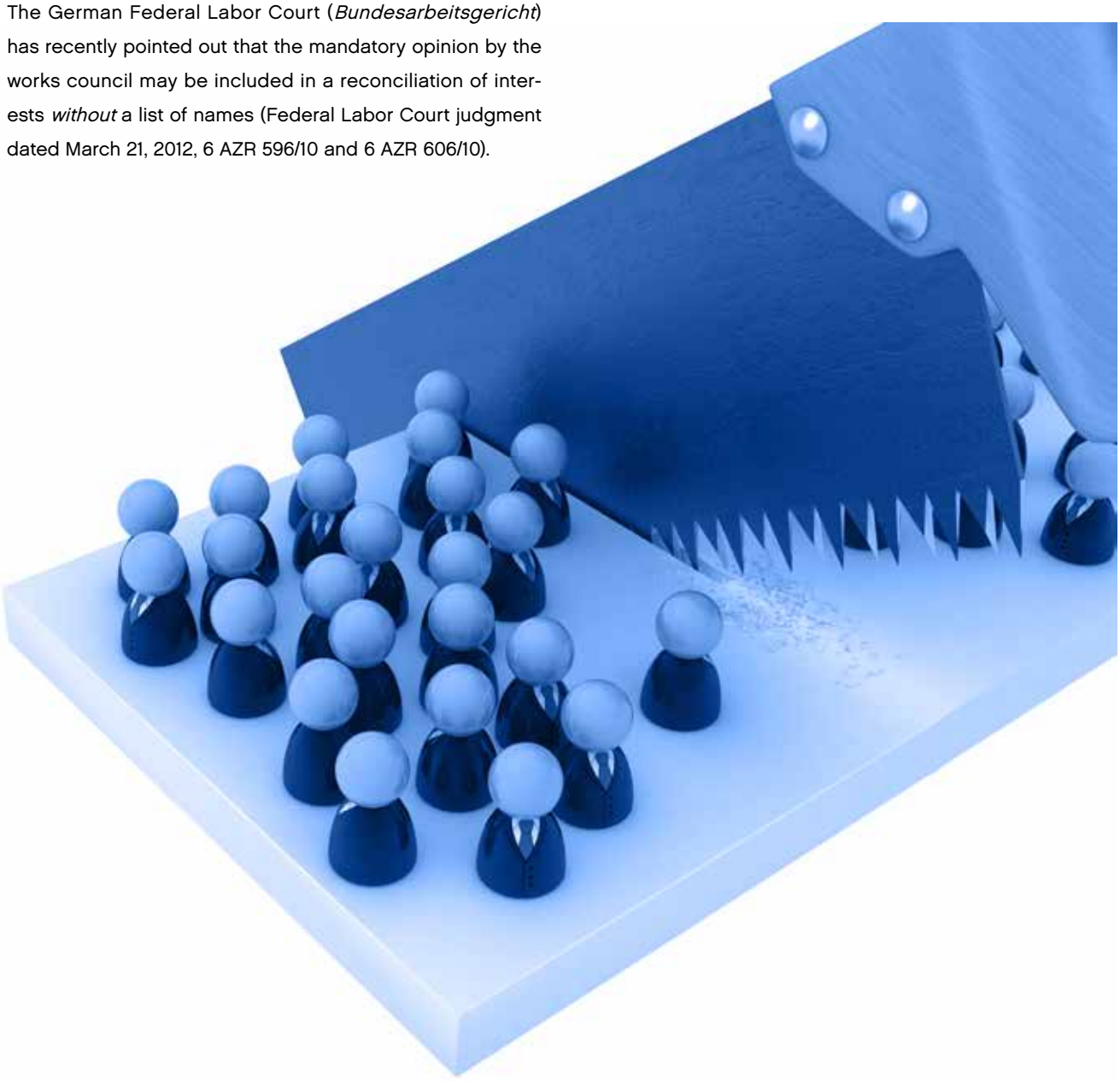
RECONCILIATION OF INTERESTS INSTEAD OF OPINION BY THE WORKS COUNCIL?

The consultation duty is generally fulfilled if the works council and the employer agree upon a "reconciliation of interests" (an agreement on whether the operational changes are necessary and, if so, the details pertaining thereto), along with a list of names of the employees to be dismissed. (The list of names, however, is not required for a valid reconciliation of interests.) The reconciliation of interests is sent, along with the notification of mass dismissal, to the employment agency in place of the works council's separate opinion on the mass dismissal, as expressly provided in the German Employment Protection Act (*Kündigungsschutzgesetz*, or "KSchG"), Section 1 para. 5 sentence 4.

The German Federal Labor Court (*Bundesarbeitsgericht*) has recently pointed out that the mandatory opinion by the works council may be included in a reconciliation of interests *without* a list of names (Federal Labor Court judgment dated March 21, 2012, 6 AZR 596/10 and 6 AZR 606/10).

