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CONTENTS

COSTS FOR FURTHER TRAINING: BEWARE OF REPAYMENT CLAUSES

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Employers are often willing to provide employees with further training. Such financial support is typically motivated by the expectation that the knowledge and/or skills acquired by the employee will inure to the benefit of the company in the future. However, if the employee leaves the company shortly after or even before the training is completed, the employer will understandably wish to be paid for the costs it incurred for the training. This article reveals the limitations surrounding an employer's claim for reimbursement.

THE NECESSITY OF AN AGREEMENT

The employer and employee must first agree upon the employee's obligation to reimburse the employer for the cost of further training if the employee leaves the company within a certain period of time, since there are no legal presumptions leading to the automatic duty of repayment. The agreement should be in writing and signed by both the employer and the employee. Whether the agreed-upon repayment obligation is enforceable will be assessed on the basis of principles developed by the German Federal Labor Court (*Bundesarbeitsgericht*; BAG)—and

any mistakes in the agreement can render the reimbursement claim unenforceable.

THE EMPLOYER'S LEGITIMATE INTEREST

To be in a position to claim repayment, the employer must have an evident interest in the skills taught in the employee's training. This is generally the case if the employee acquires new qualifications and skills that can be useful for the company. In contrast, a legitimate interest on the part of the employer may be denied if the employee merely attends refresher courses, since such courses generally do not enable employees to obtain higher-paying positions elsewhere.

ADEQUATE DURATION OF THE COMMITMENT PERIOD

It is necessary to assess the individual reasonableness of any repayment clause. The most important question is whether the period during which repayment is required in the case of resignation is reasonable with respect to the costs invested and the scope of the training. As a rule, the longer the training course, the longer the commitment period. Established practice (e.g., BAG judgment dated January 19, 2011, 3 AZR 621/08) has resulted in the following guidelines, which should be tailored to the individual circumstances:

- If the training takes up to one month with continued payment of remuneration, the employee's commitment period must not exceed six months.
- If the training takes up to two months, a commitment period of up to one year can be justified.
- If the training takes three to four months, the commitment period may last up to two years.
- If the training takes six months to a year, a commitment of up to three years can be justified.
- If the training takes two years, a commitment period of up to five years may be admissible.

DIFFERENTIATING BETWEEN THE REASONS FOR RESIGNATION

It is necessary to specify the circumstances under which a resigning employee will incur the obligation to reimburse the employer for training. For example, the employee may avoid the payment obligation if he/she is not ultimately responsible for the termination. But simply differentiating between a notice of termination given by the employer and a resignation tendered by the employee is insufficient, since an employee may resign because of a breach of contract by the employer (e.g., BAG judgment dated December 13, 2011 – 3 AZR 791/09). In accordance with current trends in legal practice, it is recommended that the employer stipulate the repayment obligation only if:

- After completing the training, the employee resigns within the specified period of time for reasons outside the sphere of the employer (e.g., resigning without providing notice for a reason for which the employer is not responsible); or
- The employer terminates the employee without notice for an important reason for which the employee is responsible, such as theft or embezzlement, or with notice for a reason based on the employee's conduct, such as disobedience or repeated tardiness.

These differentiations should be clearly described in the repayment agreement.

TRANSPARENT REPAYMENT AMOUNT

According to the most recent ruling of the BAG (judgment dated August 21, 2012 – 3 AZR 698/10), a repayment clause is ineffective if neither the exact nature of the costs in question nor their amounts are specified. While a precise determination may not always be possible, the data must be presented in a way that enables the employee to evaluate the risk of repayment. It is therefore necessary for the agreement both to provide a precise and final description of the individual items (e.g., tuition, travel expenses, accommodation charges, and meal allowances) and to specify the parameters for calculating them (e.g., mileage allowance for travel or daily rates for accommodations and meals). Failure to specify the calculation method—i.e., naming only a lump sum or maximum amount—may render the repayment agreement ineffective.

