



RECHT AKTUELL CURRENT LAW

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Focus in this edition: Employment and Corporate Law

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1. No Termination of Existing Employment Contract by Orally Concluded Managing Director's Agreement

An oral managing director's agreement may not automatically terminate an employment contract with an employee that has been concluded before (*Bundesarbeitsgericht / German Federal Labor Court*, March 15, 2011 - 10 AZB 32/10). The former employment contract remains in place but will not be performed during the term of the employee's office as managing director. A valid termination requires a written agreement. Otherwise the termination would not be explicit enough.

2. Internal Job Posting of Job Offers: Borrowed Workforce

The works council is also competent to request an internal posting of job offers if the employer intends to permanently fill the vacancy with borrowed workforce by agency workers (*Bundesarbeitsgericht / German Federal Labor Court*, February 1, 2011 – 1 ABR 79/09). According to the wording of section 93 BetrVG (*Betriebsverfassungsgesetz / Works Constitution Act*), all jobs need to be posted internally. The purpose of section 93 BetrVG is to promote the in-house job market.

3. Paid Leave of Absence after Notice of Termination: Invalid Clause?

A clause that provides that the employer is entitled to suspend the employee at full pay after notice of termination is invalid if the clause must be considered as a general condition set forth by the employer (*Hessisches Landesarbeitsgericht / State Labor Court of Hesse*, March 14, 2011 – 16 Sa 1677/10). Every employee has not only a right to salary but also a right to work which derives directly from any employment contract. The possibility to suspend the employee from work simply on the basis of the clause in question must be considered as an inappropriate restriction of this right. An employee may try to put pressure on his employer by means of a preliminary injunction in this regard.

4. Factory Meetings: Working Time?

Time spent in factory meetings is working time in the sense of the *Arbeitszeitgesetz / German Working Time Act* (*Oberverwaltungsgericht Münster / Higher Administrative Court of Münster*, May 10, 2011 - 4 A 1403/08). According to the court, the participation in factory meetings serves business purposes and thus also employer's interests. Since the participation cannot be considered as a break or as recreational time it must be considered as working time. This ruling remains rather controversial. A final decision of the *Bundesverwaltungsgericht / Federal Administrative Court* or the *Bundesarbeitsgericht / Federal Labor Court* must be awaited.

5. Purchase of Limited Liability Company Share: Seller's Disclosure Obligations

When selling company shares (in the case at hand: of a limited liability company) the seller is obliged to inform the purchaser about an existing critical financial situation of the company (*Oberlandesgericht Brandenburg / Higher Regional Court of Brandenburg, November 24, 2010, - 7 U 36/09*). If the seller does not disclose all material facts in this regard in such a case and fails to inform the purchaser fully and truthfully about the liabilities of the company, the purchaser is entitled to cancel the purchase contract on the grounds of deceit. The case at hand dealt with titled claims in the amount of more than EUR 160.000,00 that the company failed to pay. It would have been the seller's obligation to disclose those to the purchaser even if the purchaser had not asked for such a disclosure.

6. Piercing the Corporate Veil: Liechtenstein Foundation

A Liechtenstein foundation founded with the main purpose to evade taxes may not be recognized as a legal entity in German courts (*Oberlandesgericht Düsseldorf – Higher Regional Court of Dusseldorf, April 30, 2011 – 22 U 126/06*). In the case at hand, considerable amounts of black money had been transferred to the foundation by the founder. Those amounts were to be given to people close to the founder after his death – without informing the German tax authorities. After the founder's death, a lawsuit was filed by the legal heirs against the beneficiaries of the foundation. The court ruled in favor of the heirs. The creation of the foundation was considered to be incompatible with fundamental principles of the German law (ordre public) and thus the foundation could not to be recognized as a separate legal entity in Germany. On the other hand, the court still confirms the general principle that in other cases where the motivation to evade taxes had only secondary character a company may still be recognized legally as such.

7. Managing Director: No Bonus in Case of Leave of Absence?

A bonus must not be paid in case of leave of absence if a managing director has been released from his obligations as managing director and if the managing director's agreement excludes such a payment (*Landgericht Düsseldorf / Regional Court of Dusseldorf, December 23, 2010 - 15 O 276/10*). In such a case the managing director is just entitled to his fixed salary. It is doubtful, however, whether the court's opinion will sustain in other cases. In many cases there are good reasons to argue that such a provision in an agreement must be considered as inappropriate according to the principles applicable to general conditions.



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