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Prof. Thomas Wegerich,
Editor
Labor Law Magazine

wegerich@businesslaw-magazine.com

Labor Law Magazine: Works council elections and Posting of Workers Directive ahead

Dear Readers,

Our prestigious Advisory Board keeps growing: Today we would like to welcome York von Roenne, Global Director of Human Resources, Leica Camera AG, on board the ship.

“Mistakes can be expensive for employers,” says our author Pauline Moritz with regard to the German works council elections which are on next year’s agenda. You better find out what she means.

The revised Posting of Workers Directive is highlighted in two articles in this edition of Labor Law Magazine. Marc André Gimmy/Katja Schiffelholz and Sachka Stefanova-Behlert/Dr. Thomas Wolf take a look at the new law from different angles. Don’t miss out on the two objectives.

Finally: My colleagues Karin Gangl, Stefan Dworschak and myself wish you a merry Christmas and a happy and successful New Year. Stay with us in 2018!

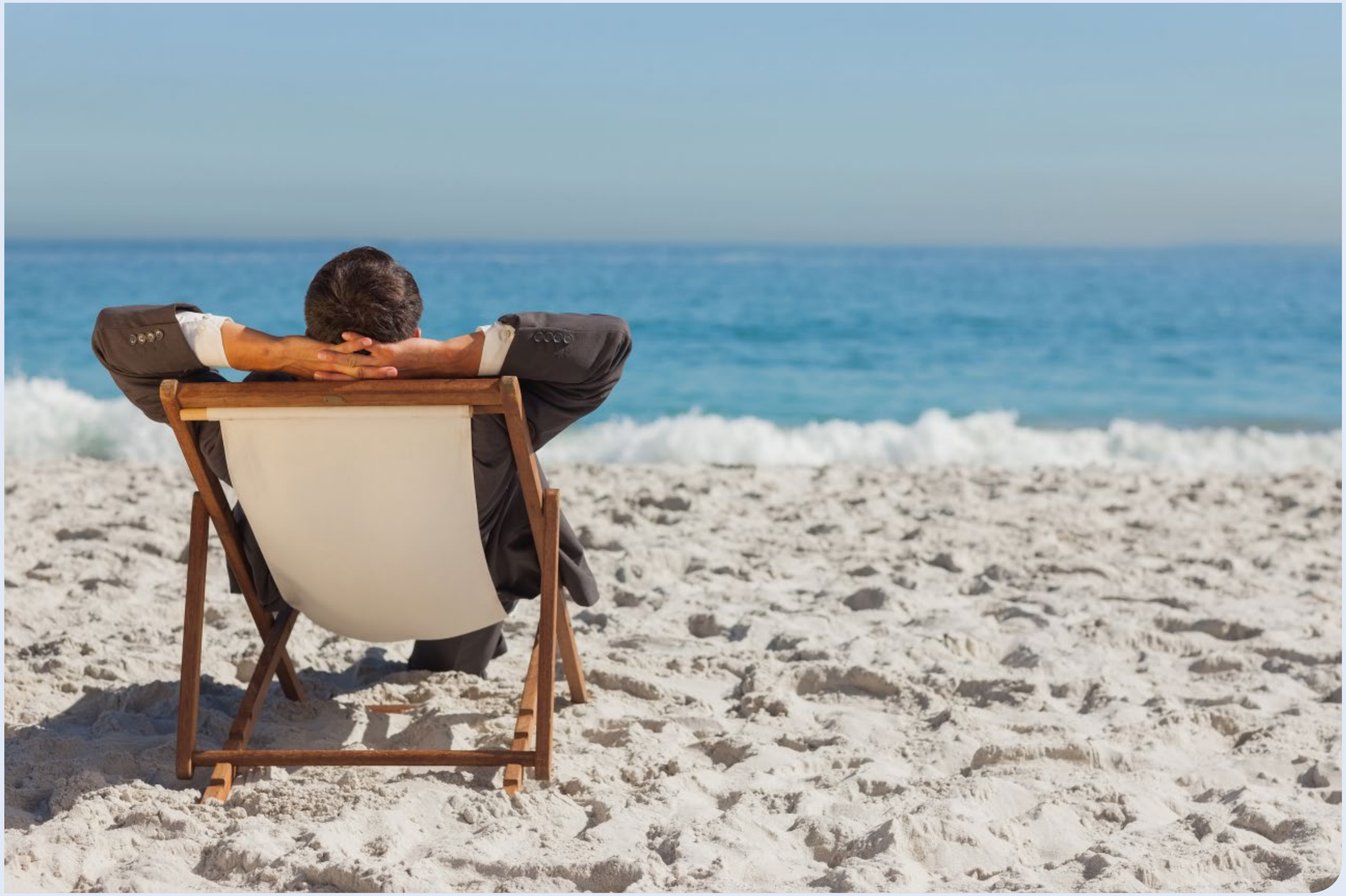
Sincerely yours,

Thomas Wegerich

Looking to Luxembourg and the ECJ

Vacation rights in Germany and Europe and the risks for employers

By Dr. Bernd Borgmann and Tom Stiebert



Sunny with a hint of looming uncertainty – vacationing can also have its legal pitfalls.

The legal frame

From the point of view of the employee, vacations are usually a nice thing. Even from the point of view of a reasonable employer, there are no concerns about granting leave to workers as they generally return to work more relaxed and often more motivated.

From a legal point of view, it is also quite simple: The employee takes annual leave and is paid in full during that time. Vacation entitlement cannot be bought or transferred to subsequent years.

German law confirms this: Payment continues while the employee is on vacation (section 11 Federal Vacation Act *[Bundesurlaubsgesetz, BUrlG])*. In addition, the vacation must be taken during the current year (section 7 (3) *BUrlG)*. A transfer to subsequent years is generally inadmissible (section 7 (3) *BUrlG)*. Only in special cases can it be transferred to the following year and must then be taken within three months. However, employment contracts or collective →

agreements often provide for the possibility of a longer transfer period into the following year. If the leave is not taken, compensation should only be granted if the employment contract ends (section 7 (4) *BUrlG)*.

However, more aspects came into play through EU law. Directive 2003/88/EC of the European Parliament and of the Council of November 4, 2003 concerning certain aspects of the organization of working time states in Article 7: *(1) Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice. (2) The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.*

The problem of transferring the leave entitlement to subsequent years, however, is not explicitly dealt with. Here, therefore, national law still seems to be relevant.

The important judgments of the ECJ

Nevertheless, for many, surprisingly, the right to vacation has become a focus of EU law in the last 10 years, which has meant that German jurisprudence has had to be modified accordingly.

It all started with the judgment in the Schultz-Hoff case in 2009 (docket number C-350/06). The ECJ emphasized here: *"Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave"*. The excitement was great and many suspected that this should mean that an unlimited accumulation of leave would be possible, which may also lead to unlimited compensation. Shortly thereafter, the ECJ was forced to modify its decision, stressing: *"Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not precluding national provisions or practices, such as collective agreements, which limit, by a carry-over period of 15 months on the expiry of which the right to paid annual leave lapses, the accumulation of entitlement to such leave of a worker who is unfit for work for several consecutive reference periods"*. (judgement from November 22, 2011, KHS, docket number C-214/10)

German law then had to react to this and interpret § 7 (3) *BUrlG* in accordance with European law.

The following principles then applied:

- If an employee has not taken up leave although able to do so, the leave will be canceled by the end of the year.
- If it was not possible to take leave, especially due to illness, the leave can be transferred for another 15 months.
- This should also apply to the allowance in lieu – the remaining leave is thus to be paid; if the leave entitlement is lost, there is no claim for compensation.
- Limitation regulations do not apply here either since the claim for allowance in lieu arises only at the end of the employment relationship.
- Exclusion periods can indeed be fixed in principle, but these also do not begin until the employment relationship ends.

Thus, according to case law, there is a risk for the employer in special cases but this is limited financially by the time limit imposed by the ECJ.

Turnaround by ECJ judgment of November 29, 2017

Surprisingly, the ECJ seems to see it differently in a recent decision published on November 29, 2017 (docket number C-214/16). A bogus self-employed person – an employee who worked on the basis of a self-employed, commission-only contract not being entitled to the claims of a salaried employee (such as vacation) – had sued for compensation of the vacation not granted to him from 1999 to 2012. The ECJ would have been expected to limit the compensation but this did not happen.

The ECJ emphasized: *"Article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave."*

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There was no time limit here, with the result that the employer has to financially compensate a vacation entitlement of 13 years (i.e., at least 13 x 20 = 260 days), which is a significant cost. The ECJ did not rule on whether, had the employment relationship continued, it would have been possible to claim the leave for 260 days as well. At first glance, however, this judgment seems to be a negative departure from previous case law – at least from the perspective of an employer.

However – and this is also clear – the judgment seeks in most cases to maintain case law and limit the accumulation of vacation entitlement and allowance in lieu. In particular, the judgment expressly recognizes that employers should be protected against excessive financial burden (recital 55) if they need this protection. This view is completely correct.

In this specific case, however, the ECJ acknowledges that "protection of the employer's interests does not seem strictly necessary" (recital 59). The nongranting of leave is based on a violation by the employer, who has also benefited from this. For this particular reason alone there is no time limit.