ADEQUATE REPAYMENT AMOUNT

The repayment amount must be reasonable in relation to the time period during which the employee's leave might trigger repayment. If the amount in question is rather high, it may be advisable to arrange the repayment obligation so that the longer the employee stays with the employer, the less he or she must pay; indeed, a court is more likely to enforce repayment when the time period in question is shorter. We therefore recommend stipulating a monthly reduction of the repayment amount on a pro rata basis. For example, if the employee's repayment commitment is for two years, the amount could be reduced by 1/24 for each month that the employee remains with the employer after concluding the training.

CONCLUSION

The agreement concerning the obligation of a resigning employee to reimburse his/her employer for further training is governed by numerous requirements. Because mistakes can render the repayment obligation unenforceable, a safe arrangement is possible only when the guidelines set forth in established legal practice are observed and when the relevant facts in the individual case are taken into consideration.

TRANSITIONAL COMPANIES (*TRANSFERGESELLSCHAFTEN*) AS INSTRUMENTS FOR CHANGES IN OPERATIONS

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In larger restructurings involving staff reductions, the transitional company has become an established means of reorganization. It offers advantages for the employer, the works council, and the staff—without necessarily leading to higher costs for the company.

In several recent cases, a transitional company was used in a way deemed by the labor courts to be an abuse of legal rights. Thus, it is forbidden for employees to change to a transitional company for a few hours, only to be rehired by the acquirer (see the article herein by Georg Mikes).

If, however, the parties involved observe certain legal prerequisites, this procedure may be a reasonable component of a social plan.

SENSE AND PURPOSE

In this situation, the employee is given the opportunity to join a transitional company within the scope of a trilateral contract and to remain there for up to a year. During this time, he/she is not unemployed, receives wages, and is covered by social security. The transitional company is intended to qualify and support an employee affected by staff reduction within the scope of a position whose duration is limited to one year. The goal is to find a job for him/her in the "primary labor market" as soon as possible.

PREREQUISITES

The basis of a transitional company is a social plan concluded between the employer and the works council during the change in operations. Since 2001, the German Works Council Constitution Act (*Betriebsverfassungsgesetz*; BetrVG) has provided that social plans can no longer be restricted to plain settlement provisions. Instead, the parties are supposed to examine the possibility of a direct employment transfer supported by the German employment agency as well. After consulting with the employment agency (a step that has been mandatory since 2011), the works council and the employer conclude a social plan providing for the formation of a transitional company. At the same time, a shop agreement regarding the details of the transitional company is usually concluded. The employees facing unemployment will be combined into an "organizationally independent unit" (as statutory law describes the transitional company). For this purpose, either the employees join one of the transitional companies—a large number of which have recently come into existence—or the employer establishes an organization separate from the previous operations that oversees job placement, employee qualification, etc. However, the independent implementation of a transitional company by the previous employer is worthwhile only in the event of a large-scale staff reduction.

The employees receive the offer to conclude a trilateral contract. By means of this agreement, the employment relationship with the former employer is terminated, and temporary employment with the transitional company is offered. Joining the transitional company is optional, but since the alternative is often termination of the employment relationship for operational reasons, the number of employees who accept the offer is usually quite large.

FINANCING THE TRANSITIONAL COMPANY

A decisive financial element of transitional companies is public subsidization by means of the "short-time work allowance" pursuant to the German Social Code III. This state subsidy is replenished by the employer so that the employee, during his/her time in the transitional company, may receive almost the full amount of the net remuneration last paid.

The employee is entitled to this benefit from the employment agency. For reasons of practicality, however, the employer is responsible for filing the claim and receives the payment directly from the employment agency. The short-time work allowance (*Transferkurzarbeitergeld*)—a benefit similar to payment in the case of partial unemployment or short-time work—is paid for a maximum of 12 months; the allowance constitutes 60 percent of the last net income or, for employees with children, 67 percent. Another prerequisite for the granting of the allowance is the employee's participation in a "profiling" before joining the transitional company. In the course of the profiling, the employee's integration prospects are determined over a two-day evaluation process. Currently, the costs of a profiling (to be borne by the employer) regularly amount to €300 to €450, of which the employment agency usually pays 50 percent.

