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WHITE PAPER

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Key German Labor and Employment Law Developments of 2019 and What's to Come in 2020

As the new year begins, it is a good time to look at key developments in German labor and employment law in 2019 and look ahead in 2020. With respect to 2019, corporate legal and human resources departments should be aware of new court rulings addressing fixed-term employment contracts, working time recording, the notorious two-week deadline for instant dismissals, and enhanced flexibility in drafting bonus clauses for board members.

In the coming year, there are several issues to be aware of, including a new minimum wage and anticipated changes concerning immigration law and whistleblower protections. Moreover, the German "Grand Coalition" still has a few reforms on the labor and employment law agenda.

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KEY GERMAN LABOR & EMPLOYMENT LAW DEVELOPMENTS OF 2019

Fixed-Term Employment Contracts

So far, the German grand coalition's plans to reform the law governing fixed-term employment has made no progress, and there is still no draft law. The coalition's specific proposals for change, announced in 2018, were that a maximum of 2.5% of the workforce must have fixed-term contracts with no justifying reason. Such contracts will be allowed for a maximum period of 18 months, instead of the previous 24 months, and only one possible extension would be permissible within this period.

Nevertheless, the labor courts must still evaluate cases concerning fixed-term contracts. According to the Federal Constitutional Court, there are only a few exceptions to the well-established rule that a time restriction on employment contracts with no justifying reason for the fixed term is ineffective if there has been an employment relationship between the parties "before." For example, such a time restriction may be effective in the case of previous employment very long ago or of a completely different nature than the present employment, or if there was a pre-employment of very short duration. In interpreting these exceptions, the Federal Labor Court ("BAG") (12.6.2019 - 7 AZR 429/17) held that a time limit in a contract for an employee who had worked for the employer in question almost nine years earlier was ineffective, reasoning that the previous employment was not "very long ago." Even previous employment 15 years earlier has been held insufficient to meet the "very long ago" standard. (April 17, 2019 - 7 AZR 323/17). In contrast, a time gap of 22 years was sufficient to justify a time limitation, according to the BAG, because such a long time gap presents no risk of the undesired chain limitations (21.08.2019 - 7 AZR 452/17).

In light of these decisions, employers should carefully consider whether, when, for how long, and in what function an employee has worked for the company previously before entering into a temporary employment contract with that employee. If the pre-employment was only a minor, short-term, or part-time job during university; was performed in a different function; or was sufficiently long ago, fixed-term contracts may still be permitted.

Working Time Recording

According to the much-discussed decision of the European Court of Justice ("ECJ") on May 14, 2019 (C-55/18), and as we wrote about on multiple occasions in 2019, employers must be in a position to precisely record their employees' working hours. According to the Working Time Directive 2003/88/EC, EU Member States must establish a system to record the daily working hours of all employees. Further, employees are not permitted to work more than 48 hours per week and must be provided a minimum rest period of 11 hours per day.

Until recently, German law required employers to record only employee overtime hours, along with hours worked on Sundays and public holidays. (*See* Section 16(2), Sentence 1, Working Time Act/*ArbZG*). Beyond these situations, no time recording was required. It remains to be seen whether, when, and how the ECJ ruling will be implemented by the German legislature. It seems logical that lawmakers would attempt to adapt the Working Hours Act to the realities of the modern workplace, including addressing topics such as mobile work, permanent availability, home office work, and other topics.

Additionally, the obligation to record working time bears on the issue of employee remuneration as well. For example, an August 28, 2019, BAG judgment (5 AZR 425/18) found that an employee has a right to information about his or her hours worked (travel times) in order to claim overtime pay. In that case, a driver had recorded his working hours on the so-called driver card (tachograph). He asked his employer for information about his hours worked according to the driver card to evaluate whether he possessed a claim for overtime. The BAG found that the employee had a legitimate right to this information to determine the subsequent overtime payment claim.

The decisions of the Court of Justice of the European Union and BAG have strengthened workers' rights by obligating employers to record their employees' working time and ensuring workers can access information about their hours worked to evaluate claims for remuneration. With respect to recording working time, we have previously provided practical recommendations for employers.

Vacation Credit

The BAG's November 20, 2019, ruling (5 AZR 578/18) evaluated a claim for overtime compensation after termination of the employment relationship. In a judicial settlement, the parties agreed to a setoff of accrued vacation against the time of release from work, so no payment for vacation credit was owed to the employee. In the BAG's view, the setoff as drafted

did not apply to the employee's working time account credit for overtime, so the employee was still entitled to payment for overtime. In light of this decision, employers should be careful to properly draft the setoff clause in a termination notice or separation agreement to explicitly provide for setoff of not only vacation entitlements but also the employee's working time account.

Two-Week Deadline for Terminations on Grounds of Suspicion

Under section 626(2) of the German Civil Code/*BGB*, an employer has only two weeks to issue a notice of termination for cause after it becomes aware of facts supporting the dismissal. In a recent case, a managing director had been terminated for cause for violating compliance rules. Upon suspicion of the managing director's improper conduct, the employer immediately called in the compliance department, which had to be trained for one week. Employee witness interviews took another six weeks to complete due to vacation absences. Ultimately, the entire investigation took a total of 10 weeks.