The court thus recognizes that vacations have a financial dimension that must always be preserved for the employee. The interests of the employer, however, can lead to this claim being cut. Surprisingly, the ECJ no longer refers to the recreational function of the vacation in its argumentation, but turns it into a purely financial consideration.

Consequences in practice

It is always important to check the rights to which an employee is entitled. This includes strictly distinguishing between employees and the self-employed. An error does not release the employer from his or her duties, as the ECJ expressly points out. This cannot be restricted by contractual arrangements; these would, as the ECJ makes clear, be ineffective. Exclusion periods would also only begin at the end of the employment relationship and no earlier.

For this reason, in order to avoid risks, it must always be carefully checked whether a jobholder is an employee. Creative constructions for bypassing are strongly discouraged. Employers should always be advised to ensure that employees use their vacation within one year. This minimizes the risks of – possibly unlimited – compensation when leaving employment. Employing a bogus self-employed person is therefore now even riskier than before. Vacation rights continue to be a topic where fundamental changes are always possible. Knowledge of German law alone is no longer sufficient here; Luxembourg sets the course. <–

Dr. Bernd Borgmann,
Rechtsanwalt, Fachanwalt für Arbeitsrecht, Partner,
DLA Piper UK LLP, Cologne

bernd.borgmann@dlapiper.com

Tom Stiebert,
Rechtsanwalt, Lehrbeauftragter für Arbeitsrecht an der Fachhochschule für Ökonomie und Management (FOM) in Köln, Associate,
DLA Piper UK LLP, Cologne

tom.stiebert@dlapiper.com

www.dlapiper.com

Close observation of works council elections 2018

Mistakes can be expensive for employers

By Pauline Moritz

Works council elections are generally held every four years, from March 1 through May 31. A flawed election process can be costly for the employer. Violations of election rules may render the election retrospectively void and trigger a new election. All actions taken and agreements entered into by the works council elected in an invalid election are null and void. Therefore, timely and well-informed intervention, as well as close monitoring of the election process, can save unnecessary costs and at the same time open important doors to exercise influence.

A works council election is left to the employees' initiative. If the employees decide to elect a works council, the employer may not reject or impede the election. An employer who hinders or influences a works council election, for instance by threatening to terminate employment relationships, may face imprisonment of up to one year or a fine. In businesses with an existing works council, the initiative of a single employee can be sufficient to ensure the ongoing existence of a works council, even if the workforce has no interest in such a representative body.

Election costs

The employer bears all costs of the election. This includes all costs connected to the initiation and execution of the works council election as well as the revision of the election results – but only to the extent that they were necessary for the election.

Necessary costs may include the following:

- costs for providing rooms, information and communication technology as well as equipment, election documents, writing materials, voting boxes, telephone calls, postage, legal texts and commentaries;
- costs for training concerning election provisions for members of the election committee;
- legal costs for advising members of the election committee; and
- the costs of any legal dispute with the election committee in connection with the works council election.

More than just a show of hands: Flawed elections may be declared null and void.

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The employer must also continue to pay salaries for the time that employees need to exercise their voting rights or other →

rights in connection with the election. Members of the election committee who carry out office tasks outside their working hours are entitled to time off or overtime compensation.

Before the election

The election committee, which consists of at least three employees who are eligible to vote, initiates and carries out the election. It is appointed by the acting works council no later than ten weeks – in small businesses with no more than 50 employees who are eligible for election, four weeks – before the end of the acting works council's term in office.

If no or no proper election committee has been established eight weeks before the end of the acting works council's term in office – in small businesses with no more than 50 employees who are eligible for election, three weeks – the relevant labor court can appoint an election committee upon a respective motion by at least three employees who are eligible for election, or by a union represented in the business. The labor court may also appoint union representatives who are not employees in the business in question.

If no works council has yet been established, the election committee is appointed by the general works council or the group works council in companies with more than one business. If none of these bodies exists, or if these bodies remain inactive, a general staff meeting appoints the election committee. Either three of the business' employees who are eligible to vote, or a trade union represented in the business may call a general staff meeting.

The appointed election committee issues an election invitation and establishes a voter list. The publication of the election invitation marks the start of the official election process. It must be displayed in an easily accessible place throughout the entire preparation phase of the election until the end of the last day of the casting of votes. The voter list contains the names and dates of birth of all employees who are eligible to vote. The employer must provide the election committee with all information and documents necessary to compile the voter list. During this process, the election committee shall ensure that only those employees who are entitled to vote are in fact included in the voter list because this will influence the size of the works council to be elected.

Only employees that appear on the voter list are eligible to vote and be elected. Mistakes in the voter list can justify an appeal against the works council election and hence result in substantial additional costs for the employer.

Within two weeks of the election invitation and compilation of the voter list, employees may submit nominations for the election committee. At the later works council election, only those employees who have been nominated for election may be voted for. This is an essential phase for the employer because at this point – within the framework of tighter legislative limits and ensuring the free decision-making process of the election – he or she might exert influence over the election with the objective of securing the names of "employer-friendly" employees on the voter list.

Leased employees

Leased employees are entitled to vote if it is clear on the day of voter list compilation that he or she will work in the business for more than three months.

Regularly deployed leased employees are to be taken into account for the thresholds relevant for the size of the works council in the borrowing company.

The election

Works councils may be elected either by the standard or the simplified election procedure. The main difference between the two is that under the standard procedure, which applies to businesses with more than 50 employees who are eligible to vote, votes are cast for candidate lists, whereas in the simplified procedure, individual candidates are elected.

After the election

In practice, most election committees make mistakes but most works council elections nonetheless remain undisputed and not all mistakes render the election void. A successful appeal, however, will lead to the election being declared invalid and trigger a new works council election.

Every breach of material provisions of the right to vote, the eligibility to vote or the election procedure, are grounds for an appeal unless a correction has been made. Three employees acting together, the trade union which is represented within the business or the employer may file an appeal. The appeal has to be declared within two weeks of the announcement of the election results. If an appeal is not lodged within this time period, the works council is deemed to have been elected validly.

If an election is particularly flawed, it may be declared null and void without an appeal.

Conclusion

Employers should observe the upcoming works council elections closely and follow the election procedure in order to avoid the defeasibility of the election and to work towards – within given legal limits – a favorable election result. <–

Pauline Moritz,
Rechtsanwältin, Fachanwältin für Arbeitsrecht, Senior Associate, Mayer Brown LLP, Frankfurt/Main

pmoritz@mayerbrown.com

www.mayerbrown.com

A broader range of protection

The German Maternity Protection Act and and its current reform

By Axel Braun

For almost 65 years, the Maternity Protection Act has remained unchanged as the main law for maternity protection in Germany, providing bans on employment and protection against termination of employment for pregnant women and such rights after giving birth. Since employment has changed greatly over the past couple of decades, it was time to adjust the Act to take account of modern work environments, health perceptions and employment law developments. This was one of the final actions carried out in the legislative period tht has just come to an end. This article gives an overview of the main provisions of the Maternity Protection Act, including the most important changes which will take effect from the beginning of 2018.


The reformed law provides expectant mothers with more independence and choice.

Basics: The Maternity Protection Act

Maternity protection in Germany provides female employees with comprehensive protection during their pregnancy and for a certain period of time after they have given birth, against any disad- →

vantages arising in connection with the birth of their child with regard to their health and preserving their jobs and salaries.

The special status of pregnant women and mothers is already constitutionally protected by article 6 (4) German Basic Law *(Grundgesetz, GG)*, which states that each mother is entitled to be protected and cared for by the community. Under employment law, the Maternity Protection Act *(Mutterschutzgesetz, MuSchG)* ensures that during pregnancy and for some time afterwards, extensive protection is given to (expectant) mothers. This applies to all women who are in employment, irrespective of whether the employment is permanent, temporary, probationary, principal or secondary, as per section 1 (2) sentence 1 Maternity Protection Act in conjunction with section 7 (1) German Social Code IV *(Sozialgesetzbuch IV, SGB IV)* and section 1 (2) sentence 2 Maternity Protection Act. It also applies to employees who work from home (section 1 [2] sentence 2 No. 6 Maternity Protection Act) and women who are in an apprenticeship (originally and currently still provided by section 10 [2] German Vocational Training Act *[Berufsbildungsgesetz, BBiG])*.

The Act does not apply to women who are self-employed. In its original version, it did not apply either to women who hold a position in an executive body of a legal entity. However, its applicability to the latter was in dispute for years due to EU Directive 2010/41/EU on the Application of the Principle of Equal Treatment and the case law of the European Court of Justice – at least with regard to the support that should be provided to pregnant self-employed women by the state, and the termination and revocation possibilities regarding (external) female directors who are bound by instructions and whose employment up until most recently could also be terminated during a pregnancy. With the reform of the Act, it now explicitly applies to all pregnant women who are not self-employed but have a dependent work relationship pursuant to the new section 1 (2) sentence 1 Maternity Protection Act in conjunction with section 7 (1) German Social Code IV. Thus, it now also includes managing directors as well as interns, pupils and students.

