

Made in Germany

# LaborLawMagazine

In this issue

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Prof. Thomas Wegerich,  
Editor  
Labor Law Magazine

[wegerich@businesslaw-magazine.com](mailto:wegerich@businesslaw-magazine.com)

**Labor Law Magazine: new strategic partner,  
new members of the Advisory Board**

Dear Readers,

We are proud to have attracted two new members to our esteemed Advisory Board. Please join me in welcoming Gerrit-Michael Böning, Managing Director and Head of Labor Relations at Deutsche Bank, and Stefan Braun, General Counsel of EMEA at Diebold Nixdorf. We look forward to working with them to continuously develop the Labor Law Magazine further.

And there is even more positive news: Fragomen, the international immigration law specialists, have joined the club, too. They are covering an interesting field of law, which is of high practical importance for most companies.

This, in a broader sense, is exactly what we aim to achieve with this magazine. So don't miss out on a single article in this edition.

Sincerely yours,

Thomas Wegerich

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## Data privacy laws go Europe!

A new era for employee data privacy compliance under GDPR, DSAnpUG-EU and the EU-US Privacy Shield

By Dr. Daniel Klösel

Things will be getting serious in 2018!

In recent years, data privacy matters have become a key management and compliance issue throughout Germany and Europe. This trend was preceded by numerous data privacy affairs involving large and popular companies such as Daimler, Telekom and Deutsche Bahn, to name just a few examples in Germany. As a result of the affairs, these companies were subject to administrative fines totaling up to several million euros and extensive negative press coverage. And not long ago after the European Court of Justice (ECJ) had declared the Safe Harbor Agreement invalid, the German data protection authorities imposed further penalties on certain multinationals, including Unilever, Adobe and Ponica, because they had refused to adjust their agreements on data transfers to the US.

Under the EU General Data Protection Regulation (GDPR) – which replaces all domestic data privacy laws in Europe as of May 25, 2018 – this situation is getting



The EU lawmakers take data privacy compliance very seriously and so all companies with businesses in Europe should as well!

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even more serious. One aspect which materially differs from existing laws is the tightened fine regime GDPR introduces for administrative offenses now drawing fines of up to €20 million or 4%

of the total worldwide annual turnover of the preceding financial year. In comparison, the scope of possible fines for data protection violations under existing laws in Germany does not exceed €300,000.

This quite clearly illustrates that the EU legislator takes data privacy compliance very serious and so all companies with businesses in Europe should also do!

→

## Milestones

Data privacy regulation is probably the area of law that has been subject to the most radical change over the last couple of years. And the driving force has been the European Union:

In May 2016, European lawmakers passed the entirely new GDPR, replacing all domestic regulations as of May 25, 2018. Directly applicable without any further need for domestic legislatures to formally adopt it, GDPR provides for almost 100 provisions on data privacy and generally tightens the current laws of many EU member states. There are certain doubts, however, whether GDPR will also lead to a uniform level of data protection in Europe as it allows the member states to introduce national laws in order to implement the EU regulation. As a result, the German government had already presented a draft legislation (*DSAnpUG-EU*) in February 2017 which shall become effective still this year. The legislation provides for supplemental rules in particular on employee data privacy mostly in accordance with the current laws in Germany.

Only a few months before in October 2015, during the decisive phase of the GDPR negotiations, another milestone on data privacy issues has been achieved

as the ECJ declared the existing Safe Harbor arrangement to be void. As a consequence, many multinationals with businesses in Europe – which either transferred data to their parent companies located in the US and/or made use of US-based IT (cloud) services had to adjust their contractual arrangements mostly by relying on EU model clauses. After the EU and the US government agreed on the EU-US Privacy Shield as successor agreement to Safe Harbor in 2016, a few multinationals have also made use of this new solution yet and initiated the necessary self-certification procedure.

### “Two levels of justification”

Presenting all the impacts of these new laws is hardly possible here. Nevertheless, the general concept of the European data privacy regime could be summarized with “two levels of justification” which is also similar to the existing German model.

