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aclanz Partnerschaft von Rechtsanwälten
An der Hauptwache 11 (Alemanniahaus)
60313 Frankfurt am Main
E-Mail: info@aclanz.de
Web: www.aclanz.de

1. Does a takeover of the majority of the staff by a third person represent a transfer of undertaking?

The takeover of the majority of the staff of a production-oriented business with considerable operating capital, does not represent a transfer of undertaking according to § 613a of the German Civil Code (BGB) in the event that necessary machines and other operating material are not taken over by the third person (*Bundesarbeitsgericht* / German Federal Labor Court, September 23, 2010 – 8 AZR 567/09). With regard to service-oriented businesses with little operating capital where the focus primarily lies on personnel a takeover of the majority of the staff may, however, be considered as a transfer of undertaking.

2. A general terms and conditions clause for lump-sum settlements of overtime with the monthly salary is invalid

The general terms and conditions clause "required overtime is settled with the monthly salary" does not sufficiently respect the requirement of transparency (§ 307 I 2 BGB) and it is invalid in accordance with § 306 BGB because the amount of overtime expected without additional remuneration is not sufficiently clear (*Bundesarbeitsgericht* / German Federal Labor Court, 1.9.2010 – 5 AZR 517/09). In practice, employers can, however, create a valid overtime clause by explicitly specifying the maximum amount of overtime compensated by the monthly salary in the employment contract. Of course, the limits of the German Working Hours Act (*Arbeitszeitgesetz*) must be respected.

3. The Labor Court is not bound by the first proposal for the appointment of the chairperson of a labor conciliation board

If a labor court has to appoint the chairperson of a labor conciliation board, it is irrelevant which candidate has been proposed in the first place (6thchamber of the *Landesarbeitsgericht* / State Labor Appeals Court of Berlin-Brandenburg, June 4, 2010 – 6 TaBV 901/10). In general a court appoints a third person as chairperson if the parties cannot agree on one chairperson. The same applies if the parties have no specific concerns against the proposal of the opposing side. The 10th chamber of the same court had stated a different point of view in an earlier decision (*Landesarbeitsgericht* / State Labor Appeals Court of Berlin-Brandenburg, January, 1 2010 – 10 TaBV 2829/09): The court is bound to the first proposal as long as there are no specific concerns against it, as if to say: "First come, first served."

4. No claim for continuous employment for the managing director of a GmbH / German Limited Liability Company after revocation of office

The managing director of a GmbH does not have a claim for continuous employment as managing director or in a similar position after the revocation of his office by the shareholders unless the underlying employment contract provides in a general manner for a comparable activity or an activity below the level of managing director in such an event (*Bundesgerichtshof* / German Federal Court in Civil Matters, October 11, 2011 - II ZR 266/08). The question whether such clauses are recommendable for an employment contract with regard to the potentially disturbed relationship usually resulting from a revocation is another issue.

5. Worker participation in supervisory board: stock corporation status process necessary if the co-determination is no longer necessary due to a decline in the number of employees?

In the event that the co-determination regulations would be no longer applicable due to a decline in the number of employees to less than 500, it is necessary to file formalized status proceedings according to §§ 97 ff. AktG (*Aktiengesetz* / German Stock Corporation Act) in order to confirm the new status of the business. Otherwise, a co-determined supervisory board will persist as such (*Oberlandesgericht* / Court of Appeals Frankfurt/M., November 2, 2010 – 20 W 362/10 - Asklepios Verwaltungsgesellschaften mbH). This judgment is not final, yet, the *Bundesgerichtshof* / German Federal Court in Civil Matters as the higher court may have to deal with it rather soon. As long as there is no final ruling a management board might be well advised to initiate status proceedings merely as a matter of precaution.

6. Non-renewal of employment contract due to advanced age – age discrimination against a managing director of a GmbH / German Limited Liability Company?

The case in question dealt with a 62 years old managing director who had a fixed-term employment which had not been renewed. At the respective board meeting the age of the managing director and the continuity of the management beyond the age of 65 had been discussed among other things. After all, the company decided to employ a 41 years old successor as managing director. The former managing director sued for damages on the grounds of age discrimination. The *Oberlandesgericht* / Court of Appeals of Cologne ruled in favor of the claimant, awarding him a payment of € 36.000,00. According to the Court the *Allgemeines Gleichbehandlungsgesetz (AGG)* /German General Act of Equal Treatment applies to a managing director of German Limited Liability Company (§ 6 III AGG analogous application), provided that his access to employment was actually affected by discrimination. Statements made at a board meeting may serve as conclusive evidence of discrimination, unless proven otherwise in the individual case, § 22 AGG. The managing director would thus be entitled to compensation in the amount of two monthly salaries. The company has filed an appeal with the *Bundesgerichtshof* / German Federal Court in Civil Matters. The German Federal Court may have to render a final ruling in this case.

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
Joachim.Wichert@aclanz.de

SOFIA DIAMANTOPOULOS
Attorney at Law
Sofia.Diamantopoulos@aclanz.de

RAFAEL HERTZ
Attorney at Law
Rafael.Hertz@aclanz.de

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