Scope of protection

One of the main areas covered by the statutory maternity protection provisions is health protection, which aims to ward off any risks to the life and health of the mother and child that may arise in the workplace. Pursuant to section 9 (2) and (3) Maternity Protection Act, the employer must ensure that the workplace of a pregnant employee corresponds to her requirements, i.e., the activities need to be adjusted in terms of type, place, pace and length and must be as ergonomic and emission-free as possible. This also includes granting breaks or providing the opportunity to sit or lie down during working hours. Even if the employment contract does not contain any provisions regarding being transferred to protect her health, a pregnant employee may be given other tasks to perform if it is deemed unreasonable for her to continue to carry out her current duties (Section 13 [1] No. 2 Maternity Protection Act). Pursuant to section 7 (2) Maternity Protection Act, if requested, the employee must be granted the necessary time off to breastfeed. With the reform of the Maternity Protection Act, an em-ployer is now also obliged to run a conceptual risk assessment on every actual or possible danger to pregnant employees (Section 10 Maternity Protection Act); protective action can also include workplace reorganization. The European Court of Justice recently decided that the employee bears the burden of proof at first when appealing the content of the conceptual risk assessment (decision from October 19, 2017, ref. no. C-531/15 – Otero Ramos).

In the order of precedence of protective measures, bans on employment can be applied depending on the condition of the individual employee's health. If medically certified, a ban on employment for health reasons is possible at any point during the pregnancy (section 16 [1] Maternity Protection Act). Other bans on employment apply irrespective of the particular circumstances, above all if the employee's tasks involve manual labor or the employee is exposed to harmful environmental conditions (section 11 [1] and [5] and section 12 Maternity Protection Act). These bans on employment concern expectant women as well as breastfeeding women. In addition, pursuant to section 11 (6) Maternity Protection Act, piece work or assembly line work, meaning systems that are dependent on the speed of work or quantity produced, is forbidden. Expectant mothers and those who are breastfeeding are also not allowed to do overtime or night work. As a rule, the maximum working time is 8 hours a day (section 4 [1] sentence 1 Maternity Protection Act). Six weeks before the birth, the employee may not work at all, section 3 (1) Maternity Protection Act, and eight weeks after the birth (in the event of multiple births, twelve weeks, Section 3 [2] →

sentence 2 Maternity Protection Act, or even longer in cases of miscarriage). According to sections 4 (1), 5 (1) and (2), 6 (1) and 12 Maternity Protection Act, the same bans on employment apply to women who are breastfeeding as to those who are expecting.

The new Maternity Protection Act leaves pregnant employees a further choice within the ban period before giving birth. Provided the employee expressly agrees and a medical certificate confirms her ability to do so, she may continue to work during this period (section 3 [1] Maternity Protection Act). However, there is an absolute ban on employment within the protective period after the birth, which cannot be repealed even if requested by the mother (section 3 [2] Maternity Protection Act). Before giving birth, employers are also obliged to avoid irresponsible risks for the employee or her child by letting her work alone. Overtime and night work is now possible, but only in exceptional circumstances and with an acceptance declaration from the regulatory authorities responsible for work protection (normally the trade office or the work protection agency).

Although the employer can only take maternity protection measures after having been informed about a pregnancy, the employee is not generally obliged to inform the employer about her pregnancy (section 15 [1] Maternity Protection Act). However, an obligation may exist as an ancillary obligation under the employment contract (section 241 German Civil Code *[Bürgerliches Gesetzbuch, BGB])* if substantial legitimate interests of the employer would be affected by the pregnancy, for instance if the employee holds a key position which would require a long period of training for anyone covering the position during maternity leave. On the other hand, an employer is also not allowed to ask an applicant in an interview if she is pregnant, which is why a pregnant applicant has a "right to lie" without any legal consequences if confronted with this type of question. However, this does not apply if, due to the pregnancy, she could not carry out the intended work or if a ban on employment were to apply to the applicant.

Protection of remuneration

In order to discourage the employee from performing work that could damage her health, the Maternity Protection Act also stipulates that remuneration is to be protected. This means that the employee will receive maternity protection pay from her employer, which guarantees that she will receive the average remuneration earned over the last 13 weeks or 3 months before she became pregnant if she has been transferred on the basis of a ban on employment or can-not work either in whole or in part (section 18 Maternity Protection Act). During the protective period before and after the birth, the employee's obligation to work is suspended, which is why she is not entitled to any remuneration. To ensure financial security during these periods, however, the employees receive monies from their social security provider or the state (maternity pay) and a subsidy from their employers (section 19 Maternity Protection Act). For the latter, and also for any monies that may be paid during the ban, according to section 11 Maternity Protection Act, the employer is entitled to be reimbursed for the statutory medical insurance contributions (section 1 [2] No. 1 and 2 German Expenditure Compensation Act *[Aufwandsausgleichsgesetz, AAG])*.

Workplace protection

According to section 17 (1) Maternity Protection Act, the employment contract of an affected employee cannot be terminated during the pregnancy and also for a period of four months after the birth (workplace protection). Pursuant to section 134 German Civil Code, any terminations made to the contrary are invalid; moreover, any breaches made by the employer of the statutory provisions of the Maternity Protection Act may constitute an administrative or even a criminal offense (sections 32 and 33 Maternity Protection Act in conjunction with section 9 [2] German Administrative Offenses Act *[Ordnungswidrigkeitengesetz, OWiG])* from 2019, also for violations within the conceptual risk assessment. This prohibition includes terminations of any kind and, therefore, alongside routine termination and dismissal with the option of altered working conditions, also extraordinary termination and termination during insolvency proceedings. Newly introduced is the clarification that job protection applies for at least as long as any ban on employment.

Dismissing an employee during the maternity protection period is also only possible in exceptional circumstances and with an acceptance declaration by the responsible regulatory authority, which constitutes their main role in maternity protection. The basic precondition for this is that the termination has nothing to do with the pregnancy (section 17 [2] Maternity Protection Act). Furthermore, more stringent requirements, also with regard to content, apply than with an extraordinary termination under section 626 (1) German Civil Code: There must always →

be special circumstances which make terminating the employee unavoidable, e.g., willful breaches of contract, offenses involving property or financial risk to the employer.

With the reform of the law, protection against terminations is extended to employers' actions of preparing a termination, Section 17 (1) sentence 3 Maternity Protection Act. Therefore, dismissals are also invalid if the termination has been declared after the protection period but preparations have been made before. This includes, for example, advertising for the employee's job, interviewing potential successors and even obligatory consultation of the works council or an application for the acceptance declaration by the responsible regulatory authority.

Outlook

The reform of the Maternity Protection Act gives pregnant employees more autonomy to decide whether they continue working until a later stage during their pregnancy or not. It also stipulates an extension of their workplace protection as employers now even have to wait with preparations of potential terminations until bans on employment have ended. For them, the new regulations also provide a stricter obligation to monitor the working conditions of pregnant employees due to the new mandatory risk assessment. Even if highly criticized by trade unions because of the potential pressure on pregnant employees to continue working as long as possible, the Act now includes a broader range of protection, especially regarding the employee's general health while still working. Last but not least, even more women are now able to make use of the protection offered by the Act. <–

Axel Braun,
Attorney, Specialist Attorney and Partner in Employment & Labor Law,
Luther Rechtsanwaltsgesellschaft mbH, Cologne

axel.braun@luther-lawfirm.com

www.luther-lawfirm.com

Businesses should take advantage of their opportunities

Voluntary redundancy programs as an alternative to unilateral staff cuts

By Dr. Wolfgang Lipinski

For various reasons, companies may be forced to make short-term decisions on staff reductions. Staff can be reduced traditionally by termination by the employer for operational reasons, or through termination agreements signed by common consent on the basis of voluntary programs. After thoroughly analyzing the existing situation (among other things, existing job security, company image, works council and trade union decision-makers, economic situation), the company should make decisions on a case-by-case basis. This article shows that voluntary programs can be a genuine alternative to unilateral staff reductions, and how they can work.

The pros and cons of voluntary redundancy programs

Voluntary programs can be implemented quickly and therefore bring swift financial relief. As termination agreements are →

Golden handshake? Voluntary redundancy programs can end up being expensive for companies.

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concluded to ensure legal compliance, there will be no dismissal protection lawsuits involving legal risks. Voluntary programs are low profile, with minor impact on the company's image. The programs do not require social selection, enabling separation agreements with older employees and employees under special protection against dismissal in order to achieve a new age structure. This often reduces staff costs permanently if older and more expensive employees leave. In contrast to unilateral staff reduction, voluntary programs do not usually induce strike action by trade unions with representation in the company, or at least only limited action.

The disadvantages of voluntary programs are that they are often (very) expensive and might constitute a negative precedent for any later social plans with unilateral staff reduction. From the company's point of view, a voluntary program that is poorly designed bears the risk that key employees the company actually wants to retain leave with high severance payments, and the company has to bring in expensive replacements for them later.

Negotiations with the works council

Voluntary programs may be implemented in businesses with or without works councils. If a works council exists, the voluntary program constitutes a measure which must be negotiated with the works council and which is subject to a reconciliation of interests and a social plan, insofar as the planned downsizing is covered by the requirements of section 17 of the German Protection Against Unfair Dismissal Act *(Kündigungsschutzgesetz, KSchG)*. If the works council supports the voluntary program, the additional challenge of a collective social plan with the trade union typically will not arise, or will at most assume a subordinate role. For the voluntary program to be successful - from a business perspective - careful consideration should be given to an exact definition of the scope of its application during negotiations with the works council. Furthermore, the works agreement regarding the voluntary program should include a provision reserving its double voluntary nature. Such a provision can prevent key employees leaving with severance payments. However, a guideline must be drawn up to cover the risk of repercussions for employees if they state an interest in the voluntary program but the company refuses to conclude a termination agreement as it does not want to lose them. It would also be beneficial to define clear financial terms (for example compensation formula with ceiling). We consider it highly recommendable to include a bonus, meaning an additional payment for employees who sign the termination agreement within a very short period of time (for example, 10 to 14 calendar days). Additionally, the number of jobs to be eliminated should be specified.

