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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. Access to Employee's Email Account by Employer

The employer is allowed to check the employee's business email account, if that is necessary in order to safeguard corporate interests (*Landesarbeitsgericht Berlin-Brandenburg* / Regional Labor Court of Berlin-Brandenburg, February 16, 2011 – 4 Sa 2132/10). Even in the event that the employee is allowed to use the account for private purposes, such a measure would not imply any infringement of section 88 TKG (*Telekommunikationsgesetz* / Telecommunications Act) if the emails have been left in the account by the employee. The employer would not provide any telecommunication services. The employer's access would neither mean an infringement of the Principle of Secrecy of Telecommunication nor an illegal encroachment on any other constitutional rights of the employee in this specific case. In the case at hand the employee was ill, had no deputy named and was not answering his employer's calls. There was a risk that orders received by email remained unanswered. The *Landesarbeitsgericht Niedersachsen* / Regional Labor Court of Niedersachsen, May 31, 2010 – 12 Sa 875/09 decided similar. A decision of the German Federal Labor Court is pending.

2. Retroactive Claims for Equal Pay – Suspension of Current Proceedings

In the event that an employee of a temporary work agency files a claim for equal pay (the same as paid to the permanent staff) in the past because of an invalid collective labor agreement, he may not refer to the renowned precedent set by the *Bundesarbeitsgericht* / German Federal Labor Court, December 14, 2010 - 1 ABR 19/10, in this regard. The law suit would have to be suspended until a decision about the validity or invalidity of the specific collective labor agreement is made also with regard to the past (*Landesarbeitsgericht Baden-Württemberg* / Regional Labor Court of Baden-Wurttemberg, June 21, 2011 - 11 Ta 10/11); the decision dealt with the collective labor agreement of the *Christliche Gewerkschaft Zeitarbeit & PSA (CGZP)* / Christian Union Temporary Work & PSA. On December 14, 2011, the *Bundesarbeitsgericht* had decided that the current collective labor agreement was invalid. The *Landesarbeitsgericht Baden-Württemberg* decided that the validity of earlier collective labor agreements would still have to be reviewed individually.

3. Notice of Termination because of Improper Performance

A notice of termination due to improper performance is justified if the employee is not performing according to his abilities over a longer period of time (*Landesarbeitsgericht München* / Regional Labor Court of Munich, March 3, 2011, 3 Sa 764/10). The extent of the employee's obligation to perform must comply with his potential to perform. However, if an employee does not perform in accordance with common standard, this may imply that he might be violating his obligation to perform. As to an effective termination of employment the common standards would have to be ascertained by comparing the performance with employees in comparable positions over an extended period of time and finally, the quality of the performance has to be significantly lower than the common standards.

4. Proper Termination without Notice by Managing Director for Cause – but no Compensation?

A Managing Director of a GmbH (*Gesellschaft mit begrenzter Haftung* / German Limited Liability Company) lawfully terminating his employment relationship due to a restriction in

his competences and powers is usually not entitled to claim compensation against the company according to section 628 para 2 BGB (German Civil Code) (*Oberlandesgericht Karlsruhe* / Court of Appeals Karlsruhe, March 23, 2011 – 7 U 81/10). In the particular case major competences and powers were withdrawn from the Managing Director in question due to a corporate restructuring process but contrary to the Managing Director's Agreement. The notice of termination given by the Managing Director was effective but a claim for compensation would not be justified because the Court felt that the GmbH has not committed any fault in this regard. The General Shareholder Meeting restricting the competences and powers of the Managing Director had the power to do so and the Court pointed out that also the Managing Director's Agreement provided for a paid leave even in the event that the Managing Director was dismissed without terminating his agreement. The *Oberlandesgericht Frankfurt am Main* / Court of Appeals Frankfurt/Main – December 17, 1992, 26 U 54/92 has ruled differently and has granted a compensation to the Managing Director in a similar case. Due to this discrepancy between upper court jurisdictions, the *Oberlandesgericht Karlsruhe* has allowed an appeal of its judgment to the *Bundesgerichtshof* / German Federal Court in Civil Matters.

5. Dismissal Managing Director for Cause – Presentation of Financial Statements after Due Date

The GmbH Managing Director of a GmbH (*Gesellschaft mit begrenzter Haftung* / German Limited Liability Company) commits a gross breach of duty, if he does not present the annual financial statements within the legal deadline to the shareholders. Such a failure would justifiy a dismissal from his corporate functions for cause (*Kammergericht Berlin* / Court of Appeals Berlin, August 11, 2011 – 23 U 114/11). The managing director may not be exonerated by the fact that the majority shareholder has omitted to forward a receipt necessary for correct accounting before due date. Such a serious misconduct would justify an injunction of the court prohibiting the Managing Director to represent the GmbH externally and to conduct the business.

6. Competence of Supervisory Board: Conclusion of Consultancy Contract for Assigning Qualified Person as Chief Executive

The supervisory board of an *AG* (*Aktiengesellschaft* / German Public Limited Company) is competent and has the power to enter into a contract with a consultancy company which has the obligation to procure a specific person or any other qualified person for Executive Officer's services on the one hand and on the other hand receives the remuneration for an Executive Officer (*Kammergericht Berlin* / Court of Appeals in Berlin, June 28, 2011 – 19 U 11/11), because such a contract would be comparable with a direct chief executive's contract (sections 84 para 1 s. 5, para 1 s. 1, 112 s. 1 AktG (*Aktiengesetz* / Stock Corporation Act). According to the court it would be of no significance whether the remuneration structure stipulated in the contract violates legal provisions for appropriate remuneration of officers. The violation of these principles would be merely a breach of legal obligations of the supervisory board but usually, it would not cause any invalidity of the remuneration arrangement at the same time.

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

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

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

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.)