Subsidization by the employment agency is not possible if the intention is to continue the employee's employment in either the same company or an affiliated one (the "revolving-door effect"; see the article herein by Georg Mikes).

If the employment agency does not refund costs and/or pay subsidies, the employer must bear the costs of the transfer measures in full. These costs include, in particular, the so-called remnant costs for the employee remuneration: social security contributions calculated for 80 percent of the gross income, payments for vacation and holidays, and replenishment of the short-time work allowance. (The amount of this replenishment is to be negotiated with the works council. Most of the time, the replenishment results in total remuneration for the employee in the transitional company in the amount of 75 to 85 percent of the last net wages. The employment agency and the transitional

company discourage higher percentages, as these reduce the incentive for employees to look for new jobs.) The employer also bears the "qualification costs" (e.g., for training on how to apply for a new job), which usually total about €1,000 per employee.

In most cases, companies try to reduce the costs of the transitional company by having the employees cofinance the employer's contribution to the transitional company. This is achieved by transferring the employee notice periods to the transitional company. After notice of termination for operational reasons has been given, the employer does not have to pay the monthly salary until the end of the notice period. The employee, however, immediately joins the transitional company by means of a trilateral contract, and the employer saves the corresponding labor costs.

In addition, the social plan may include a provision stating that employees who join the transitional company will receive little or no severance pay—yet another cost-saving measure for the employer. Plus, the time spent in the transitional company may be staggered by age or period of employment. For instance, the time spent by an employee in a transitional company is often twice as long as his/her notice period, though it may not exceed 12 months.

Finally, the employer must bear the administrative costs of the transitional company (usually about €200 per employee per month in the transitional company).

THE ADVANTAGES OF A TRANSITIONAL COMPANY

From the employee's point of view, a decisive advantage of the transitional company is that he/she is not out of work, but in an actual employment relationship. The employee receives training, gains additional qualifications, and is supported in his/her efforts to find a new job. Social security contributions continue to be paid. If an employee cannot find a job after having left the transitional company, then—and only then—will he/she receive unemployment benefits. The employee may even withdraw from the transitional company to accept a position on a probationary basis with a new employer; if the employee does not receive a permanent offer, he/she may return to the transitional company.

The decisive advantage for the employer is that the vast majority of employees usually leave (by common consent within the scope of a trilateral contract), and actions against unfair dismissal are thereby avoided. Companies can often save part of the notice-period wages if the employees immediately join the transitional company under contract. The phase-out salaries that would otherwise have been paid are usually used in part to finance the employment relationships in the transitional company. Depending on the outcome of the negotiations for the social plan, severance pay may also be saved. Finally, all transitional companies now offer to calculate the expected costs in advance and to provide advice to employers.

When deciding which transitional company is the right one, the employer and the works council should consider the "interconnectedness" of the transitional company within the region and its placement rate in former projects. Finally, the transitional company must have the necessary administrative resources, offices, and advisors to implement the project.

TRANSFER OF BUSINESS AND INSOLVENCY

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THE TARGET CONFLICT BETWEEN EMPLOYEE PROTECTION AND CONTINUATION OF A BUSINESS BY SALE

The purpose of Section 613a of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB) is to protect employment relationships when a business or part of a business is acquired by a new owner, by transferring the employees by operation of law directly from the former owner to the acquirer. Established practice has made clear that this

section applies to the acquisition of an insolvent business as well. If the insolvency administrator concludes that the business cannot be continued, he/she will look for a purchaser. However, there will be fewer potential purchasers if the administrator determines that the employees belonging to the business have employment contracts which are "too advantageous"—a situation that might well have contributed to the insolvency. Therefore, it is not surprising that insolvency administrators, together with potential purchasers, often look for ways to sell insolvent businesses without applying Section 613a BGB. Sometimes this is the only way to save at least part of the business and the corresponding jobs.