The company should prepare guidelines for unilateral staff reduction which might become necessary as a follow-up measure if the number of jobs to be eliminated is not reached. Such guidelines provide reliability, a time schedule and thus the ability to plan, which both frequently save the company a lot of money. From a business perspective, a voluntary program runs particularly well if it is possible to negotiate with the works council, in addition to the works agreement for the voluntary program, a social plan with lower benefits in the event of unilateral terminations. The social plan applies if the desired reduction numbers have not been reached after the voluntary program has been finalized.

Blocking period and mass dismissal notification

Since it is common for voluntary programs to make severance payments of more than 0.5 monthly salaries per year of employment, the employee often faces a blocking period of twelve weeks before he or she can claim unemployment benefit. Insofar as the business does not wish to bear these costs, it should attempt everything with regard to labor and social security law, partly in cooperation with the works council, in order to avoid a blocking period (i.e., a collective decision). As voluntary programs frequently conclude more termination agreements than the standard number pursuant to section 17 *KSchG* within 30 calendar days, a mass dismissal notification must be sent to the relevant employment agency *(Agentur für Arbeit)* before signing the termination agreements. If this is not carried out in the correct form, the concluded termination agreements will be invalid. As voluntary programs usually grant a bonus for those who make a quick decision, it is often not possible to navigate the process in a way that renders a mass dismissal notification unnecessary, for instance by not exceeding the threshold. Businesses frequently fail to consider that the threshold includes terminations that are not part of the voluntary program (e.g., terminations by employees for operational reasons and dismissals with the option of altered conditions of employment).

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Implementation and communication

The voluntary program should be openly supported by the works council (for example at works meetings through joint declarations by the employer and works council to employees). In order to have the works council on its side, a company should consider the budget for the voluntary program carefully and ensure a transparent restructuring concept, which has ideally been confirmed by a works council expert. In any case, a well-planned and thorough communication strategy is essential for the success of any voluntary program. In this context, the following should be taken into consideration: Time schedule, guidelines for termination talks, preparation of flyers, posters and letters to individual employees.

Conclusion

Businesses that have to downsize should look closely at the advantages and opportunities offered by voluntary programs. The employer may openly enter into negotiations with the works council on a reconciliation of interests and a social plan and suggest a voluntary program. Alternatively, the company may initially declare its intention to implement a unilateral staff reduction. The works council may then discover the possibility of using an initial voluntary program prior to the implementation of a unilateral staff reduction during the course of negotiations. However, this depends on the existing situation of the business and on the negotiation strategy chosen by the employer. Businesses should take reasonable advantage of their opportunities to design and control this situation.

KEY POINTS:

- Voluntary programs, which may be skillfully combined with a unilateral staff reduction and respective regulations for handling and/or designing a social plan, are an effective method and a genuine alternative to unilateral staff reductions.
- Thorough analysis of the legal and current situation, careful preparation and a reasoned negotiation strategy on the part of the employer are all important factors for the success of a voluntary program.
- It is essential to involve labor lawyers early in the process to ensure the voluntary program is designed and implemented successfully.
- Voluntary programs are regularly successful if supported by the works council.
- In spite of the high costs, voluntary programs offer considerable advantages. <–

Dr. Wolfgang Lipinski,
Rechtsanwalt, Partner, Beiten Burkhardt, Munich

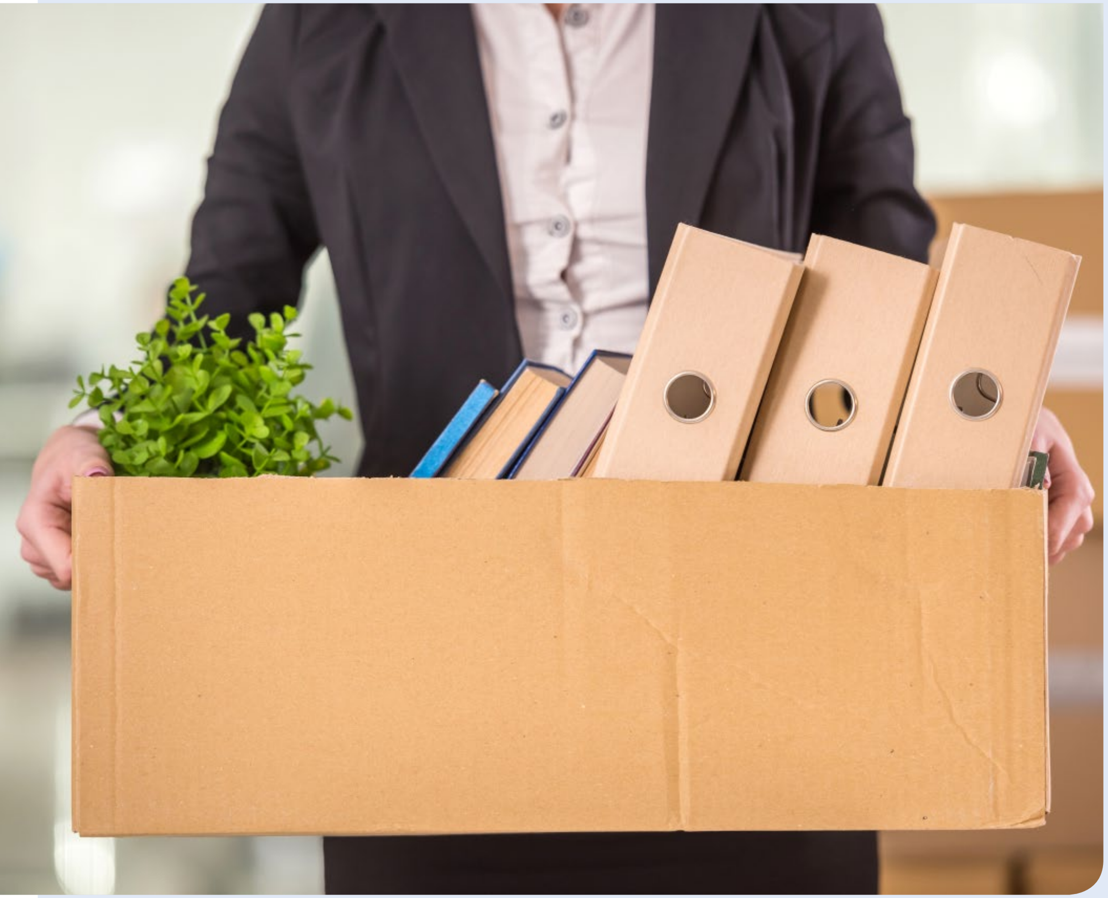
wolfgang.lipinski@bblaw.com

www.bblaw.com

Achieving the impossible?

Information on mass layoffs in Germany and how to get it right

By Dr. Jan Tibor Lelley, LL.M. and Dr. Julia Bruck



Reductions in force (RIF) should be executed diligently. Otherwise, the terminations in question may be invalidated.

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Why should we expect the impossible to be simple? In reality it ranges from a mere formality to a complex and critical obligation. Apart from many different laws applying on restructuring cases, such as negotiation of reconciliation of interests *(Interessenausgleich)* and social compensation plan *(Sozialplan)* or works council consultation before terminations, there is the information and consultation – of the works council – and then again information – of the Labor Office – prior to a reduction in force (RIF) or mass dismissal. This procedure has to be carried out according to § 17 of the Dismissal Protection Act *(KSchG)*.

This information and consultation process used to be seen as a formality based on labor market policy where the labor office would receive information on the number of individuals joining the labor market. Today, however, German labor courts have developed it into a combination of formalities and obligations driven by EU Directive 98/59/EG. The information and consultation procedure with the works council is now more prominent. Today, any error or failure to comply with this highly formalistic procedure regularly invalidates terminations in a RIF and therefore creates major financial risks for companies when restructuring.

What triggers the process?

A company is obliged to inform the relevant Federal Labor Office according to § 17 paragraph 1 *KSchG* if the dismissal of a certain minimum number of employees is planned. This notification duty is triggered for

- businesses with generally more than 20 and less than 60 employees when more than five employees are to be dismissed,
- businesses with generally at least 60 and less than 500 employees when 10% of the regular employees or more than 25 employees are to be dismissed, and

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- businesses with generally at least 500 employees where the planned dismissals will affect 30 or more employees.

The term "employee" in § 17 paragraph 1 *KSchG* includes executive employees and even managing directors. The RIF must be completed within 30 calendar days. Due to European Union requirements, "dismissal" is no longer the coming into effect of the termination on the last day of the notice period, but the receipt of the notice of termination. This includes not only dismissals in the literal sense but also, for example, termination agreements which are actively offered by the company to advance restructuring measures.