On a first level, in any case personally identifiable data may be processed if and to the extent that applicable laws provides for a legal basis (art. 6 para. 1). Under GDPR and the supplemental German rules three opportunities remain significantly relevant in practice:

- At first, an individual consent of the affected employees which is, however, only valid under GDPR in case it has been granted voluntarily and meets further requirements. These pertain, in particular, to the style of the consent form: It must be intelligible and easily accessible as well as written clearly and in a plain language (Article 6, paragraph 1 (a), 7). In addition, the German draft laws provide for even stricter specifications: Consent is only regarded as being voluntarily when it is based on legal or economic advantages for an employee or on the equal interests of both, the employer and the employee. Moreover, consent has to be issued in writing and certain additional obligations concerning the employee’s right to withdraw consent as well as the purposes for processing the data covered by the consent have to be provided (Article 26, paragraph 2).
- The GDPR also provides for additional legal justifications including, but not limited to, the prevailing interests of the company as part of a comprehensive assessment and as related to compliance concerns for purposes of preventing and investigating criminal acts (e.g., Article 6, paragraph 1 [f]). The supplemental German rules then

provide for more precise definitions for the cases in which data processing is “appropriate” and therefore legally justified on this basis (Article 26, paragraph 1).

- Furthermore, and this is of great significance for employee data protection matters, works agreements between a company and its works councils continue to constitute a sufficient legal basis. Similar to the practice of German courts, such works agreements must, however, comply with the applicable data protection regulation, in particular now with the GDPR (Article 82, paragraph 1 of the GDPR and Article 26, paragraph 4 *DSAnpUG-EU*).

The second level relates to cases where data is to be transferred outside the EU. Here, additional legal justification must cover foreign data transfers. Under the GDPR, such a legal basis may also be provided by individual consent that then has to meet further requirements, in particular requirements related to information addressing the possible risks to the subject of the data if such transfers are made (Article 49, paragraph 1).

As consent pertaining to either level may be withdrawn by an employee →

at any time (Article 7, paragraph 3), GDPR provides for alternative solutions on the second level as well. These solutions are based either on an “adequacy decision” (Article 45) or other “appropriate safeguards” such as EU model clauses or binding corporate rules (Article 46). At present, data transfers to the US in particular are generally privileged by such an adequacy decision due to the Privacy Shield Agreement. The German supplemental rules only provide for some clarifications on this situation (Article 78 et seq.).

#### Further changes, but no intragroup privilege!

Aside from this general concept, GDPR provides for additional changes in terms of its extraterritorial applicability, in particular to any data processing related to business activities with a company's establishment in the EU regardless of whether it takes place in the EU or not (Article 3, paragraph 1; further extensions are stipulated in Article 3, paragraph 2). Other substantial changes comprise the appointment and the role of data protection officers (Article 37 et seq.) as well as significantly extended documentary obligations for companies in conjunction with further information rights of employees (Article 12 et seq.).

Furthermore, GDPR still provides for the general privilege of processing data on behalf of the controller (Article 24 et seq.). If this privileged model remains particularly significant in practice – either with regard to data transfers within multinational groups or when using external IT (cloud) services – the GDPR also stipulates extended obligations for data controllers and, especially, for data processors (Article 30).

However, another privilege that is significantly important in practice could not be established: the intragroup privilege where a group division would not be deemed as third party similar to the privileged status reserved for processing data on behalf of the controller. Even if rec. No. 48 refers to the potential interest of multinational groups to transfer data between single entities (which certainly goes in the right direction), the requirements for justification mentioned above remain generally applicable to these cases as well.

#### Substantial impacts: adjustments of contracts and the like

These new European laws pose a major challenge for complying with data privacy. This particularly applies to any existing agreements: Consent declarations, works

agreements and intercompany agreements with affiliated companies and external providers need to be reviewed and adjusted with respect to the tightened requirements under the new European data privacy laws as well as the German supplemental rules.

Aside from tackling this legal paperwork, several additional steps may also have to be taken, for example, reviewing the IT environment to determine whether it provides the necessary technical infrastructure to fulfill the extended documentary and information obligations. But the new laws do not just provide for extended obligations, but also alternative solutions like the EU-US Privacy Shield. These do, of course, require that certain additional measures be implemented, particularly self-certification in the US.