THE LEGAL LIMBO OF CIRCUMVENTING SECTION 613a BGB

Attempts to simply offer cancellation agreements to employees of an acquired company in exchange for new but less favorable employment contracts with the acquirer seem straightforward but are actually questionable. The logic of such an approach is obvious—there would be no transferable employment due to the cancellation agreement, and the employee would "start anew" on the basis of the newly concluded employment contract. However, the German Federal Labor Court (*Bundesarbeitsgericht*; BAG) deemed this approach to be an inadmissible circumvention of the law several decades ago—and applied Section 613a BGB despite the conclusion of such contracts. The result is that in these cases, the employees in question were deemed to have been transferred, thus maintaining their former favorable employment conditions and seniority. But this had the effect of discouraging potential purchasers, and consequently many struggling businesses did not survive—to the detriment of their employees.

NEW APPROACHES

In the past, more "subtle" approaches were taken with the same objective, e.g., by means of a "job creation and qualification company" (or, as it is called when the focus is on other aspects, a "transitional company"; see the article herein by Dr. Markus Kappenhagen). In a recently decided case (BAG judgment dated August 18, 2011, 8 AZR 312/10, press release 67/11), the insolvency administrator offered trilateral contracts to the employees. These provided for withdrawal from the insolvent company and entry into a job creation company. In fall 2005, several trilateral forms were signed by each employee, which in each instance contained different dates in the year 2006 for their transfer to the job creation company. However, only one such date was intended to be decisive, which the job creation company was to determine later by countersigning one of the contracts.

In May 2006, two more trilateral contracts of this type followed, this time with reference to potential subsequent employment with the planned acquirer of the business, who intended to retain a majority of the company's 452 employees. On May 29, 2006, the job creation company signed the contract providing for the withdrawal from the insolvent company, as of May 31, 2006, of the employee who lodged the claim; the contract also provided for his entry into the job creation company as of June 1, 2006. On June 1, the claimant attended an employees' meeting in which the 352 employees to be retained by the acquirer were chosen by lot; the claimant was among them. Because the business was intended to be continued as of June 2, the claimant's employment with the job creation company was canceled as of the end of June 1, 2006.

Not surprisingly, the BAG considered this approach too to be a circumvention of Section 613a BGB. The parties involved had avoided explicit confirmation of further employment with the acquirer in consideration for withdrawal from the insolvent company and had involved a job creation company. Ultimately, however, despite considerable contractual efforts, the claimant's formal employment with the job creation company lasted only one day—and this had been planned. The BAG assessed these facts to mean that the acquirer may not use the one-day interruption of the employment to argue that Section 613a BGB does not apply. According to the BAG, despite the decision by lot, there was no arrangement aimed at final withdrawal from the company to be acquired; i.e., the lottery was merely window dressing for an in-fact promise of employment to the vast majority of the employees.

The BAG made a similar decision in another case (judgment dated October 25, 2012, 8 AZR 572/11; press release 76/12). In that case, the acquirer concluded a collective bargaining agreement with the German labor union IG Metall in March 2008. It intended to further employ 1,100 of the 1,600 employees of the insolvent company indefinitely and another 400 at least for a limited period of time. Subsequently, the acquirer purchased the tangible current

assets. In April 2008, the insolvency administrator agreed on a conciliation of interests and a social plan with the works council and the labor union for a transferring restructuring. Finally, at the beginning of May, the claimant signed a trilateral contract by which he would terminate employment with the current company effective May 31, 2008, and immediately thereafter—i.e., as of 12 a.m. on June 1, 2008—change over to a job creation company. Simultaneously, he signed several contracts presented to him that provided partly for limited and partly for unlimited employment with the acquirer as of 12:30 a.m. on June 1, 2008; the contract that would apply was to be determined by the acquirer. On May 30, 2008, the acquirer opted for a contract limited to 20 months. The employee filed a complaint for a declaratory judgment that the limitation was ineffective, and his claim was successful.

In this case as well, the BAG arrived at the conclusion that this constituted an inadmissible circumvention of Section 613a BGB. In its view, the maze of diverse agreements caused the employee to believe that he would soon be employed by the acquirer of the business.