If employees with special protection against dismissal are impacted by the RIF, special rules apply. Recently, the Federal Labor Court (case 6 AZR 442/16) ruled that a protected employee (protected because of parental leave) needs to be included in the notification/consultation process with the works council and also notification to the Federal Labor Office even if the dismissal is outside the 30-day period of § 17 paragraph 1 *KSchG*. In this case, it is enough that the company applied to the relevant agency for permission to terminate the protected employee. It is very likely that this ruling is also relevant for other groups of protected employees, for example expectant women, mothers or disabled employees.

Two procedures for mass dismissals

The notification requirement consists of two completely separate procedures: The notification and consultation procedure with the works council (§ 17 paragraph 2 *KSchG*) and the notification to be submitted to the Federal Labor Office (§ 17 paragraph 3 *KSchG*). Regarding the content of the information, both procedures are the same. According to § 17 paragraph 2 numbers 1 – 6 *KSchG*, the information/consultation and notification must include:

- the reason for the planned dismissals,
- the number and profession of employees to be dismissed,
- the number and profession of employees who are regularly employed,
- the timeframe in which the terminations will be issued,
- the criteria chosen for the selection of employees to be dismissed, and
- the criteria to be used for calculating possible severance packages (in a social compensation plan).

Notification/consultation procedure with the works council

The notification and consultation procedure with the works council is much more difficult than notifying the Federal Labor Office.

First of all, it has to be carried out with the works council of the affected plant. If there is no works council, the procedure is dispensable. If the consultation procedure concerns senior employees, the works council is not responsible. In this case, the representative body for executive staff has to be involved.

The procedure according to § 17 paragraph 2 *KSchG* consists of two components,

- the notification process and
- the consultation process.

The goal of notification and consultation is to inform the works council about the planned dismissals in a timely fashion and to facilitate consultation between the employer and the works council. Management needs to start the process as soon as the employer is seriously considering steps leading to mass dismissals. In order to be compliant with § 17 paragraph 3 *KSchG*, the procedure should be initiated at least two weeks before the Federal Labor Office is notified of the mass release.

In addition to the content as per § 17 paragraph 2 no. 1 – 6 *KSchG*, the notification must entail an express offer of consultation to the works council. It is best practice to include a timetable for the planned mass dismissal with two specific dates for consultation with the works council. Consultation with the works council should take place no earlier than one week after the first notification. This gives the works council time to prepare and, if necessary, request further information. The schedule can also specify when the works council would make its statement on mass dismissal and when notification to the Federal Labor Office is planned.

Notification of the works council must be given in writing. While it was controversial for a long time whether this meant the legal form of § 126 of the German Civil Code (*BGB*), the Federal Labor Court has recently ordered that the legal written form – which would mean wet-ink signature – is not necessary. But nev- →

ertheless, it is best practice to document the whole process properly in case there is any dispute.

During the process, the employer and works council have to consult on how to avoid redundancies and or how to mitigate the consequences of the intended RIF. This may include measures such as severance payments, retraining of staff, transfer to a different company or short-time work *(Kurzarbeit)*. However, no agreement has to be reached. The consultation process is over when the works council issues a statement or by establishing prima facie evidence of the notification and consultation process after at least two weeks.

Notification to the Federal Labor Office

The Federal Labor Office must always be notified, whether or not there is a works council. The notification is sent to the district's office where the plant conducting the RIF is located. If several plants of one company are conducting RIFs, several notifications must be submitted to the local labor offices, in this case the place of the corporate headquarters is not crucial.

The Federal Labor Office has to be notified after the works council has given its statement or two weeks after starting the information/consultation procedure. In this case, without any available statement from the works council, management needs to confirm in a special form that the information and consultation process is complete. In order to fully comply with the notification obligations set out in § 17 paragraph 3 *KSchG*, we recommend using the forms provided by the Federal Labor Office. Afterwards a copy of the notification must be sent to the works council for information purposes according to § 17 paragraph 3 *KSchG*.

How to get it right?

Make no mistake: The notification of mass dismissals to the labor office and in particular advance information and consultation with the works council is a lynchpin in every RIF.

Using a checklist can help to successfully navigate the murky waters of the information, consultation and notification procedure:

- Prepare information for the works council in writing. Provide the information at least two weeks before submitting notification for a mass dismissal to the Federal Labor Office.
- Consult with the works council concerning possible options to avoid RIF or reduce the number of dismissals or mitigating their consequences for employees.
- Inform the labor office about the start of the information and consultation procedure with the works council.
- After completing the information and consultation procedure with the works council: Submit notification of mass dismissals in writing to the labor office, together with a statement from the works council. Or, if such a statement is not available, with prima facie evidence concerning the completed information and consultation process and a report on the current state of the consultation.
- Forward a copy of the notification sent to the Federal Labor Office to the works council. ←

Dr. Jan Tibor Lelley, LL.M.,
Certified Specialist for labor and employment law, Partner, Buse Heberer Fromm, Frankfurt/Main

lelley@buse.de / Twitter: @JanTiborLelley

Dr. Julia Bruck,
Trainee Lawyer, Buse Heberer Fromm, Essen

www.buse.de

Working towards an integrated European labor market

The posting of workers

By Marc André Gimmy and Katja Schiffelholz

Introduction

The primary objective of the European Union is to establish a common economic area. Therefore, the freedom of movement for workers serves to provide a European labor market where workers can offer and employers can request labor irrespective of national borders. However, there are forms of transnational worker mobility which do not integrate workers to the extent described by the freedom of movement for workers. Workers tend to remain connected to their home country with less integration into the employment system of the host country. This is referred to as the posting of workers and is guaranteed by the (active) freedom to provide services, Article 56 of the Treaty on the Functioning of the European Union (TFEU). This also applies when the posted workers are not EU citizens but from third countries (Case 43/93 - [1994] ECR I-3803) because the freedom to provide services enjoyed by the posting company results in an ancillary freedom of movement for the posted worker (see also COM [206] 159, p.8: On the basis of existing case law, it must be concluded that the host Member State may not impose administrative formalities or additional conditions on posted workers from third countries when they are lawfully employed by a service provider established in another Member State, without prejudice to the right of the host Member State to check that these conditions are complied with in the Member State where the service provider is established).

By posting workers, questions arise in relation to the applicable legal system. The Rome I Regulation generally determines which law is applicable to situations involving several countries. If no choice of law is selected pursuant to Article 3, the applicable law is determined pursuant to Article 8 (2) Rome I Regulation. In principle, the law of the country where the work is habitually carried out, regardless of the temporary posting, has to be applied. Nevertheless, Directive 96/71/EC establishes certain overriding mandatory rules in the area of employment contracts, particularly when national rules are more favorable for the employee.

Which law applies for posted workers? The answer tends to be complex.

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The posting of workers across Europe has in addition significant impact on social law and immigration with respect to residence title and/or work permit (see table below).

Overview of Requirements for Postings in Europe

	Austria	Czech Republic	Germany	Hungary	Netherlands	France	United Kingdom	Poland	Slovakia
Residence title (RT) required									
EU nationals	No	No	No	No	No, except Croatians	No	No	No	No
EEA	No	No	No	No	No	No	No	No	No
Switzerland	No	No	No	No	No	No	No	No	No
Others	Yes	Yes	Yes	Yes, except if employer est. inside EU	Yes	Yes	Yes	Yes	Yes
Work permit required									
EU nationals	No, except Croatians	No	No	No	No, except Croatians	No	No	No	No
EEA	No	No	No	No	No	No	No	No	No
Switzerland	No	No	No	No	No	No	No	No	No
Others	Yes; except if employer est. in EU / EEA / CH	Yes; incl. in RT	Yes; incl. in RT	Yes; incl. in RT; except if employer est. in EU	Yes; incl. in RT or work permit	Yes; incl. in RT or work permit	Yes, incl. visa + sponsor license	Yes; incl. in RT or work permit	Yes; except if employer est. in EU / EEA / CH
Notification of posting required	Yes; i.e., online	Yes; at labor office	Yes; i.e., online	Yes; i.e., online	Yes; at Chamber of Commerce	Yes; i.e., online	Depending on nationality	Yes; i.e., online	Yes; i.e., via e-mail
Social security system	EU law is applicable for Union citizens (nationals of EU Member States), Icelandic, Norwegian, Liechtenstein and Swiss citizens; refugees and stateless persons residing in an EEA state; also nationals of third countries who are legally resident in an EU Member State (Regulation (EU) No. 1231/2010); refugees and stateless persons residing in an EEA state; also nationals of third countries who are legally resident in an EU Member State (Regulation (EU) No. 1231/2010); exceptions apply to Denmark and UK								
List of social security agreements	Link to List	Link to List	Link to List	Link to List	Link to List	Link to List	Link to List	Link to List	Link to List
Contribution rates for employer	20,72%	34%	19.425% + accident	22% (19.5% from 1.1.2018)	approx. 18.42%	approx. 30.14%	13.8%	20.74%	35%

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Different options

In general, workers moving within the European Union must be subject to single social security legislation. Generally speaking, the social security scheme established by the legislation for the Member State of the new employment is applicable under the regulations. However, in order to give as much encouragement as possible to the freedom of movement for workers and services and to avoid unnecessary and costly administrative complications, the Community provisions in force allow for certain exceptions. Posting workers gives rise to three situations: Posting from another Member State of the European Union (a), posting from Iceland, Liechtenstein, Norway or Switzerland (b) or posting from a state which does not belong to the EAA (EU + Iceland, Liechtenstein and Norway) and which is not Switzerland (c).