THE CASE

An insolvency administrator informed the works council about a planned mass dismissal, and they agreed upon a reconciliation of interests without a list of names. The reconciliation of interests stated: "The works council does finally see no options to avoid the intended mass dismissals. The consultation procedure pursuant to Section 17 Para. 2 KSchG is thus concluded." Subsequently, the insolvency administrator notified the competent employment agency about the mass dismissal and enclosed the reconciliation of interests. However, individual employees filed actions against unfair dismissal, contending that their dismissals were formally ineffective because no works council opinion had been enclosed with the notification of mass dismissal.



They stated that the reconciliation of interests without a list of names was not sufficient. The courts of first and second instance agreed that the dismissal was ineffective.

THE DECISION

The Federal Labor Court agreed with the insolvency administrator, stating that while a reconciliation of interests without a list of names does not *replace* an opinion by the works council, an opinion could nevertheless be *included* therein. According to the Court, the purpose of the works council's opinion on the mass dismissal is to inform the employment agency of the options the works council believes can prevent the need for dismissals. The Federal Labor Court held that an opinion of the works council may also be part of the wording of the reconciliation of interests and does not require any further or separate statement in a separate document. The dismissals were thus considered effective.

Employers should welcome this decision. If the works council has already passed an opinion on the mass dismissals while negotiating the reconciliation of interests, it would be pure formalism to demand another statement in addition thereto, particularly since the procedure established by Section 17 KSchG is very formalistic anyway.

Moreover, an agreement by way of a reconciliation of interests is not mandatory. The consultation duty pursuant to Section 17 para. 2 KSchG does not involve a duty to agree upon the scope and consequences of the mass dismissal.

FURTHER PARTICIPATION RIGHTS OF THE WORKS COUNCIL

Many of the works council's other participation rights have remained unchanged, including the following:

- To be informed of personnel planning, pursuant to Section 92 of the German Works Council Constitution Act (*Betriebsverfassungsgesetz*, or "BetrVG").
- To be informed of the reduction of operations, pursuant to Section 106 para. 3 no. 6 and Section 109a BetrVG.
- To negotiate the reconciliation of interests and social compensation plan due to an intended operational change of the facility, as in the case of a significant reduction of operations, pursuant to Sections 111 and 112 BetrVG.

In addition to the notification of the mass dismissal, the works council must also be informed about the individual planned terminations pursuant to Section 102 BetrVG, since information about the terminations overlaps only partially with the mass-dismissal notification.

Although there are different rights of participation, the procedures for each one do not have to be conducted separately. For example, informing the works council of each individual termination pursuant to Section 102 BetrVG and of the mass dismissal itself may be done in a single procedure, provided that all individual requirements are observed and the information is clear. To avoid any ambiguities, however, the works council must understand which duties of participation are being fulfilled in each case.

Finally, it should be noted that the information, consultation, and notification duties apply even if the employer belongs to a group of companies for which a single controlling company makes the authoritative decisions.

PRIVATE USE OF A COMPANY CAR WHEN THE EMPLOYEE IS UNABLE TO WORK

by ***Claudia Röthlingshöfer***

Munich
German Attorney at Law; Mediator
croethlingshoefer@jonesday.com
+49.89.20.60.42.200

If an employee has been provided with a company car, time and again the following questions arise: Under what conditions may the car be withdrawn, and which contractual regulations are possible? This article is intended to shed light on this topic and disclose particular problem areas.

CONTRACTUAL BASICS

If a company car is provided to an employee, it is urgently recommended that the employer stipulate this benefit by contract, taking into account the following issues.

IS PRIVATE USE PERMITTED?

Whether or not to provide the company car for the employee's private use is the principal decision in this context. Private use constitutes a real performance in kind and thus serves as a consideration for the work performance owed. Only if the car is provided exclusively for business purposes is such a provision not deemed a form of remuneration. The consequences in this context are far-reaching: if private use is not allowed, the employer may request the return of the company car at any time. In such a case, the car is considered a means for work that the employee is not entitled to possess. In the case of private use, however, requesting the car's return is either not possible at all or possible only under restricted conditions.

Discussed herein is the issue of the right to revoke an agreement for the provision of a company car, as well as other return duties, particularly in the event of the employee's inability to work.

FORMULATING A RIGHT TO REVOCATION

A standard employment contract permitting revocation of the private use of a company car must not only contain the precise reasons for the revocation, but also factually justify them. According to the rulings of the German Federal Labor Court (*Bundesarbeitsgericht*), these factual reasons must be specified in the employment contract in a manner that makes clear to the employee what he/she may expect. The employee must be able to recognize the conditions under which private use of the car will be suspended.

