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CURRENT LAW

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Focus in this edition: Employment and Corporate Law

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1. No Co-Determination for Business Facebook-Page

The establishment of a business Facebook-page that allows clients and other parties to post comments about employees is not subject to co-determination. The works council does not need to be involved. As opposed to the local court the *Landesarbeitsgericht Düsseldorf* / State Labor Court of Düsseldorf, January 12, 2015 - 9 Ta BV 51/14 - did not recognize Facebook as a technical device monitoring of the behavior and performance of employees, because records are not generated automatically but only by the other users, e.g. clients. The general possibility for the employer to search in Facebook would not qualify as such a technical device. Only employees actually editing the page in Facebook might be subject to monitoring by a technical device. However, in the case at hand 10 employees were using the same log-in. Thus, it was not possible to monitor them individually and no co-determination was required.

2. Independent Contractors: Substantiation of Clandestine Employment

In order to argue successfully that an independent contractor has actually the status of a clandestinely employed employee, the independent contractor must substantiate that he was given binding directions by the employer just as real employees would have received such directions: He has to specify which directions have been given by whom and that he has actually acted according to such directions. Unspecified generalities would not be sufficient in order to substantiate the status of an employee (*Landesarbeitsgericht Düsseldorf* / State Labor Court of Düsseldorf, December 18, 2014 – 15 Ta 528/14). According to the Court, this applies especially if the written contract with the independent contractor simply defines objectives and provides that the independent contractor is allowed to send a replacement for himself. The ruling emphasizes the importance of carefully drafting independent contractors' contracts even though the details of the actual execution of the contractual relationship work may ultimately have decisive relevance.

3. Termination Clause for Home Office Arrangements: Consideration of Employee's Interests

The employer may terminate the home office work without formal notice of termination only in the event that the underlying clause in the employment agreement provides that also the interests of the employee are taken into consideration (*Landesarbeitsgericht Düsseldorf* / State Labor Court of Düsseldorf, September 10, 2014 – 12 Sa 505/14). The case at hand dealt with a corporate account manager of a bank. First, the bank wanted to terminate the employment, but failed. Then, the bank decided to terminate at least the home office arrangement with the employee according to a termination clause in the employment contract without any preconditions for such a termination. The Court ruled that such clause would disadvantage the employee inappropriately. Therefore, the employer should have respected the

formal requirements of a notice of termination in order to modify the terms of the employment agreement.

4. European Company (SE): Place of General Meeting of Shareholders abroad

The statutes of a European Company (SE or *Societas Europaea*) with its seat in Germany may provide that General Meetings of Shareholders can take place abroad if the statutes provide for binding criteria of discretion taking into consideration the interests of the specific shareholder community (*Bundesgerichtshof* / German Federal Court, October 21st, 2014 – II ZR 330/13). A clause providing that the General Meeting may take place at the seat of the company, any seat of a stock exchange in the EU or in any EU-city with more than 500.000 inhabitants may not be sufficient.

5. Liability of Board Members for Neutral Acts of Business

A company suing its Members of the Management Board for breach of duty regarding so-called neutral acts of business must substantiate facts indicating a breach of duty. The statutory easing of the burden of proof (Section 93 (2) *Aktiengesetz* (German Stock Company Code) does not apply. According to the *Oberlandesgericht Nürnberg* / Court of Appeals of Nuremberg, October 28, 2014 - 12 U 567/13 – not any act within the scope of responsibilities of Members of the Management Board should be considered as a "potential" breach duty. Otherwise, there would be the risk that Members of the Management Board could be bothered arbitrarily by unjustified claims and law-suits. In the case at hand, a Member of the Management Board had spent approx. 45.000 EUR for several trips to Asia.

6. Members of the Management Board: Unilateral Reduction of Compensation by the Supervisory Board

A resolution of the Supervisory Board according to Section 87 (2) *Aktiengesetz* (German Stock Company Code) reducing unilaterally the compensation of a Member of the Management Board is invalid if the Supervisory Board has not exercised its discretion as to "if" and "how" such a reduction should be made and/or if legitimate interests of the Member of the Management Board have been ignored (*Oberlandesgericht Stuttgart /* Court of Appeals Stuttgart, October 1st, 2014 – 20 U 3/13). In the case at hand, the Supervisory Board had reduced the compensation down to 2.500 EUR per month after the company became subject to insolvency proceedings. However, there was no evidence whatsoever that the Supervisory Board had actually based its decision on any kind of discretionary reasoning. Therefore, the Court refused also any adjustment of the reduction and confirmed that the Member of the Management Board is still entitled to the compensation initially agreed upon (approx. 17.000 EUR per month).

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