In scenarios a) and b), a worker may continue to be covered for a maximum period of 24 months by the social security system of the sending state. In order to stay in their home social security system, employees will need an A1 form which states that they are still covered by their home system while abroad. Article 16 of the Regulation even permits the relevant authorities of two or more Member States to reach agreements providing for exceptions. A request concerning these exceptions shall be submitted without delay when it can be foreseen that activity will take place for more than 24 months. Furthermore, extensions can be requested if the work could not be completed due to unforeseen circumstances (such as sickness). These requests must be submitted and substantiated before the end of the initial period. If work continues for more than two years without an exemption or extension, employees will have to switch to the local social security system and contributions paid in the hosting Member State. It is worth noting that a suspension of work during a posting period (due to holidays, illness, training, etc.) does not extend the posting period. A complete new posting can however be authorized after a two-month waiting period from the date of expiry of the previous posting period.

If situation (c) arises, the sending state has either concluded a social security bilateral agreement with the hosting state which will determine the respective rules and procedures, or there is no social security bilateral agreement. In the latter case, the social security system of the hosting state will apply. This might, depending on the sending state, result in the situation that the worker remains subject to the social security system of the sending state. <–

Editor's note: The information regarding the different countries has been provided by several lawyers from Taylor Wessing: Wolfgang Kapek and Sandra Popp (Austria), Ales Linhart (Czech Republic), Marc André Gimmy and Katja Schiffelholz (Germany), Torsten Braner (Hungary), Bart Hunnekens (Netherlands), Claire Dieterling (France), Sean Nesbit (United Kingdom), Krystian Stanasiuk (Poland), Radovan Pala and Silvia Gatciova (Slovakia). (tw)

Marc André Gimmy,
Rechtsanwalt, Fachanwalt für Arbeitsrecht,
Partner, Taylor Wessing, Munich

m.gimmy@taylorwessing.com

Katja Schiffelholz,
Rechtsanwältin, Associate,
Taylor Wessing, Munich

k.schiffelholz@taylorwessing.com

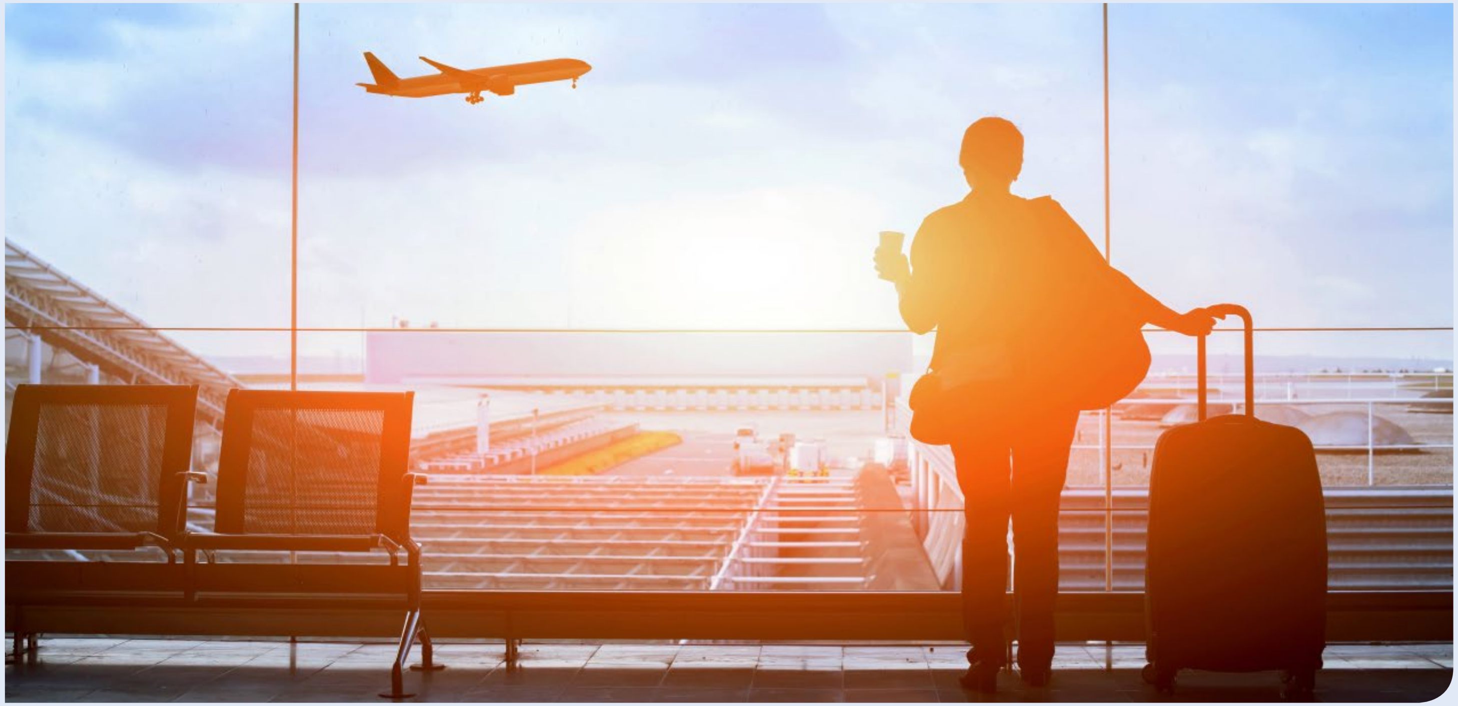
www.taylorwessing.com

Cutting through complexity

International assignments in light of the revised Posting of Workers Directive

By Sachka Stefanova-Behlert and Dr. Thomas Wolf

Introduction



If the Directive is adopted in its revised form, it will have a significant impact on EU-wide assignments.

International employee assignments are a complex matter. Since the implementation of the Enforcement Directive 2014/67/EU, which provides a mechanism for the implementation of the Posting of Workers Directive by introducing assignment-related registration obligations for posted workers and companies, international employee assignments throughout Europe have become even more complex. Not only have the companies to comply with existing social security and tax obligations, but also to ensure that employee assignments within Europe are registered in a timely manner with the relevant labor authorities. Otherwise they may be exposed to severe sanctions and fines in some EU countries. Further, companies are required to observe far more than a formal procedure when fulfilling registration obligations. They must make sure that mandatory local employment laws apply to their assigned employees. Mandatory laws and the level of protection for posted workers may vary from one country to another. In particular, some Member States require companies not only to comply with typical mandatory working provisions, but also with more far-reaching provisions.

The current Amendment Proposal for the Posting of Workers Directive 96/71/EC, which was approved by the European Council on October 23, 2017 and is expected to come into force at the beginning of next year without any further modifications, will bring about considerable changes with the aim of increasing the level of protection for posted workers

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and harmonizing practice throughout Europe.

In light of the existing registration mechanisms of Enforcement Directive 2014/67/EU, which has been already implemented in all Member States, it is a pressing challenge for companies to review and, if necessary, adjust their employee assignment practice in Europe.

Main changes

The Posting of Workers Directive 96/71/EC shall generally apply to all assignments within the European Union regardless of sector. Specific rules will be laid down for the transportation sector, though.

Equal remuneration

One of the main revisions aims to strengthen the principle of equal payment for equal work. Under the revised Directive, posted workers shall receive the same remuneration as comparable local workers in the host country. According to the current version of the Directive, companies must comply with mandatory working conditions, such as maximum work periods and minimum rest periods, minimum paid holidays and safety regulations, for example. With regard to remuneration, the payment of minimum wages has to be ensured. By contrast, under the revised Directive, posted workers shall receive the same remuneration as the comparable local workers in the host country. This includes any allowances and bonuses and not just the minimum wage. In addition, posted workers need to be reimbursed for expenditure resulting from travel, board and lodging in the future.

Maximum duration of posting to be 18 months

Postings are by definition temporary and this is nothing new. For decades, there have been legal disputes about the permissible and appropriate duration of a temporary posting. The revised Directive finally settles these disputes by limiting the duration of inter-European assignments to 12 months with the option of extending for a further six months upon notification from the service provider to a total of 18 months. The Directive does not contain any additional requirements for granting the extension. Consequently, the period of 18 months is likely to become the significant benchmark for assignments.

As the posting of workers shall now not exceed 12 months, the revised Directive foresees different labor law regimes before and after the expiration of the 12 months. Within the 12 months, the mandatory working conditions described above are to be complied with. Upon expiration of the 12-month period, companies must adhere – in addition to the minimum working conditions as set forth in the Directive – to any other working conditions applicable in the host country on the basis of national laws, regulations or administrative provisions, or universally applicable collective agreements or arbitration awards. Formal provisions, provisions on the conclusion and termination of employment relationships as well as provisions on supplementary company pension schemes shall be exempted and shall not be mandatory. In the event of extension, the same applies after 18 months.