Such factual reasons could include use of the car in violation of contract provisions or a precisely stipulated decrease in the company's annual result compared to the previous business year. The contract should describe in sufficient detail the conditions under which the return of the company car should be expected.

In contrast, a clause in a standard employment contract allowing revocation of private use at any time may not withstand a "content control" proceeding; in such a proceeding, the court examines the contract to ensure that the employer has not incorporated ambiguous provisions that may be interpreted to its advantage. Such a clause disadvantages the employee in an inappropriate manner, since the right to revocation is not bound to any factual reason. This is also true of a contract permitting revocation simply because private use of the car "no longer appears to be reasonable under market and economic aspects."

However, even revocation based on sufficient reasons will not withstand a content-control proceeding if the car's monetary benefit to the employee exceeds 25 percent of his/her total remuneration.

IS THE (TEMPORARY) WITHDRAWAL OF A COMPANY CAR POSSIBLE WHEN THE EMPLOYEE IS UNABLE TO WORK?

Under certain conditions, the employer may request the surrender of a company car provided for the employee's private use. As a rule, if the obligation to continued remuneration expires, the employee's right of use expires as well.

The car will be available to the employee in times of illness as long as the employee continues to receive wages. In other words, this claim exists, subject to a period of extended remuneration specified in the employment or collective agreement, for a period of up to six weeks (Section 3 para. 1 of the German Act on Continued Payment of Wages and Salaries During Sickness (*Entgeltfortzahlungsgesetz*)). Once the employer ceases to pay the employee's wages, the employee's right to private use of the car ceases until his/her recovery. From that point, the employer may request the return of the company car, unless the contractual agreement provides otherwise.

Consequently, private use of the company car is owed only when the employer is obligated to pay remuneration. Accordingly, during parental or other leaves when the employee does not receive wages, the right to use the company car for private purposes is suspended.

The obligation to immediately return the car to the employer in case of illness—such as when the car is needed by a substitute employee—may also result from the employee's duty of good faith. In this case, however, an employee who is still receiving wages is entitled to compensation for the

lost value. Such compensation claim also applies during vacation and maternity leave, as well as to released members of the works council.

MUST THE EMPLOYER PROVIDE ADVANCE NOTICE OF THE NEED TO RETURN THE CAR?

According to the case law of the Federal Labor Court, an employer that wishes to revoke private use of the company car is not required to provide the employee with advance notice. However, the Regional Labor Court of Lower Saxony recently decided that a contractual clause which provides for the immediate return of the company car without compensation after the termination of the employment relationship should provide advance notice of at least four weeks. Such advance notice was recommended because: (i) the employer usually does not immediately hire a replacement employee who will require the car; and (ii) the terminated employee often depends on the car in his/her search for a new position. However, the employer in this particular case has filed an appeal with the Federal Labor Court, and the decision is still pending. In particular, it remains to be seen whether the Court will decree that the return of a car due to inability to work also requires advance notice.

CONSEQUENCES IN THE EVENT OF UNJUSTIFIED WITHDRAWAL OF THE COMPANY CAR

If the employer unlawfully and culpably withdraws the company car, it is obligated to pay damages to the employee. The means of calculating such compensation has been disputed; the Federal Labor Court assumes that the employee may abstractly calculate his/her damages, but the exact calculation will have priority. If the employee is forced to use a comparable private car, the claim for loss of use is to be limited to the exact costs spent in this context (depreciation, taxes, insurance, costs for repairs and maintenance, fuel).

EXPIRATION OF THE ENTITLEMENT

The right to use the company car expires with the end of the employment relationship. Subsequently, the employee must return the car. If the employee was allowed to use the car for private purposes, he/she does not have to return the car until the expiration of the notice period in case of a termination. This applies even if the termination is disputed and the employee has, for example, initiated an action for protection against dismissal. According to a 2012 judgment by the Regional Labor Court of Hamm, other provisions apply if the termination is obviously ineffective.

In this context as well, the rule applies: if private use was not allowed, the employer may request the surrender of the company car at any time—which includes the beginning of the employee's notice period.

CONCLUSION

Employment contract clauses referring to the provision of a company car must be formulated carefully. But if a conflict arises when an employee is to be deprived of a company car despite an existing employment relationship, prior analysis of the legal situation is recommended. Otherwise, the employer may be confronted with damage claims.

LAWYER CONTACTS

FRANKFURT

NEXTOWER
Thurn-und-Taxis-Platz 6
60313 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

DÜSSELDORF

Königsallee 61
40215 Düsseldorf
Tel: +49.211.5406.5500
Fax: +49.211.5406.5501

Dr. Markus Kappenhagen
German Attorney at Law;
Certified Labor and
Employment Lawyer
mkappenhagen@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

JONES DAY GLOBAL LOCATIONS

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