CONCLUSION

These decisions, whether welcome or regretted, are nevertheless consistent. The BAG has continued the path it has taken so far with regard to circumventions, showing that only measures referring to a "real" withdrawal from the business to be transferred fall *outside* the scope of Section 613a BGB. The involvement of job creation companies in which the employee is formally "parked" for 30 minutes or a single day does not offer any advantage. Rather, this is seen as a disadvantage, since the employee's contractual freedom is ignored. Employees who initially indicated that they would rather work under worse conditions than risk losing their jobs completely may later refer to the ineffectiveness of the contracts they themselves signed, and this will not count as an act against good faith and loyalty. However, potential acquirers will consider this and possibly refrain from engaging in takeovers that would have saved jobs.

TEMPORARY WORKERS IN PERMANENT JOBS: A WORKS COUNCIL'S RIGHT TO WITHHOLD CONSENT?

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Since the revision of Section 1 of the German Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*; AÜG), employers have increasingly been confronted with works councils' refusal to consent to the use of temporary workers in positions not established "on a temporary basis."

In court rulings and legal literature, two questions in particular have arisen in this context:

1. How should the phrase "on a temporary basis" be interpreted?
2. Can the works council refuse its consent to the use of temporary workers in permanent jobs?

INITIAL SITUATION

Since having been revised at the end of 2011, Section 1 AÜG reads, in part: "Leasing workers to companies that are not their formal employers shall be effected on a temporary basis." By means of this amendment, the federal government implemented into national law the European Temporary and Agency Work Directive (Directive 2008/104/EC of the European Parliament and the Council of November 19, 2008, on temporary-agency work).

As the legislature did not define the phrase "on a temporary basis" in terms of time, considerable legal uncertainty arose, with judges providing different interpretations. This uncertainty is increasingly utilized by works councils to withhold consent when they believe the employer wants to hire temporary workers permanently.

THE MEANING OF "ON A TEMPORARY BASIS"

Three opinions have evolved regarding how the phrase "on a temporary basis" is to be understood:

The first opinion assumes that the use of temporary workers is "temporary" and thus admissible only if the existence of a factual reason for a time limitation according to the German Act on Part-Time and Fixed-Term Employment (*Teilzeit- und Befristungsgesetz*) can be affirmed at the time the employee is hired for a certain job. This view holds that the permanent use of temporary workers is per se excluded.

The second opinion holds that the phrase "on a temporary basis" merely serves as a safeguard against the unregulated use of temporary employees, a situation that must be judged on an individual basis. Accordingly, the hiring is deemed to be temporary if it covers temporary labor requirements. However, if the job actually becomes a permanent position, the employee in question can no longer be considered a temporary worker.

The third opinion assumes that the phrase "on a temporary basis" was included only to point out that the German legislature implemented the European directive by means of the amendment. Therefore, no maximum duration for the hiring can be assumed from the phrase. However, the use of temporary workers does not have to be limited in time from the outset and can also occur in permanent jobs.

MAY A HIRING COMPANY'S WORKS COUNCIL REFUSE TO GRANT ITS CONSENT?

If one agrees with the first opinion—that the phrase "on a temporary basis" not only has a clarifying function but also constitutes a prohibition on the hiring of temporary workers for permanent jobs—the question arises whether this constitutes a basis for the hiring company's works council to withhold consent for the hiring.

One possible reason for withholding consent is the assumption that such a hiring would infringe a law (Section 99 Para. 2 No. 1 *Betriebsverfassungsgesetz*; BetrVG). In other words, the deployment of temporary workers would be illegal if it was not made on a temporary basis.

Some observers believe that Section 1 AÜG does not constitute a prohibition and that therefore the hiring company's works council is not entitled to refuse its consent. This follows from the fact that the AÜG does not provide for any sanctions against employers who ignore it. (The opposite opinion, of course, holds that Section 1 AÜG does indeed constitute a prohibition and is therefore a reason for the works council to withhold its consent.)

Still another opinion holds that Section 1 AÜG technically does not constitute a prohibition but that the existence of a prohibition is not necessary for the refusal of consent—which means the works council does have the right to refuse.