Practical impact and recommendations

Revision of the contractual arrangement for assignments

Many companies use domestic secondment agreements when posting workers abroad. This practice goes back to the Rome I Regulation 2008/593/EC which allows parties to choose almost freely the applicable law in the event of temporary employment in a host country (cf. Article 8 of Rome I Regulation). This rule is now considered to be superseded by the revised Posting of Workers Directive which is perceived to be lex specialis in relation to Article 8 of Rome I Regulation. Consequently, the companies must comply with any working conditions applicable in the host company as soon as the assignment exceeds 12 months, or 18 months in the event of an extension, regardless of the parties' choice of law. The choice of law may only matter with regard to the questions of termination law and company pension scheme, which are no less important. However, the enhancement of applicable local working terms beyond the minimum requirements and the reduction of the choice of law makes the domestic secondment agreement as a contractual tool for assignments less attractive and more problematic. By contrast, the conclusion of a local contract from the beginning for any assignments longer than 12 months appears to be more beneficial for companies. It ensures compliance with the provisions of the Directive and also creates legal clarity for the companies regarding the applicable law by avoiding any clash of jurisdictions. Further, the choice of law offers no protection for companies seeking to avoid the more beneficial effect of local termination law for the employees. The latter is explicitly stipulated in Rome I Regulation. In other words, the conclusion of a local contract is the preferable option for assignments of more than 12 months.

Social security considerations

This contractual tool does not hinder the retention of social security coverage and benefits of the home country in most assignments.

Unfortunately, the EU legislator has failed to synchronize the permissible duration of postings under the Posting of Workers Directive with the existing social security legislation (cf. Regulation 2004/883/EC and 2009/987/EC). This contains a 24-month limit for social security freedom for posted workers. This is confusing. In any case, the revised Directive 96/71/EC shall not have any impact on social security matters, in particular on the duration of postings, for social security purposes.

Labor law registration obligations

The implementation of the Enforcement Directive urges companies to deal thoroughly with the question of applicable laws in the host company. This results clearly from the existing registration obligations with the local labor authorities and the notable financial exposure for companies in the event of noncompliance. Indeed compliance with registration obligations has become imperative for current assignment practice.

Another aspect companies need to be aware of is the fact that neither the Posting of Workers Directive – in its current or revised version – nor the Enforcement Directive distinguish between posted workers and business travelers. The concept of business travelers has not been considered at all. Any obligations resulting from both Directives, compliance with formal registration obligations and substantive requirements are likely to apply to business travelers too. Based on current practices of local authorities, there is a strong trend in EU Member States to subject business travel to registration obligations and requirements for compliance with local working conditions regardless of the duration. As a consequence, there is barely any room left for companies to influence the character of the assignment and the resulting obligations. By contrast, given the existing registration periods in some countries, companies should plan assignments well in advance in order not to jeopardize their implementation.

Summary

If the Posting of Workers Directive is adopted in its revised form, it will have a significant impact on EU-wide assignments. In particular, companies are well advised to review their assignment practice and adjust the contractual arrangement to the new regulations of the Directive. This is especially compelling in light of the obligations to register posted workers with local authorities and prove compliance with local working conditions. The Enforcement Directive is already in place. The revised Posting of Workers shall apply in 4 years at the earliest. Nonetheless, companies should become acquainted at the early stage of planning with the local working conditions whenever they assign employees abroad. <–

Sachka Stefanova-Behlert,
Rechtsanwältin, Manager,
KPMG Law Rechtsanwaltsgesellschaft mbH, Berlin

sstefanovabehlert@kpmg-law.com

Dr. Thomas Wolf,
Rechtsanwalt, Partner,
KPMG Law Rechtsanwaltsgesellschaft mbH, Berlin

twolf@kpmg-law.com

www.kpmg-law.com

Guidelines for internal investigations

Two landmark decisions by the German Federal Labor Court

By Dr. Daniel Klösel and Dr. Thilo Mahnhold

Corruption, antitrust violations, fraud, data theft, theft of company assets, the betrayal of company secrets: The list of potential breaches of contract and, in most cases, criminal offenses in the workplace seems to be never-ending. The development of sophisticated compliance strategies to reduce the risk of such violations or mitigate their liabilities if the inevitable occurs is no longer unique to multinationals. Investigating potential cases of such criminal offenses is an important element of compliance strategies and – in some jurisdictions – is key to the reduction of administrative fines. But what if it is not the suspect but the investigator who is the actual source of potential liabilities? The EU General Data Protection Regulation (GDPR), which will come into force on May 25, 2018, is accompanied by administrative fines of up to 4% of the total annual worldwide turnover of a corporate group. In addition, individuals who suffer material or nonmaterial damage as a result of an infringement of the GDPR are entitled to compensation. Because data protection laws "hide what is hidden" and investigators "hate what is hidden", it stands to reason that there will be a conflict of interests. This makes it even more important to be aware of what investigators can do without violating data privacy laws and exposing the employer to risks such as administrative fines, damage claims and, in some instances, even criminal liability and the inadmissibility of evidence in court.

Employers should make sure that pursuing a private investigation is warranted.

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The German Federal Labor Court has now issued guidance for internal investigations in two landmark decisions. Although they refer to the current German Data Protection Act, which will be replaced by the GDPR and a revised version of the German Data Protection Act on May 25, 2018, both decisions give some indication of how courts could rule in the future.

The German Federal Labor Court on private investigators

In its decision of June 29, 2017 (2 AZR 597/16), the German Federal Labor Court clarified the legal framework for the deployment of a private investigator. The previous instance, the Appellate Court of Baden-Württemberg, had decided that the deployment was not justified as the private investigator was only investigating a single breach of contract and not a criminal offense. In this case, the employer had received an e-mail (addressed to a customer) which mentioned that the employee was working for a competitor. The employer then consulted a private investigator who ultimately saw the employee working for the competitor. The Appellate Court of Baden-Württemberg came to the conclusion that the dismissal without notice was invalid as the evidence →

collected by the private investigator was inadmissible in court and therefore gross misconduct had not been proven.

The Federal Labor Court overruled this decision with unmistakable clarity. Although the decision of the Appellate Court of Baden-Württemberg was based on a strong argument – specifically, the wording of section 32 (1) Data Protection Act which only referred to criminal offenses - the Federal Labor Court ruled that there was no legal argument to interpret section 32 (1) Data Protection Act as the appellate court had. According to the Federal Labor Court, this interpretation would be in contravention of European law as it would not reasonably weigh the employee's right to privacy against the employer's interest. Furthermore, the court assumed that when section 32 Data Protection Act came into effect in 2009, it was not intended to modify the rulings of the Federal Labor Court, which had allowed covert investigations under certain conditions.

Against this background, the Federal Labor Court states that the (covert) surveillance of an employee by a private investigator is justified in general if the following rules are observed:

- there is a (simple) suspicion of gross misconduct, which does not necessarily have to be a criminal offense;
- the suspicion is based on specific facts (to be documented);
- no less intrusive investigative measures exist ("need to know");
- the investigative measure is reasonable (balance of interests).

It should be noted that German case law applies a strict interpretation of these principles. The steps that can be taken must be selected in accordance with the circumstances of the specific case. In particular the "need to know" principle must be closely observed. If, for example, a measure that is less intrusive than using a private investigator does not exist, the scope and length of the investigation must nevertheless be limited, for instance only a few hours a day and not every day. It is also crucial that a weighing of the respective interests has taken place.

The German Federal Labor Court on keylogger programs

The second decision of the German Federal Labor Court concerned keyloggers, which track all keyboard entries regardless of content, from business to online banking to personal correspondence. The employer in this case had decided to take this step after rumors that the employee in question was using his work computer for private business during working time. It was also reported to the employer that the employee had hastily closed "heavily pictured" windows on his computer in at least one case. In its decision of July 27, 2017 (2 AZR 681/16), the Federal Labor Court compared keylogging to covert video surveillance, which it had already deemed to be justified under strict requirements. The court also considered the aforementioned principles, which lay down the legal framework for the deployment of private investigators, video surveillance and other covert investigative measures. With regard to the case at hand, however, the court held that the use of a keylogger failed to meet even the first prerequisite of a simple suspicion of gross misconduct based on specific facts. Rumors and the one-time closing of a "heavily pictured" window are simply not sufficient. The court also highlights that keylogging is highly intrusive and contravenes the right to privacy as it provides a comprehensive and complete profile of computer use. The court explicitly states that the use of a keylogger in this specific case was excessive.

Even in light of this ruling, keylogging is not a no-go per se but is definitely a last resort with very limited areas of application. Its use must be clearly restricted in scope and time, and a careful weighing of interests must take place to ensure that its use is not excessive. The Federal Labor Court even gives an example for a less intrusive and permissible surveillance measure: Recording process data for use of the internet browser for a limited period. Evaluation of this kind of data on a random basis can be the preferred option for monitoring compliance with company policies on Internet use. This is good news from the employer's perspective, as the court clearly acknowledges the employer's interest in warranting compliance with internal policies and protecting company assets and IT systems.

