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CURRENT LAW

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Focus in this edition: Employment and Corporate Law

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1. Interview with Employer during Sick Leave

An employee is not required to show up for an interview upon employer's request during sick leave in order to discuss how he can be employed in the future. (*Bundesarbeitsgericht* / Federal Labour Court, November 2nd, 2016 – 10 AZR 596/15). According to the ruling, the employer's power to give instructions is not generally excluded during sick leave. However, the employer must also take into consideration the employee's personal situation. Thus, instructions would only be binding if they were justified by urgent operational reasons. For instance, the employee would have to show up, if he had privileged information required for damage prevention and demanding his personal presence, whereas simply asking him to show up in order to discuss future work possibilities would not be appropriate for a binding request to show up.

2. Further Restrictions on Employments with a Fixed Term?

An employment contract with a fixed term without special justification for the fixed term is prohibited if there had already been a prior employment relationship (Section 14 (2) TZBFG (*Teilzeit- und Befristungsgesetz* / Part Time and Limited Term Employment Act). This prohibition applies without any limitation in time for any employment in the future (*Landesarbeitsgericht* / State Labour Court of Baden-Württemberg, October 13, 2016 – 3 Sa 34/16.) The Court's ruling is in contradiction to precedents set by the *Bundesarbeitsgericht* / German Federal Labor Court allowing an employment with fixed term with the same employee after a grace period of three years. The Court has admitted an appeal against its own ruling for further review by the German Federal Labor Court so that it must be awaited whether the German Federal Labor Court overturns its own precedent.

3. Parking Fines Paid by the Employer: Taxable Income?

Fines paid by the employer for parking violations do not constitute taxable income of the employee (*Finanzgericht* / Fiscal Court of Düsseldorf, November 11, 2016 – 1 K 2470/14 L.) According to the Court, case law of the *Bundesfinanzhof* / German Federal Fiscal Court cited by the fiscal administration would not apply: The rulings of the German Federal Fiscal Court concerned fines that were actually higher and that were charged directly to the employees. In the case at hand there was no actual inflow of payment on the side of the employee because the fines, aside from the fact that they concerned only minor amounts, were charged directly to the employer as registered keeper of the car. Therefore, they did not constitute a monetary benefit for the employee. Finally, it also mattered that the employer, a parcel service, acted in his own business interest when he made those payments and only paid fines in cities where he could not obtain a permit for short term parking for deliveries.

4. Commercial Agents: Expansion of Indemnity Claim for New Products?

At the termination of an commercial agency agreement, a commercial agent may be entitled to an indemnity claim even for business made with an existing customer according to Sect. 89b (1) Sentence 1 No. 1 HGB (*Handelsgesetzbuch* / German Commercial Code). The wording of this provision seemingly grants indemnity just for business made with "new customers". However, the European Court of Justice had actually already clarified in a prior preliminary ruling that the legal term "new customer" must be construed more extensively. The *Bundesgerichtshof* / German Federal Court in Civil Matters, October 6, 2016 – VII ZR 328/12 followed up and ruled accordingly: If the commercial agent extends the business with an existing customer to new products or brands and thereby creates a special business relation, such business would have to be treated the same as business with a new customer according to Sect. 89b (1) Sentence 1 No. 1 HGB. Any special sales strategy and special efforts for procurement would be decisive.

5. Voidability of Corporate Resolutions Passed in Premises of a Hostile Shareholder

Resolutions that have been passed in a shareholders' meeting of a *GmbH* (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company) and are confirmed formally by the chairman of the meeting are normally not void in the first place, but are voidable by way of a lawsuit to be filed with court within a period of one month (*Bundesgerichtshof* / German Federal Court in Civil Matters, March 24, 2016 - IX ZB 32/15). According to the rulings of the Court, the apartment of a hostile shareholder may be an unacceptable place of assembly. However, a resolution which was passed and confirmed formally in such circumstances would only suffer from a procedural defect but would not be void in the first place. Therefore, as a matter of precaution the one month deadline for filing a lawsuit against it should be observed in any case. The one month deadline would only be irrelevant if the choice of place of assembly constituted a material obstruction of participation in the shareholders' meeting.

6. No Seller's Liability: Knowledge of Managing Director of Company Sold may be Attributed to Buyer

The knowledge of the managing director of a target company regarding defects od the company may be attributed to the buyer of the company and therefore lead to an exclusion of the liability for defects of the seller of the company if the managing director was inclined to become shareholder of buyer (*Oberlandesgericht* / Court of Appeals of Düsseldorf, June 16, 2016 - I 6 U 20 / 15). In the case at hand, the managing director had already held talks about his future participation without the seller's knowledge. Thus, there was a case of a premature transfer of loyalty. However, an attribution of knowledge can be excluded in the company's purchase contract.

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