OUTLOOK AND RECOMMENDED ACTION

Complaints have been filed with the Federal Labor Court (*Bundesarbeitsgericht*; BAG) against many of the court decisions made since the revision of the AÜG, with a decision by the highest court expected in the near future. Due to the uncertain legal situation, it is expected that, until a decision has been made, the likelihood that works councils will refuse to consent to the deployment of temporary workers will only increase.

The employer has several options:

1. The employer can conclude a shop agreement with the works council for the deployment of temporary workers until a decision by the highest court has been made. Although such an agreement does not preclude the withholding of the works council's consent, the potential for conflict is reduced if an agreement has been accepted by both sides before the problem arises in a specific case.
2. The employer can abstain from using temporary workers in permanent jobs.
3. If the employer intends to continue hiring temporary workers for permanent jobs and is not willing to

conclude a shop agreement, the only option is to obtain a court order in lieu of the works council's consent for the provisional continued employment pursuant to Section 100 BetrVG. While this may provide a solution, it also poses a risk, depending on the court's decision. However, if there is a factual reason for the provisional continued employment pursuant to Section 100 BetrVG, the temporary worker can be retained, at least until a legally binding court decision has been made.

BACKGROUND CHECKS ON JOB APPLICANTS: WHAT IS ALLOWED?

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The words of the poet Friedrich Schiller, "So test therefore, who join (forever)," apply not only to relationships between romantic partners, but to relationships between employers and employees as well, since the employer and employee enter into a permanent debt relationship upon concluding an employment contract. Once the federally mandated protection against unlawful dismissal applies (i.e., after six months), the employee can be terminated only under very restricted conditions.

INITIAL POSITION: THE EMPLOYER'S RIGHT TO ASK

The employer, understandably, would like to have as much information as possible about an applicant and his/her professional and personal/social qualifications prior to concluding an employment contract, in order to find out whether the applicant is "suitable." At a job interview and/or in a personnel questionnaire, the applicant answers questions regarding skills, knowledge, and experience; provides details about his/her vocational training or professional background; and even mentions personal interests and hobbies. However, the employer's interest in such information is in opposition to the applicant's personal rights and his/her right to privacy, as well as the protection of personal data. Who would like to admit to living with his/her parents, collecting weapons, reading comic books, having a string of traffic violations, keeping exotic pets, or preferring to spend the weekend in video arcades? From the employer's point of view, all this information might be of interest, but what does it have to do with the job?

The following applies: If any particular information is relevant to the position and the work, it is admissible to ask about it. Thus, a transport company is permitted to ask a potential truck driver about his criminal record as it relates to traffic violations. The company may also ask about vision defects and alcoholism, but the same questions may not be asked of a secretary or accountant. (The latter may be asked about his criminal record with regard to breaches of trust or offenses against property.) The less a question is connected to the job and its requirements, and the more it pertains to the person him- or herself, the less admissible it is. Thus, admissible questions must be answered truthfully, but in the case of inadmissible questions, the applicant is granted the "right to lie."

BACKGROUND CHECKS

Many companies refuse to settle for the information provided by the applicant on job applications and in personal interviews. So-called background checks (also known as "pre-employment screenings") therefore enjoy great

popularity; aimed at "enlightening" the employer on the applicant's background, they may be conducted either online or off. And just as employers are increasingly utilizing social-networking sites in the hiring and recruitment process, employees are engaging professional service providers like myID.com to improve their online reputations.

For employers, the most "popular"—i.e., the most frequently used—measures include verification of documents and certificates presented, examination of the applicant's financial situation and criminal record, inquiries into his/her physical- and/or mental-health status, and "Googling" the applicant's name. What is actually permitted?

The admissibility of background checks is generally based on two principles:

- The principle of *necessity*: The data must be necessary for making the decision to employ the candidate. However, the employer must be guided by the rules and principles that govern the right to ask questions during an interview.
- The principle of *direct inquiry*: As a rule, personal data must be collected directly from the person in question, i.e., the applicant. Data may be collected without the applicant's participation and/or from a third party only if this has been provided for or compulsorily stipulated by legal provision, or if collecting the information directly from the applicant would entail disproportionate time and effort and if an objective observer would conclude that the applicant's right to privacy does not supersede the employer's need to obtain this information from a third party. Furthermore, the applicant must always be informed of the hirer's decision to contact third parties.

