



RECHT AKTUELL

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1. Long-term Sick Leave: Expiring Date for Vacation not Taken

According to section 7 (3) BUrlG (*Bundesurlaubsgesetz* / German Federal Act on Vacation) the right to take vacation is time barred at the end of the first quarter of the following year, respectively March 31. Due to overriding EU-Law this shall not apply in cases of long-term sick leave. In such cases claims will be time barred after a period of 15 months (*Bundesarbeitsgericht* / German Federal Labor Court, August 7, 2012 – 9 AZR 353/10 in line with the European Court of Justice (ECJ) November 22, 2011 – C-214/10 and the *Landesarbeitsgericht Baden-Württemberg* / State Labor Court of Baden-Wurttemberg, December 21, 2011 – 10 Sa 19/11 – see also [Current Law I-2012, Nr. 1](#)).

2. Limited Control of Terms and Conditions regarding a Clause for Lump-Sum Settlement of Overtime

Bundesarbeitsgericht / German Federal Labor Court on May 16, 2012 – 5 AZR 331/11: A clause specifying remuneration for overtime work in an employment contract is not subject to the restrictions on contents of general terms and conditions according to section 307 (1) sentence 1 BGB (*Bürgerliches Gesetzbuch* / German Civil Code). The clause in question provided that the first 20 hours overtime work would be included in the monthly salary. The right of the employer to request overtime had not been included explicitly in the wording of the contract. According to the Court the clause concerned a major obligation of the employment relationship in consideration of work and remuneration, e.g. salary, and, therefore, the restriction would not apply. Also the clause could not be considered as an invalid surprise clause in the sense of section 305 lit c (1) BGB and it would not violate the principle of transparency according to section 307 (2), (1) sentence 2 BGB (see also [Current Law 1-2011, Nr. 2](#)).

3. Employer`s Right to Modify Distribution Structure?

An employer has no obligation to keep up a certain distribution structure even if that may affect the commission scheme of the employees (*Bundesarbeitsgericht* / German Federal Labor Court, February 16, 2012 – 8 AZR 242/11). Exception No. 1: the distribution structure used so far has been agreed upon in the employment contract. Exception No. 2: the distribution structure has become common and binding practise in the company. However, cases justifying such exceptions are very rare. If they happen to occur, a so-called modifying termination of the employment agreement may become necessary.

4. Liabilities Assumed Prior to Takeover of Business

The new owner of a business may be liable for obligations assumed prior to the takeover of the business if he takes over also the name of the business (section 25 (1) sentence 1 HGB (*Handelsgesetzbuch* / German Commercial Code). This applies also if the business taken over had been a one-man business and the new owner is a GmbH (*Gesellschaft mit begrenzter Haftung* / German Limited Liability Company) that simply adds the abbreviation GmbH to the former name of the business (*Bundesgerichtshof* / German Federal Court in Civil Matters, July 5, 2012 – III ZR 116/11). Also a temporary co-existence of old and new business would not exclude the liability of the new owner.

5. Freedom of Establishment: Cross-Border Conversions of Companies

The freedom of establishment guaranteed by EU-Law precludes national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another EU-country to convert to a company governed by national law (European Court of Justice (ECJ) July 12, 2012 – C 378/10 “Vale”). The case concerned an Italian Srl trying to move and to convert to a Hungarian *Építési kft.* The ruling is fully in line with previous rulings of the Court permitting also cross-border spin-offs and mergers.

6. Principle of Unconditional Transparency towards Supervisory Board

If a Member of the Management Board of an AG (Aktiengesellschaft / German Stock Corporation) violates the principle of unconditional transparency towards the Supervisory Board he may be dismissed from office (Oberlandesgericht München / Court of Appeals Munich, March 14, 2012 – 7 U 681/11). In the case at hand the Supervisory Board had initially permitted secondary business activities of the Member of the Management Board in question. However, as soon as the Members on the Supervisory Board had changed the new Supervisory Board became suspicious and asked for disclosure of any secondary business activities. However, the Member of the Management failed to react in due course and, consequently, the Supervisory Board decided to dismiss him. Rightly, judged the Court as far as the dismissal from office was concerned. However, such a violation of the principle of unconditional transparency would not automatically justify a termination for cause of the underlying employment contract (which must be distinguished from the dismissal from office) at the same time if the Member of the Management Board can justify his failure to react.



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