**Dr. Daniel Klösel**  
Rechtsanwalt  
JUSTEM Rechtsanwälte, Frankfurt am Main

[d.kloesel@justem.de](mailto:d.kloesel@justem.de)

[www.justem.de](http://www.justem.de)

#### May 25, 2018: The clock is ticking!

All these necessary adjustments have to be finalized before GDPR takes effect on May 25, 2018. At first glance, this time-frame does not appear very challenging, but it is. As the necessary adjustments will often require negotiating with works councils, affiliated companies and/or other third parties like external IT providers, companies have no time to waste to ensure their compliance with data privacy under the new European laws. The increased fines of up to €20 million or 4% of a company's total worldwide annual revenue may not be the only reason to justify such effort, but certainly is a very important one! <–



# Bene docet, qui bene distinguit

## Transferring an undertaking in the EU: current issues

By Prof. Robert von Steinau-Steinrück and Stephan Sura

**B**ack when Latin was the lingua franca, they already knew this fact: Those who point out the differences do better. And they were right, as you will see in this article.

Acquiring an undertaking, a business or parts of one doesn't just happen within the scope of an M&A. Other, sometimes even bigger, challenges occur when employment relationships have to be transferred to a new owner, including challenges that involve multiple contractual circumstances: In Germany, for example, protective legislation for employees plays a major role, and the allocation of responsibility toward employees is established between the acquisition parties. Due to the complexity of the matter and the fact that the main applicable legal provisions are not always comprehensible, a flood of decisions have been issued by German labor courts (*Arbeitsgerichte*) over the last few years. This has helped concretize what has been missing in the codified law. A selection of the most recent decisions is presented below.

### Basics

The transfer of an undertaking or a business (*Betriebsübergang*) is the transfer of an operation through contractual agreement. According to settled case law by the Federal Labor Court (*Bundesarbeitsgericht, BAG*), the transfer of an undertaking implies the transference of ownership of a "long-term economic unit" from the perspective of a cumulative evaluation (see, e.g., *BAG* decision from April 17, 2003, ref. no. 8 in the *Ausländerzentralregister*, AZR 253/02). Regarding the employment situation, Section 613a of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) – largely based on EU directives, this is the key legal provision in German employment law for the transfer of undertakings – states that the acquirer enters into the rights and obligations arising from the employment relationships in existence at the time of transfer. For this reason, the transference of an undertaking does not lead to the end of individual employment relationships; rather, those within the transferred unit are conveyed as a whole to the acquirer.



Challenges occur when employment relationships have to be transferred to a new owner.

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In a pure share deal, the company's identity is preserved and the acquirer takes over the target with all of its rights and obligations by law or by contract. No special protective legislation for employees is necessary in this case because

the employment relationships remain unchanged. Accordingly, Section 613a of the BGB applies mainly to an asset deal if the sale of a business or a part of it is involved as well as to transformations of undertakings under the Transforma- ➔

tion Act (*Umwandlungsgesetz, UmwG*): mergers, split-ups, transfers of assets and changes to the corporate form.

Nevertheless, the provision only applies to employees with regular employment contracts and not to managing directors or members of the management board. In addition, former employees and retirees who still have claims under a company pension plan are excluded as they no longer have an employment relationship.

### Employment contents

The legal protection aims to secure the existing employment conditions for affected employees so, with exception of the contractual partner, their employment situations remain unchanged. For this reason, employment contracts, including all their current contents, are carried over to the transferee of the operation, and it is neither required nor possible to demand that new individual agreements be signed.

Should works agreements or collective bargaining agreements involving the previous employer affect individual employment contracts and no substitute agreements have been established with the acquirer, the contents of the former applicable collective agreement are

transformed into provisions within the individual employment contracts with the new employer. In this situation, the provisions cannot be changed to the disadvantage of employee for one full year (Section 613a [1] 2 of the *BGB*). In addition, changing these provisions during the first year of the new employment relationship is only possible when the original collective agreement ends and the acquirer and the employee mutually agree on the application of another collective agreement that is not already applicable by corresponding memberships.

In general, a potential seller's membership in an employers' association is a strictly personal matter and is not automatically transferred in the course of the transaction. If, however, a collective bargaining agreement with similar provisions is already in force with the acquirer, it can, under certain conditions, collectively replace the previous agreement with the seller. If the business as a whole is transferred and retains its identity, previously concluded works agreements will remain in force.

