



RECHT AKTUELL CURRENT LAW

Edition III/2013

Focus in this edition: Employment and Corporate Law

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. Reference Letter: Regrets, Gratitude and Best Wishes?

An employee cannot require his employer to express thanks and best wishes in the reference letter (*Bundesarbeitsgericht / German Federal Labor Court, December 11, 2012 – 9 AZR 22/11*). According to the Court an employer is not obliged to express any personal feelings such as regrets or gratitude in a reference letter. However, if an employee is not satisfied with a specific wording in this regard he can ask the employer to delete it as a whole without any replacement.

2. Removal of Justified Warning Letter from Personnel File?

An employee may have a claim for removal of a justified warning letter from the personnel file if the warning letter has not only lost its warning function but also its function to serve as evidence (*Bundesarbeitsgericht / German Federal Labor Court, July 19, 2012 - 2 AZR 782/11*). According to the Court the interest of the employee in removing the warning letter must outweigh the interest of the employer in keeping it in the file. That is the case where the employee's behavior has become immaterial, meaning the warning has become legally irrelevant for the employment relationship, e.g. the breach of duty was not serious and the employee has worked properly for a considerably long period of time.

3. Lump Sum Payments to Members of Works Councils for Expenses and Overtime Illegal?

Lump sum payments for alleged expenses and overtime may violate the *Begünstigungsverbot / principle of non-preferential treatment of members of works councils (Arbeitsgericht Stuttgart / Labor Court of Stuttgart, December 13, 2012 - 24 Ca 5430/12)*. Such payments would be possible in exceptional cases in which (1) accounting of details must be considered unreasonable and (2) the amounts paid correspond to usual expenses typically incurred. In any case, the assumption that each member of the works council would have the same expenses and the same amount of overtime would be contrary to any kind of realistic approach according to the Court. Furthermore, the Court points out that section 37 (2) BetrVG (*Betriebsverfassungsgesetz / German Works Constitution Act*) provides that overtime should be primarily compensated with time off instead of overtime pay.

4. Business Opportunities Doctrine Applies also to Civil Law Partnership with Real Estate Dealings?

The Business Opportunities Doctrine (*Geschäftschancenlehre*) applicable to commercial partnerships and corporations may also apply to the managing partner of a GbR (*Gesellschaft bürgerlichen Rechts* / civil law partnership), if the GbR has some kind of business, no matter whether there is an explicit non-competition covenant or not. This ruling of the *Bundesgerichtshof* / German Federal Court in Civil Matters, December 4, 2012 - II ZR 159/10 - has led to compensation claims against the managing partner of a real estate company in the form of a GbR. The managing partner had made a real estate transaction on his own account although the transaction had been already related specifically to the dealings of the GbR. Actually, the GbR had been first in touch with the transaction and the managing partner had already started to negotiate the transaction on behalf of the GbR. The managing partner futilely raised the objection that the GbR would not have been able to finance this transaction anyways. The Court pointed out that the managing partner has the burden of proof in this regard and that he had not supplied sufficient evidence for his objection. The Court expects a managing partner to do anything conceivable to take advantage an existing business opportunity on behalf of the GbR. For this purpose the managing partner should have considered the possibility of involving a further partner as financing partner.

5. Insufficient Authorization by Supervisory Board in Dealings with the Management Board

A resolution of the Supervisory Board of an AG (*Aktiengesellschaft* / German Public Limited Company) does not grant sufficient powers to one of its members in order to be able to conclude a purchase agreement with a member of the Management Board if the extent of the company's obligation was still uncertain at the time of the authorization (*Oberlandesgericht München* / Court of Appeals Munich, December 19, 2012 - 7 U 1711/12). Generally speaking, such board resolution must be interpreted rather restrictively only with regard to legal requirements as to certainty and clarity. In the case at hand, the details of payment had not been determined at the time of the adoption of a resolution. Therefore, it did not matter that the allegedly empowering resolution had actually be signed by all members of the board.

6. Unfair Breakdown of Negotiations with Candidate for the Management Board?

A candidate for the Management Board of an AG (*Aktiengesellschaft* / German Public Limited Company) cannot request compensation for unfair breakdown of negotiations just because of the fact that the final approval by the Supervisory Board had been described as a mere formality (*Landgericht München* / High Court of Munich, December 27, 2012 - 5 HK O 20845/11).

7. GmbH: Internal Compensation for Disguised Profit Distributions?

The approval of the fellow shareholders of a GmbH (*Gesellschaft mit beschränkter Haftung* / Limited Liability Company) to a benefit that must be qualified from the tax point of view as a disguised profit distribution excludes compensation claims within the company unless the transaction must be qualified as a payment out of the assets necessary to back up the stated capital of the company according to Sections 30, 31 GmbHG (*GmbH-Gesetz* / German Limited Liability Act). On the other hand subsequent tax burdens of the GmbH may justify internal compensation claims, analogous application of Section 426 BGB (*Bürgerliches Gesetzbuch* / German Civil Code). This ruling of the *Oberlandesgericht Frankfurt* / Court of Appeals Frankfurt, November 28, 2012 - 23 U 118/03 dismisses clearly former doctrines and case law which are more extensive in this regard. The case is still pending (*Bundesgerichtshof* / German Federal Court in Civil Matters - II ZR 9/04 -).



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

RECHT AKTUELL / CURRENT LAW summarizes jurisdiction, legislation and other legal issues but does not give legal advice on a specific case or problem. Decisions mentioned in the articles just represent a review of the respective judgment despite a future rescission or a change in legislation. Therefore, we do not accept any liability for the content of this letter. Please contact us for further information.

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.)