



RECHT AKTUELL CURRENT LAW

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1. Invalid CGZP-Collective Bargaining Agreements: 3.100 Employers are subject to Social Security Audits

According to a preliminary assumption issued by the Federal Government in February 2012 approx. 3.100 temporary work agencies are affected by the recent rulings of the *Bundesarbeitsgericht* / German Federal Labor Court. Out of 613 employers so far audited 316, are facing additional social security contribution claims in the total amount of € 14.4 million. Background: The *Bundesarbeitsgericht* / German Federal Labor Court - 1 ABR 19/10, had ruled on December 14, 2011 that the *Christliche Gewerkschaft Zeitarbeit und PSA* (CGZP / Christian Union Temporary Work & PSA) could not be a party in collective bargaining making the respective collective bargaining agreement invalid. Employers feared considerable additional payments for social security contribution. There is still no final ruling as to the question whether also collective bargaining agreements made with the CGZP at an earlier point in time are invalid (see [CURRENT LAW I-2012, No. 3](#)).

2. Special Protection against Unfair Dismissal also Applicable to Substitute Member of Works Council?

A Substitute Member of a Works Council may claim special protection according to section 15 para 1 s. 1 KSchG (*Kündigungsschutzgesetz* / German Employment Protection Act) and section 103 BetrVG (*Betriebsverfassungsgesetz* / German Works Constitution Act) against unfair dismissal during the time the permanent member of the Works Council is on a leave no matter whether the Substitute Member actually performs Works Council work or not (*Bundesarbeitsgericht* / German Federal Labor Court, September 8, 2011 – 2 AZR 388/10). However, subsequent special protection according to section 15 para 1 s. 2 KSchG will only be granted if the Substitute Member has actually performed such Works Council work during the leave of the Permanent Member.

3. No Subsequent Use of Pictures and Personal Data of Former Employee on Employer's Homepage?

The use of personal data and pictures of a former employee on the employer's homepage is a violation of the employee's general right of personality (*Hessisches Landesarbeitsgericht* / Regional Labor Court of Hesse, January 24, 2012 – 19 SaGa 1480/11). According to the Court a former employee can request by way of preliminary injunction his data and picture to be immediately removed.

4. No Offsetting of Minus and Plus Hours without Agreed Working Hours Account

An employer cannot offset minus and plus hours on a weekly basis unless the parties have agreed on a current working hour account (*Landesarbeitsgericht Rheinland-Pfalz / Regional Labor Court of Rhineland-Palantine*, November 15, 2011 – 3 Sa 493/11). The employer in question withheld salary in the amount of € 1.372,52 arguing that the employee had collected up to 118,75 minus hours at the term of the employment. The Court pointed out that the schedule of working hours was set up by the employer himself and, generally speaking, it is the employer's risk if he cannot provide the employee with enough work. Minus hours accrued due to such operational reasons would only be offsettable if the parties had agreed on a running working hour account. But this was not the case in this matter.

5. Discretionary Margin of General Shareholders' Meeting for Formal Approval of the Acts of the Management Board and Supervisory Board?

The formal general approval of the acts of either the Management Board or the Supervisory Board of an AG (*Aktiengesellschaft / German Public Limited Company*) is at the discretion of the General Shareholders' Meeting. Nevertheless, there may be no discretionary margin at all in cases where acts of the respective board have gravely and obviously violated the Law. A formal general approval covering such violations of Law could be subject to rescission in court (*Bundesgerichtshof / German Federal Court in Civil Matters*, February 7, 2012 – II ZR 250 / 10). This did not apply in the case at hand although the boards had not involved the shareholders when the Commerzbank AG purchased step by step the Dresdner Bank AG. According to the Federal Court, the legal conditions making a general shareholders' meeting necessary when it comes to acquisitions are still rather unspecified from the legal point of view. Thus, in the case at hand, the acts of the Management and Supervisory Board could not be considered as grave and obvious violations of Law - if there were any violations of Law at all.

6. Co-Determined GmbH: 24 Board Members are 4 too many

Shareholders of a co-determined GmbH (*Gesellschaft mit begrenzter Haftung / German Limited Liability Company*) may not stipulate in the articles of association that more than 20 individuals should be appointed as members of the Supervisory Board. This applies even if no voting right is granted to (just four) additional members on the board (*Bundesgerichtshof / German Federal Court in Civil Matters*, January 30, 2012 – II ZB 20/11). According to the Court section 7 para 1 s. 1-3 *MitbestG (Mitbestimmungsgesetz / German Co-Determination Act)* provides for mandatory

regulations. Neither the shareholders nor the employees are entitled to send more than ten members each to the Supervisory Board. This must be respected with regard to the principle of parity. Furthermore, the Supervisory Board's ability to work effectively and to keep up confidentiality could be jeopardized by an excessive number of members on the board. The case at hand dealt with a municipal company and the municipality's intention was that not only the mayor but also politicians of all parties represented in the city's parliament should appoint (additional) members on the Supervisory Board.

7. Effective Date of Redemption of Share

The redemption of shares in a GmbH (*Gesellschaft mit begrenzter Haftung* / German Limited Liability Company) becomes effective with the notification of the resolution of redemption and does not require effective payment of a compensation to the shareholder expelled in order to be valid (*Bundesgerichtshof* / German Federal Court in Civil Matters, January 24, 2012 – II ZR 109/11). The ruling of the Federal Court overturns the prevailing opinions and precedents in this regard. According to the Federal Court a period of suspense between the point in time of the redemption resolution and the compensation payment should be avoided. Otherwise the respective shareholder could still exercise his shareholder's rights after the notification of the redemption resolution and cause further irritating differences in shareholders meetings. This would be contrary to prevailing interests of the GmbH. On the other hand, the Federal Court recognizes also a personal liability of the remaining shareholders for the compensation payment.

8. Diligence of Management Board concerning Legal Issues

The Management Board of an AG (*Aktiengesellschaft* / German Public Limited Company) has the duty to review legal issues very carefully. If it does not have the expertise required, it must seek advice of a qualified professional and provide this professional with any information and document that may be relevant for the issue at hand. According to the Federal Court the board has to review any legal advice given thoroughly also with regard to its plausibility. If such a review is omitted, the Management Board may face damage claims for breach of its personal obligation for due diligence (*Bundesgerichtshof* / German Federal Court in Civil Matters, September 20, 2011 – II ZR 234/09). The Federal Court states explicitly that the simple assumption that a legal situation was sufficiently reviewed just because a law firm has initially developed a concept for the specific transaction is not enough to protect the Members of the Management Board from damage claims.



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