

November 30, 2016

CURRENT LAW

4th Quarter 2016

Focus in this edition: Employment and Corporate Law

aclanz Partnerschaft von Rechtsanwälten mbB
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. Court Fixes Bonus of Employment

If the employer reserves the right to decide about a bonus for the employee every year, the decision must be based on reasonable discretion. (*Bundesarbeitsgericht / Federal Labor Court*, August 8, 2016 – 10 AZR 710/14). In such a lawsuit, the employee is not even obliged to file a motion for disclosure of the principles that had led the employer. The employer must justify his bonus decision and carries the burden of proof that the decision actually corresponds to the principles of reasonable discretion. Otherwise, the court itself may fix a higher bonus amount considered more appropriate.

2. Compensation for Tax Damages Caused by Delayed Payments of Salary

The employer must also reimburse fiscal damages incurred if he is ordered by court to pay salary for previous years (*Landesarbeitsgericht Rheinland-Pfalz / State Labor Court of Rhineland-Palatinate*, March 17, 2016 – 5 Sa 148/15). In the case at hand, the employee filed a law suit against the termination of his employment contract. He succeeded and the employer had to pay salary also for the period after the wrongful termination. However, the employee had suffered tax damages in the amount of approximately EUR 8.000,- due to additional income tax that he had to pay because of higher tax rates that were applicable in the year when the salary was actually paid. According to the Court, employers are liable for damages caused by delay in payment. Thus, additional taxes caused by delayed salary payments must be compensated.

3. Employers may not be Liable for Online Violations of Copy Rights Law by Employees

An employer cannot be held liable if employees have violated copy right law by using the employer's WiFi (*Amtsgericht / Local Court of Berlin-Charlottenburg*, June 8, 2016 – 231 C 65/16). As long as an employer has no indication that his employees are practicing file sharing there is no basis for a liability of the employer as violator of copy rights. There is no general obligation for an employer to inform adult employees about the lawful use of the internet.

4. Insolvency Law: Creditors may have to Reimburse Payments

If a debtor doesn't comply with his own commitments for payment or makes late payments after he has been threatened with a delivery ban, this may indicate actual insolvency also from the creditor's point of view (*Bundesgerichtshof / German Federal Court*, June 9, 2016 – IX ZR 174/15). The Court pointed out that such a set of facts may also indicate that the creditor himself cooperated intentionally in the discrimination of other creditors. In this event the insolvency administrator would be entitled to contest transactions and payments, which were carried out before the opening of insolvency proceedings. Thus, the creditor must fear the obligation to return payments and other advantages already received from debtor. In any event, the all circumstances of the specific case always have to be taken in account.

5. Termination of Commercial Agency Agreement: No Evasion of the Indemnity Claim of an Commercial Agent at the Term of Contract

The commercial agent's indemnity claim after the termination of his contract may not be limited in advance according to sect. 89b HGB (*Handelsgesetzbuch / German Commercial Code*). Therefore, clauses intending to deduct a part of the ongoing commission as supposed advance payment to the future indemnity are invalid, according to the *Bundesgerichtshof / German Federal Court*, July 14, 2016 – VII ZR 297/15. An exception might just be possible, if without agreeing on such a deduction clause the principal and the commercial agent would not have agreed to a higher remuneration without the part to be deducted. If that cannot be proven by the principal, the German Federal Court considers even a repayment agreement invalid that the commercial agent and the principal concluded on the occasion of the severance, if the repayment does relate to the deductible part of the commission.

6. Freedom of Establishment: Easier Transformation of a French into a German Company

A *Société à responsabilité limitée (SARL)* can be transformed into a *Gesellschaft mit beschränkter Haftung (GmbH / German Limited Liability Company)* according to the *Umwandlungsgesetz (UmwG / German Change of Corporate Form Act)* although the *SARL* is not mentioned in this statute. The *Kammergericht / Court of Appeals of Berlin*, March 21, 2016 – 22 W 64/15 has confirmed this extensive interpretation of the German provisions in consideration of the Freedom of Establishment guaranteed according to EU-Law (Art. 49, 54 TFEU / Treaty on the Functioning of the European Union). Furthermore, the local court responsible for the registration is not allowed to complicate the process by applying more restrictive regulations regarding European Companies (SE). The SE regulations were designed for large companies only. Thus, their application would have discriminated *SARL* against German Companies.



JOACHIM HUND-VON HAGEN, D.E.A. (PARIS II)

Attorney at Law, Commercial Mediator
Certified Trade and Corporate Law Attorney
Certified Tax Attorney

Joachim.HundvHagen@aclanz.de

DR. JOACHIM WICHERT

Attorney at Law
Certified Employment Law Attorney
Commercial Mediator

Joachim.Wichert@aclanz.de

DOMINIK HOIDN

Attorney at Law

Dominik.Hoidn@aclanz.de

SABA MEBRAHTU

Attorney at Law

Saba.Mebrahtu@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 the result of the review by the specific judicial body. Subsequent modification or diverting case law have to be taken into consideration. Therefore, we do not accept any liability for the content of this letter. Please contact us for further information.

aclanz Partnerschaft von Rechtsanwälten mbB

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.)