In court, the managing director argued that the employer did not comply with section 626(2) given the length of the investigation. In its May 29, 2019, decision (*OLG Hamm* - 8 U 146/18), the court disagreed, holding that the termination was not time-barred. The court reasoned that the two-week time period does not begin if the employer has no evidence but only indications that would justify an extraordinary termination (termination on grounds of suspicion). In the court's view, the company was allowed to carry out further investigations and interview potential witnesses without starting the two-week clock. The court cautioned, "however, this only applies as long as the employer investigates the case with reasonable haste and takes steps which shall provide him with a comprehensive and reliable knowledge of the full situation."

Based on this case, employers are advised to conduct internal investigations as quickly as possible and precisely document the steps of the investigation.

Recoupment of Money Paid for Bogus Self-Employment

In a June 26, 2019, decision (5 AZR 178/18), the BAG had to determine the consequences for a company that engages a "freelance contractor" who is later found to have engaged in bogus self-employment. The employer had paid the worker at issue €60 per hour plus VAT under a "freelance contract," for a total of €106,603.38. After the "freelancer" resigned, the German Social Security authorities sought unpaid Social Security contributions from the company in light of a finding that the freelancer had engaged in "bogus self-employment." The company, in turn, claimed €50,000 from the purported freelancer, representing the difference between the fee paid to the purported freelancer and the significantly lower amount it would have paid an employee. The court granted the company's claim against the purported freelancer but refused to grant reimbursement of the company's contributions to the statutory pension insurance.

Under the BAG's ruling, a company that must pay the Social Security contributions for a bogus self-employed worker can still seek excess remuneration from the worker. This makes sense because the higher fee paid to the worker was based upon the presumption the worker was paying to insure himself.

Company's Discretion on Variable Remuneration for Board Members

Under German law, board members are not employees. Therefore, with regard to variable remuneration, more flexible contract provisions are permissible, according to the September 24, 2019, decision (II ZR 192/18) of the BGH (Federal High Court). In this case, the board member's employment contract provided that the supervisory board could, with reasonable discretion, grant special benefits, bonuses, or the like in addition to the basic salary but voluntarily and without any legal claim. The director later sued for a bonus and argued various positions based upon German employment law: company practice, equal treatment, and the "unreasonable disadvantage" according to the general terms and conditions rules in the German Civil Code.

Although these positions generally apply to board members, the BGH dismissed the lawsuit, holding that the labor court's case law for employees cannot be transferred to board members. The court reasoned that board members are not employees; they are not dependent on instructions, are subject to special loyalty obligations, and may have to accept subsequent salary changes, even salary cuts. The remuneration for members of the management board can be designed individually, and a variable component can be left to the discretion of the supervisory board.

The judgment should be welcome news for many companies. Even with such discretion, however, it is still crucial to clearly formulate the remuneration regulations in a board member's contract.

KEY GERMAN LABOR & EMPLOYMENT LAW DEVELOPMENTS IN 2020

Minimum Wage

On January 1, 2020, the minimum wage in Germany increased to €9.35 gross per hour worked.

Experts Immigration Law

The Immigration Act for Specialists takes effect March 1, 2020. The law aims to facilitate the immigration of qualified professionals to work in Germany. Due to ongoing demographic changes and a lack of specialists in so-called "bottleneck professions," not only those with academic training but also nonacademics with vocational training will have access to the German labor market. The "Blue Card of the EU" has existed since 2012, according to which highly qualified foreign nationals can obtain a residence permit for employment in the European Union. The Immigration Act for Specialists now also makes it easier for foreign nationals without an academic qualification to pursue employment in Germany.

Protection of Whistleblowers

On December 16, 2019, the Directive (EU) 2019/1937 for the protection of persons who report violations of Union law took effect. So-called "whistleblowers" are those who uncover operational abuses or criminal behavior by companies. EU Member States now have two years to transpose the Directive into national law. Until then, the Directive has no immediate effect.

Nonetheless, whistleblowers may currently rely on the German Business Secret Act (*GeschGehG*), adopted in 2019 based on Directive (EU) 2016/943, for protection. The protection of business secrets from unauthorized acquisition, use, and disclosure is overruled, according to section 5 of the Business Secret Act, if the disclosure serves to uncover an illegal act, or a professional or other misconduct, and is suitable to protect the general public interest and contribute to social change. "Other misconduct" is defined as "unethical behavior," although this assessment is subject to the whistleblower's opinion, and it is sometimes difficult to distinguish between justified whistleblowing and (political) activism by disgruntled employees. Additionally, the Business Secret Act does not require the whistleblower to first try to remedy the situation within the company by notifying his employer of the alleged misconduct. While such notification had previously been necessary, the new trade secret guideline permits a whistleblower to immediately contact the authorities or the press.

German labor courts, and increasingly the European Court of Justice as well, impact the daily work of corporate human resources departments. Their often surprising decisions will keep HR professionals busy in 2020, as will the German government's plans to finalize legislative projects such as new regulations on working time recording and fixed-term employment contracts.

LAWYER CONTACTS

Friederike Steininger
Munich
+49.89.20.609.42.200
fsteininger@jonesday.com

Paul Melot de Beauregard
Düsseldorf
+49.211.5406.5500
pbeauregard@jonesday.com

Markus Kappenhagen
Düsseldorf
+49.211.5406.5500
mkappenhagen@jonesday.com

Georg Mikes
Frankfurt
+49.69.9726.3914
gmikes@jonesday.com