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CURRENT LAW

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Focus in this edition: Employment and Corporate Law

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1. Integration of Disabled Employees: Codetermination by the Works Council is Limited

Only the employer is responsible for integrating disabled employees in due course. Any codetermination rights of the works council are limited to defining the general process of integration (*Bundesarbeitsgericht* /Federal Labour Court, March 22, 2016 – 1 ABR 14/14). The case at hand concerned a decision of a conciliation board. The decision provided for the formation of an integration team, which should have been composed of one representative of the employer and one of the works council. The integration team was supposed to take care of the company's integration management. The employer objected and sued successfully against this decision of the conciliation board. The Court ruled that the formation of the integration team went beyond defining just general principles of the integration process.

2. Automatic Extension of an Employment Contract by Continuing to Work after the Fixed Term?

If the employment relationship, upon expiration of the term for which it was entered into, is continued with the knowledge of the employer, it shall be deemed to have been extended for an indefinite period if the employer does not object without undue delay, Section 15 (5) TZBFG (*Teilzeit- und Befristungsgesetz* / Part Time and Limited Term Employment Act). However, according to the *Bundesarbeitsgericht* / Federal Labour Court, October 7, 2015 – 7 AZR 40/14, this may be handled differently in the following case: The employer had explicitly set the condition precedent that any (indefinite) extension of the employment contract must be made in writing. According to the Court simply continuing to work for the employer would not be sufficient for transforming automatically the employment at fixed term into an employment for an indefinite period of time. The condition precedent set had to be considered as a valid objection within the meaning of Section 15 (5) TZBFG to such a transformation.

3. First-Come, First-Served Principle for Severance Payment

An employer may offer severance packages and payments on a first-come, first-served basis to his employees (*Landesarbeitsgericht* / State Labour Court of Düsseldorf, April 12, 2016 – 14 Sa 1344/15). In the case at hand, the employees had to communicate their commitment participate by an IT-system especially set up for this purpose. One last commitment was registered just seconds after the last package had been already awarded. According to the Court, German Law does not provide for any mandatory severance payments. Therefore, an employer is entitled to limit the number of severance packages and payments. Such an approach can be qualified neither as arbitrary nor as discriminatory.

4. Personal Liability of Director of UK Limited

The director of a UK Limited is liable for the reimbursement of payments made after the company became insolvent or after it was established that it was over-indebted according to the same principles that would apply to a managing director of a GmbH (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company), if insolvency proceedings are opened in Germany due to the Limited's center of interests in Germany (European Court of Justice (ECJ), December 10, 2015 – C-594/14). According to the Court this ruling does not affect the Freedom of Establishment in the European Union. In the case at hand, the Limited had established a branch and was mainly active in Germany.

5. Intransparency of Post-Contractual Non-Solicitation Clause for a Sales Agent

A clause providing that "the sales agent has to refrain from soliciting customers of the Company or even trying to do so during a period of two years after termination of the agency relationship" must be considered as intransparent and is therefore invalid according to Section 307 (2) Sentence 1 and 2 BGB (*Bürgerliches Gesetzbuch* / German Civil Code), as the *Bundesgerichtshof* / Federal Court has ruled on December 3rd 2015 – VII ZR 100/15. Firstly, according to the Court, it would not be clear whether "customers" meant all customers or only customers who had been acquired by the commercial agent himself. Furthermore, it would be unclear whether "soliciting" referred only to inducing customers to terminate prematurely existing contracts and whether the clause was also about the placement of other products. Consequently, the Court ruled that the non-solicitation agreement was invalid as whole. A reduced application or interpretation of the clause was not possible.

6. Directors of a Limited Liability Company are Liable for their Co-Directors

If a co-director makes unjustified payments to himself, the other director must substantiate facts and prove that he did not neglect his own duties due to the fact that he did not prevent such payments. Otherwise both directors are liable for the reimbursement according to section 43 (2) GmbHG (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*/German Limited Liability Company Act) (*Oberlandesgericht München* / Court of Appeals of Munich, October 22, 2015 – 23 U 4861/14). In the case at hand, the director was not able to provide evidence proving due diligence with regard to the unjustified payments. According to the Court he should have noticed them, or at least, he should have supervised his co-director more closely regardless of his specific responsibilities within the Company.

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