Relevance under the GDPR

What will these landmark decisions be worth when the GDPR and the new German Data Protection Act come into force? In all relevant aspects, the new section 26 (1) of the German Data Protection Act is identical to section 32 (1) of the current Data Protection Act. The aforementioned decisions are based on an argumentation which allows the Federal Labor Court to continue to uphold both decisions even under the new laws. Even if →

it remains speculation, there is good reason to believe that this is the purpose of the two carefully drafted decisions. Nevertheless, there is one crucial and unanswered question that the German courts have to deal with under the GDPR and the Data Protection Act: According to article 13 (1) GDPR, the data subject, that is the employee, must be informed at the time that personal data is being obtained directly. It is irrelevant whether this entails video surveillance, private investigators, keylogging or GPS tracking if the data is obtained directly from the subject. If the employer or investigator is obliged to simultaneously notify the employee about these tools or measures, covert investigations would be impossible. In light of this, a recent decision by the European Court of Human Rights (ECHR, judgment of September 5, 2017, Bărbulescu v. Romania, no. 61496/08) is also noteworthy. It advises local courts to take into account that employees should be notified in advance of the possibility that their employer might take measures to monitor correspondence (in the case at hand, this was a messenger service). Although the ECHR has justified the use of covert investigative measures such as video surveillance in the past, this is another hurdle to be overcome if the German Federal Labor Court wants to uphold its two landmark decisions.

All in all, there is good reason to believe that the German Federal Labor Court will not be forced to alter its decisions. The ECHR ruling only influences the interpretation of German laws and German courts decide at their own discretion how to observe such rulings. Although the GDPR is binding, there is reason to assume that it does not aim to abolish reasonable covert investigative measures as this would otherwise be an overzealous interpretation of the right to privacy. In addition, article 14, which addresses duties to inform when data is not collected from the data subject, provides for an explicit exemption from the duty to inform if the information in question seriously impairs the achievement of data processing objectives. It is merely logical to apply this exemption to situations in which the data is obtained directly from the subject or employee (see Byers, NZA 2017, 1086, 1090).

What needs to be done?

Because the GDPR and the new Data Protection Act are currently driving many employers to revise their data protection policies, there is good reason to consider whether the mere possibility of specific (covert) investigative measures should be disclosed as part of a revised data protection concept. Policies on IT security, the use of telecommunications, data protection policies or compliance policies in a broader sense could be an appropriate place for these disclosures. For employers with works councils, master works agreements on data protection or individual works agreements regarding the tools that are subject to codetermination (for example video surveillance) could be another smart option when taking precautionary steps. In light of all the unknown factors, one thing is certain: The implementation of the GDPR is a challenge, not only for employers but also for the courts. <–

Dr. Thilo Mahnhold,
Rechtsanwalt, Partner, Fachanwalt für Arbeitsrecht, JUSTEM Rechtsanwälte, Frankfurt/Main

t.mahnhold@justem.de

Dr. Daniel Klösel,
Rechtsanwalt, Associate, JUSTEM Rechtsanwälte, Frankfurt/Main

d.kloesel@justem.de

www.justem.de

Kristin Band
Legal Department
Fritz Dräxlmaier GmbH & Co. KG
Vilsbiburg

band.kristin@draexlmaier.de
www.draexlmaier.de

Gerrit-Michael Böning
Deutsche Bank AG
Managing Director / Head of Labour Relations
Frankfurt/Main

gerrit-michael.boening@db.com
www.db.com

Stefan Braun
General Counsel EMEA, Fachanwalt für Arbeitsrecht, Fachanwalt für IT-Recht
Diebold Nixdorf, Paderborn

stefan.braun@dieboldnixdorf.com
www.dieboldnixdorf.com

Sandra Dreyer
Senior Counsel Labor & Employment
GE
Frankfurt/Main

sandra.dreyer@ge.com
www.ge.com

Michael Fritz
Geschäftsführer Personal
DB Engineering & Consulting GmbH
Berlin

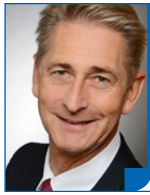
michael.fritz@deutschebahn.com
www.deutschebahn.com

Dr. Marc Kaiser
Leiter Arbeitsrecht, Versicherungs- / Schadenmanagement
AUDI AG
Ingolstadt

marc.kaiser@audi.de
www.audi.de

Dr. Frank Kohls
Counsel, Labour Law Europe
IBM Deutschland Management & Business Support GmbH
Ehningen

fkohls@de.ibm.com
www.de.ibm.com



Stefan Möhren
HR Labor Relations
LEDVANCE GmbH
Garching

s.moehren@ledvance.com
www.ledvance.com

Ellen Raahede-Secher
Managing Director / Country Human Resources Director Germany
Parker Hannifin Manufacturing Germany GmbH & Co. KG
Kaarst

ellen.raahedesecher@parker.com
www.parker.com

York von Roenne
Bereichsleiter Human Resources / Global Director Human Resources
Leica Camera AG
Wetzlar

york.von.roenne@leica-camera.com
www.leica-camera.de

Frank Schürmann
Director Labor Relations Germany
UPS Deutschland Inc. & Co. OHG
Neuss

fschuermann@ups.com
www.ups.com

Alexandra Seemann
Legal Department Manager / German Labor Relations, Labor & Social Law
SAP SE
Walldorf

alexandra.seemann@sap.com
www.sap.com

Christian Stadtmüller
Head of HR Labor Relations
Infineon Technologies AG
Neubiberg

christian.stadtmueller@infineon.com
www.infineon.com

Christian Vetter
Leiter Arbeits- und Sozialrecht Deutschland
Dow Deutschland Inc.
Hamburg

christian.vetter.hamburg@t-online.de

Dirk Wasmuth
Leiter Arbeitsrecht, Versicherungs- / Schadenmanagement
Porsche
Ingolstadt

dirk.wasmuth@porsche.de
www.porsche.de

Liana Weismüller
Leiterin Arbeitsrecht und Betriebsverfassung / Head of Labour Law
Condor Flugdienst GmbH
Frankfurt/Main

liana.weismueller@condor.com
www.condor.com

Alexander Werner
Head of Team Labor and Employment Law
Merck
Darmstadt

alexander.werner@merckgroup.com
www.merckgroup.com

ALTENBURG
FACHANWÄLTE FÜR ARBEITSRECHT

Dr. Anja Mengel, LL.M. (Columbia)
Partner, ALTENBURG Fachanwälte für Arbeitsrecht
Französische Str. 2–4, DE-10117 Berlin

a.mengel@altenburg.net
www.altenburg.net

BEITEN BURKHARDT

Markus Künzel
Partner, Beiten Burkhardt Rechtsanwaltsgesellschaft mbH
Ganghoferstr. 33, DE-80339 Munich

markus.kuenzel@bblaw.com
www.bblaw.com

BUSE HEBERER FROMM

Sabine Feindura
Partner, Buse Heberer Fromm
Kurfürstendamm 237, DE-10719 Berlin

feindura@buse.de
www.buse.de

Dr. Jan Tibor Lelley
Partner, Buse Heberer Fromm
Bockenheimer Landstr. 101, DE-60325 Frankfurt/Main

lelley@buse.de
www.buse.de

DLA PIPER

Pascal R. Kremp, LL.M.
Partner, DLA PIPER UK LLP
Maximilianstr. 2, DE-80539 Munich

Pascal.Kremp@dlapiper.com
www.dlapiper.com

FRAGOMEN

Dr. Axel Boysen
Partner, Fragomen Global LLP
Neue Mainzer Str. 75, DE-60311 Frankfurt/Main

aboysen@fragomen.com
www.fragomen.com

JUSTEM RECHTSANWÄLTE

Caroline Bitsch
Partner, JUSTEM Rechtsanwälte
Neue Mainzer Str. 26, DE-60311 Frankfurt/Main

c.bitsch@justem.de
www.justem.de

Dr. Thilo Mahnhold
Partner, JUSTEM Rechtsanwälte
Neue Mainzer Str. 26, DE-60311 Frankfurt/Main

t.mahnhold@justem.de
www.justem.de

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Dr. Martin Trayer, LL.M. (Edinburgh)
Director, KPMG Rechtsanwaltsgesellschaft mbH
THE SQUAIRE, Am Flughafen, DE-60549 Frankfurt/Main

mtrayer@kpmg-law.com
www.kpmg-law.com

Luther.

Axel Braun
Partner, Luther Rechtsanwaltsgesellschaft mbH
Anna-Schneider-Steig 22, DE-50678 Cologne

axel.braun@luther-lawfirm.com
www.luther-lawfirm.com

Luther.

Prof. Dr. Robert von Steinau-Steinrück
Partner Employment, Luther Rechtsanwaltsgesellschaft mbH
Friedrichstr. 140, DE-10117 Berlin

robert.steinrueck@luther-lawfirm.com
www.luther-lawfirm.com

Dr. Guido Zeppenfeld
Managing Partner, Mayer Brown LLP
Friedrich-Ebert-Anlage 35-37, DE-60327 Frankfurt/Main

gzeppenfeld@mayerbrown.com
www.mayerbrown.com

TaylorWessing

Marc André Gimmy
Partner, Taylor Wessing
Benrather Str. 15, DE-40213 Düsseldorf

m.gimmy@taylorwessing.com
www.taylorwessing.com

ACC Association of Corporate Counsel EUROPE

Carsten Lüers
Board Member & Country Representatives Coordinator
ACC Europe – Association of Corporate Counsel

carsten.lueers@de.verizon.com

BPM BUNDESVERBAND DER PERSONALMANAGER

Christian Vetter
Mitglied im BPM-Präsidium &
Leiter der Fachgruppe Arbeitsrecht

arbeitsrecht@bpm.de

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