

March 31, 2014

RECHT AKTUELL

CURRENT LAW

Edition II-III/2014

Focus in this edition: Employment and Corporate Law

aclanz Partnerschaft von Rechtsanwälten
An der Hauptwache 11 (Alemanniahaus), 60313 Frankfurt am Main
Tel.: +49 (0)69 / 2 97 28 73 - 0, Fax: +49 (0)69 / 2 97 28 73 - 10
E-Mail: info@aclanz.de, Web: www.aclanz.de

1. Discrimination of Applicants: No Claims against the Recruitment Agency

The potential employer rather than the recruitment agency is liable for damage claims based on discrimination according to Section 15 (2) AGG (*Allgemeines Gleichbehandlungsgesetz / General Equal Treatment Act*). According to the *Bundesarbeitsgericht / Federal Labor Court, January 23, 2014 - 8 AZR 118/13*, an applicant discriminated because of his age may claim damages against the potential employer, only. This applies also in the event that the recruitment process had been exclusively organized by a recruitment agency and that it may have seemed unclear to the employee whether the agency or the employer would become the actual employer. In the case at hand, the recruitment agency and the potential employer were affiliated companies with similar names. According to the Court, the fact that the ultimate employer had been mentioned in the original job posting would provide sufficient evidence for identification.

2. Works Council Election: Access to Employer's Premises by Union Agents?

Trade union agents may attend meetings of the election committee also within the premises of the employer if the election committee has invited them to do so (*Landesarbeitsgericht Mecklenburg-Vorpommern / State Labor Court of Mecklenburg-Vorpommern, November 11, 2013 - 5 TaBVGa 2/13*). The employer can neither refuse access to the premises nor force the election committee to meet outside of the business.

3. Night Shift Premiums for Day Time Activities of Works Council Members?

A member of the works council is entitled to night shift premiums if the member had actually worked in its original function as employee had on the night shift and had received night shift premiums for such work. In that case it may not matter whether the member of the works council has completed its responsibilities as member of the works council on day or night time (*Landesarbeitsgericht Köln / State Labour Court Cologne, December 19, 2013 - 12 Sa 682/13*). The Court underlined that Section 37 (4) BetrVG (*Betriebsverfassungsgesetz / Works Constitution Act*), provides that the remuneration of a member of the works council must correspond to the remuneration of comparable employees with a regular career within the company.

4. Liability of Business Successor for Liabilities Incurred before Takeover

The new owner of a business is liable for any liabilities incurred before takeover if the business continues to run under its former name (Section 25 (1) HGB (*Handelsgesetzbuch / German Commercial Code*)). Exemptions: e.g. takeover from the insolvency administrator. However, this exemption will not apply simply because an insolvency administrator has been appointed. In fact, the takeover must have been induced at least somehow by the activities of the insolvency administrator (*Bun-*

desgerichtshof / German Federal Court, *October 10, 2013 - VIII ZR 423/12*). This is not the case where a managing director of a *GmbH* (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company) continues to run the former business after insolvency proceedings had to be closed and the GmbH had to be taken out of the commercial registry due to a lack of assets. In such a case Section 25 (1) HGB may still apply.

5. Negative Net Assets on the Balance Sheet: Personal Liability of the Managing Director?

In the event of negative net assets showing on the balance sheet of a *GmbH* (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company), the managing director has to research facts and secure documentation demonstrating that the Company is actually not insolvent in order to avoid any personal liability for payments made by the Company after this point in time. In case of litigation the insolvency administrator fulfills his burden of fact pleading simply by presenting a trade balance sheet whereas the managing director must specify why there are no negative net assets, e.g. specific hidden reserves or specific positive assets that have not been included in the balance sheet. According to the *Bundesgerichtshof* / German Federal Court, *November 19, 2013 - II ZR229/11*, it is not sufficient the managing director invokes unspecified allegations in this regard.

6. About “Chinese“ or ,”Russian-Roulette-“ and “Texan-Shoot-Out-Clauses“ with “Sicilian Openings“

A so-called “Chinese“ or “Russian-Roulette-Clause“ included in the articles of an AG (*Aktiengesellschaft* / German Stock Corporation) consisting of only two shareholders, which provides that one shareholder can offer his shares with a certain price to the other shareholder and that in case that the other shareholder refuses to accept this offer, the other shareholder is obliged to offer all his shares for the same purchase price to the first shareholder, is valid unless there is a specific risk that either of the shareholders might not be able to finance such a mechanism (*Oberlandesgericht Nürnberg* / Court of Appeals Nuremberg, *December 20, 2013 - 12 U 49/13*). The Court pointed out that already similar clauses such as so-called “Texan-Shoot-Out-Clauses“ have been considered to be valid. They provide for a similar mechanisms combined with a price spiral and in some cases combined with secret bids, e.g. so-called “Sicilian Openings“. The Court did not miss to cite confirming Case Law of other Central- and Western-European jurisdictions - as if that seemed to be relevant with regard to the rather geographical denominations found in the clauses discussed.



JOACHIM HUND-VON HAGEN, D.E.A. (PARIS II)

Attorney at Law
Certified Tax Attorney
Commercial Mediator
Joachim.HundvHagen@aclanz.de

DR. JOACHIM WICHERT

Attorney at Law
Certified Employment Law Attorney
Commercial Mediator
Joachim.Wichert@aclanz.de

DOMINIK HOIDN

Attorney at Law
Dominik.Hoidn@aclanz.de

RECHT AKTUELL / CURRENT LAW summarizes jurisdiction, legislation and other legal issues but does not give legal advice on a specific case or problem. Decisions mentioned in the articles just represent a review of the respective judgment despite a future rescission or a change in legislation. Therefore, we do not accept any liability for the content of this letter. Please contact us for further information.

aclanz Partnerschaft von Rechtsanwälten
An der Hauptwache 11 (Alemanniahaus), 60313 Frankfurt am Main
Tel.: +49 (0)69 / 2 97 28 73 - 0, Fax: +49 (0)69 / 2 97 28 73 - 10
E-Mail: info@aclanz.de, Web: www.aclanz.de (legal disclosure q.v.)