VERIFICATION OF REFERENCES

An applicant may be asked to furnish documents for the verification of qualifications (academic studies/vocational training, language skills), professional history, and prior employment. In order to prevent forgery, an employer may ask for the presentation of originals/certified copies.

Calling the previous employer also is permissible, on the grounds that it is necessary to verify the information given by the applicant, although the development in legal practice remains to be seen. In any case, the applicant must be informed about this measure also.

FINANCIAL BACKGROUND

Examination of a candidate's financial situation is admissible only when the position necessitates a high degree of trust, as in the case of a top decision maker, an accountant who works with large sums, or an official who may be subjected to bribery attempts.

However, the employer does not have an individual right to information vis-à-vis the General German Credit Protection Agency (*Schutzgemeinschaft für Allgemeine Kreditsicherung e. V.*; SCHUFA); at best, the employer can ask the applicant to submit a SCHUFA report, which discloses all loan agreements pertaining to money and goods that the applicant has concluded with SCHUFA's contractual partners. However, taking this step can be highly problematic, since the report usually reveals facts about the employee's private life. Such information goes way beyond the facts necessary to make a hiring decision and thus should not be "necessary."

CRIMINAL BACKGROUND

Questions about possible criminal records and/or investigations may be asked only insofar as they are relevant to the type of vacancy to be filled, e.g., criminal records pertaining to offenses against property in the case of accountants and cashiers, or to traffic offenses in the case of drivers.

However, criminal records must not be revealed if they have been deleted from the applicant's certificate of good conduct (a formal certificate that registers any convictions the individual may have) in accordance with the provisions of the German Federal Central Register of Convictions (*Bundeszentralregister*; BZRG). All entries are deleted after a certain period, which, depending on the seriousness of the conviction, lasts between five and 15 years.

However, while the certificate of good conduct may be requested by the employer, it may be obtained from the police only by the applicant; the employer does not have the right to request this information directly from the competent authority.

HEALTH CHECK

Inquiries into the candidate's physical health are governed by strict standards, since these affect the applicant's private sphere.

Questions regarding illness and/or severe handicaps are inadmissible unless the lack of the same constitutes an "important and decisive professional requirement" and considerably affects the applicant's qualification for the job. Thus, in the case of a pilot or driver, questions regarding vision defects may be asked, and in the case of health-care personnel, it is permitted to ask about contagious diseases if colleagues, clients, or patients could be put at risk.

Requests for a health certificate and/or medical/psychological checkup may be admissible if the position requires a certain level of physical and/or mental fitness—as in the case of professional athletes, physical therapists, pilots, food-service workers, and health-care personnel—but the voluntary participation of the applicant is required. Diagnostic findings and/or medical results may be disclosed only with the applicant's consent.

INTERNET INQUIRIES

An internet inquiry can provide the employer with extensive data about the candidate, but information that is irrelevant to the hiring decision should not be pursued. An internet inquiry is admissible only if the data in question is "publicly available" and if the interests of the applicant do not obviously outweigh the legitimate interests of the employer.

"Publicly available" refers to information that can be gathered by means of search engines such as Google and Yahoo. This probably also includes the data contained in social networks like Facebook, which can be gathered without registering with the network via a search-engine query.

With regard to research using social networks, it is necessary to determine the accessibility and orientation of the network. Spare-time-oriented networks such as Facebook are usually used exclusively for private purposes; furthermore, an employer would have to log on and/or be a user itself, which means the data contained in such networks is not publicly available.

Professional networks such as XING and LinkedIn must be assessed differently; since they are usually used for commercial reasons, any data posted there by an applicant can be considered publicly available even if the employer has to log on to the network, provided that viewing of the profile has not been restricted to the applicant's "friends."

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