aclanz RECHTSANWÄLTE

May 16, 2011

RECHT AKTUELL

CURRENT LAW

Edition 3/2011

Focus in this edition: Employment and Corporate Law

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1. Insurance Premiums to be kept Gender-Neutral as from December 21, 2012

The European Court of Justice (ECJ) has ruled that differences in premiums and benefits in life insurances violate the principle of equal treatment between men and women and therefore the ECJ has declared article 5 para 2 of the Gender Directive, which provided for exemptions, to be invalid with effect from December 21, 2012 (ECJ Judgment of March 1st, 2011 – C -236/09). The case concerned Belgian national legislation. However, also Germany has created corresponding exemptions in section 20 para 1 s. 1 AGG (*Allgemeines Gleichbehandlungsgesetz* / German General Act for Equal Treatment), which may become invalid as from December 21, 2012, due to the breach of article 21 and article 23 of the EU Charter of Fundamental Rights. The premiums that have so far been different for men and women are now supposed to meet on an average level. The consequences of the ruling are hardly foreseeable. It is conceivable that the ECJ may apply this principle also to an individual risk-assessment. A differentiation due to pre-existing gender typical diseases might also be critical.

2. No Recourse to the Parent Company when Calculating the Social Plan

The assets to be taken into consideration for the calculation of a social compensation plan are only those assets which belong to the company employing the employees and no other assets within the group of companies in case of a spin off according to section 134 *Umwandlungsgesetz (UmwG* / German Transformation Act) unless significant assets are withdrawn from the employing company (*Bundesarbeitsgericht* / German Federal Labor Court on March 15, 2011 – I ABR 97/09). The court declared a conciliation board's ruling invalid because it took also into consideration assets of the parent company.

3. Dismissal for Operational Reasons: Employer's Burden of Statement of Facts and Proof in the Event of Abolishing a whole Level in the Hierarchy

If the consequence of abolishing a hierarchical level is the loss of a workplace, a court may, as an exception, review such a corporate decision with regard to its factual justification (*Bundesarbeitsgericht* / German Federal Labor Court December 16, 2010 – 2 AZR 770/09). The employer must present the facts and proof for the loss of a work opportunity on the basis of a prognosis which excludes that other employees will be burdened excessively with other responsibilities.

4. The Announcement of a Preliminary Bonus is no binding Bonus Promise

The case at hand concerned Dresdner Bank. Its board of directors decided to supply the Dresdner Kleinwort Investment Bank (DKIB) with a bonus in the amount of EUR 400 Mio.

for 2008. The employees concerned were informed. Later, every employee received a letter stating the exact individual bonus. The letter also indicated that the amount was "preliminary" and subject to the audit of the profit situation. After the audit, DKIB cut the bonus by 90 percent. 14 employees filed a suit against this consequence and referred to the amount they each had been communicated before. The *Hessisches Landesarbeitsgericht* / State Labor Court of Hesse, September 20, 2010 – 7 Sa 2082/09, ruled in favor of DKIB: The decision concerning the bonus was just as non-binding as the written announcement of the preliminary amount of the bonus. The reduction of the announced bonus is not an inaccurate use of discretion, but justified due to the bad profit situation of DKIB and the banking crisis. Some plaintiffs are likely to appeal this decision, so that the *Bundesgerichtshof* / German Federal Labor Court will soon have to decide on this matter.

5. Board Members of US Corporation are Subject to Social Security

Members of a board of directors of a US corporation (McDonald's Germany) working in a German branch office of the company are subject to German social security insurance, e.g. statutory pension insurance and unemployment insurance (*Bundessozialgericht/*German Federal Social Court, January 12, 2011 - B 12 KR 17/09). The court based its decision on the fact that there are no specific statutory provisions exempting such board members from the obligation to pay social security. The regulations regarding exemptions for board members of a *AG* (*Aktiengesellschaft* / German stock corporation) section 27 para 1 no. 5 SGB III (*Sozialgesetzbuch III* / Social Security Code III), section 1 s. 4 SGB VI (*Sozialgesetzbuch VI*/ Social Security Code VI) cannot be applied analogously. The decision of the court has already been criticized because its reasoning left out the preliminary question whether a board member is a "dependent employee" according to section 7 para 1 *SGB VI (Sozialgesetzbuch VI* / Social Security Statute VI) (Ege, Betriebsberater 2011, 563). However, the court's point of view will have to be taken into consideration in practice as long as there is no other ruling.

6. No Liability for the Managing Director of a *GmbH* for Paying Outstanding Taxes and Employee's Social Security after onset of insolvency or over-indebtedness

The managing director of a *GmbH (Gesellschaft mit beschränkter Haftung* / German Limited Liability Company) shall be held personally liable if he initiates payments of the GmbH after the company's over-indebtedness or onset of insolvency unless the payments concerned are still compatible with the care of a diligent businessman (section 64 para 1 and 2 *GmbHG* / German Limited Liability Companies Act). The exact meaning of this principle has been left open by the legislator. On the other hand, a managing director may commit a criminal offence if the GmbH does not settle VAT and salary taxes that are due. Also in such cases he may be held personally liable vis-à-vis the tax office. The same applies to non-payment of social security contributions that are due as far as the employee's share is concerned which the employer has to handle as a trustee. The *Bundesgerichtshof* / German Federal Court in Civil Matters has confirmed now: The managing director may make payments for afore-

mentioned items after the company's over-indebtedness or onset of insolvency without being held liable by an insolvency administrator according to section 64 GmbHG. Such payments are compatible with the care of a diligent businessman (*Bundesgerichtshof* / German Federal Court in Civil Matters, January 25, 2011 – II ZR 196/09). However, the employer's share of the employee's social security contributions has been specifically excluded in this ruling.

7. Valid Assignment of Shares in a *GmbH* notarized by a Swiss Notary

The assignment of shares in a *GmbH* (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company) with a deed of a Swiss notary is valid. The same applies for the submission of the list of shareholders according to section 40 para 2 *GmbHG* / German Limited Liability Companies Act (*Oberlandesgericht Düsseldorf* / Court of Appeals of Düsseldorf, March 2nd, 2011 – I 3 WX 236/10). According to the court this applies only if the notarization abroad is functionally and personally equal to a notarization in Germany and that was the case in the case at hand with a notary admitted as notary in the Swiss state of Basel. The decision of the court has been welcomed in practice because in some instances it helps to save costs to make notarizations abroad. However, the principle set up by the court is not undisputed. For example, the *Landgericht Frankfurt* / High Court of Frankfurt, October 7, 2009 – 3-13 O 46/09 states that such notarizations are no longer valid as a result of the *MoMiG /* GmbH Modernization and Anti-Abuse Act. Thus, the question remains rather open as long as there is no binding decision by a higher court, e.g. the Federal Court in Civil Matters.

8. Prior Consent of Supervisory Board of a Stock Corporation Required for Payments by the Management Board to External Advisors who are Members of the Supervisory Board at the same time

Payments made by the management board on behalf of a *SE* (*Societas europaea* / European Public Limited Liability Company) to a law firm need prior consent of the supervisory board, if a member of the supervisory board is partner of the law office in question (*Oberlandesgericht Frankfurt* / Court of Appeals Frankfurt, February 15, 2011 – 5 W 39/09). The law suit had been filed by two shareholders of Fresenius SE. A final ruling by the *Bundesgerichtshof* / German Federal Court in Civil Matter on this rather strict principle has not been made yet. In any case it is recommendable in practice to involve the supervisory board in due course as long as this question remains open.

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