### Continuance of employment relationships

Dismissals connected with the transfer of the undertaking are prohibited and

thus invalid according to Section 613a (4) 1 of the *BGB*. A dismissal is deemed to be due to the transfer of the undertaking if the transaction was the motive for the dismissal. However, a dismissal can be valid for other reasons in connection with a transfer: for example, on operational grounds if the former employer closes the entire business because of the disposal of the undertaking. Drawing a distinction can be difficult in individual cases.

Either the former or the new owner of the undertaking (as codebtors to the employees) is, according to Section 613a [5] of the *BGB*, obligated to inform affected employees in advance and in writing about the contents and the effect of the transfer on their employment. In particular, this information must contain the point in time of the transfer, the reason(s), the individual consequences for the addressed employee and the right of objection to the transfer; the employees must be put into the position of being able to assess what the change of employer will mean for them personally.

Within one month after being duly informed, they have the right to object to the transfer of their employment relationship (Section 613a [6] *BGB*), even if it has been terminated. Reasons for the objection must not be presented. As the

general result, the employment relationship with the previous employer remains in effect. If the information is incomplete, the right to object can persist even after the transaction is complete and only be forfeit under certain circumstances, e.g., when the employee was duly informed through other sources and the employment relationship has already been transferred without any disadvantages to him or her.

### Impact on the employee representative bodies

The complete transfer of an undertaking generally has no effect on the works council as a governing body or on its members as they will remain in their positions in the acquirer's business as well. If the situation involves a pure transfer of the whole business, the works council also does not have any codetermination rights. A transfer of business in and of itself does not constitute an operational change within the meaning of Section 111 of the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) and thus is not subject to codetermination. However, if the transaction is accompanied by an operational change, for example through the split-up or the merger of businesses due to the sale of a part of the undertaking, codetermination rights, such as to →

negotiate a conciliation of interest and a social plan, may exist.

### Current jurisdictional issues

With its decision from November 19, 2015, the *BAG* confirmed the objection to the transfer of the employment relationship is only valid toward the seller or the acquirer of the concrete transfer of undertaking (ref. no. 8 of the *AZR* 773/14). Section 613a (6) of the *BGB* does not include an unlimited right to objection against every potential transfer of the employment relationship in the past. The “former” employer in this context is always the seller in the ongoing transaction; a valid objection to previous transfers would have only been possible towards the participating parties of these transactions. This jurisdiction is extremely relevant for “chains” of transfers of undertakings and potential incomplete information towards the employees within the chain as it restricts the right to objection if any misacting party at least provided the basic information, which means informing about the acquirer and the point of time of the transfer.

Furthermore, the *BAG* (decision from May 5, 2015, ref. no. 1 of the *AZR* 763/13) has mainly confirmed a settled case law for the continued applicability of works

agreements for central works agreements on a company level. The provisions of a central works agreement are transformed into separate works agreements when the transactions are individually established as long as there are no existing provisions through a central works agreement at the company itself. Here, individual employment contract provisions are not transformed, which means that changes are possible in accordance with the local works council even before the one-year period ends according to Section 613a (1) 2 of the *BGB*.

Finally, several higher labor courts substantiated the necessary change in employer for an actual transfer of undertaking: No real change in the proprietor is given through a contractual leading agreement between the owner and another party, at least when this is not open to the public (decision of the Higher Labor Court of Berlin-Brandenburg from May 11, 2016, ref. no. 15 Sa 108/16). The Higher Labor Court of Baden-Württemberg even distinguished the “essential and comprehensive outside perspective” from the sheer (and potentially incorrect) role as the employer before (decision from March 9, 2015, ref. no. 4 Sa 19/15). For the transfer of an undertaking and thus for the applicability of its legal provisions, an external impact is always mandatory.

This external issue is neither given by the bare change of partners while the employing stage stays the same (Higher Labor Court of Düsseldorf, decision from August 10, 2015, ref. no. 9 Sa 421/15).

### Outlook

The law of transfers of undertakings is a highly dynamic issue that produces distinguishing cases every day. This will continue in 2017 due to the upcoming decision by the European Court of Justice on the effect of reference clauses in individual employment contracts when the acquirer didn't participate in the negotiations on the respective collective bargaining agreement (ref. no. C-680/15, C-681/15). On the domestic field, the same

goes for the highly expected judgment by the Federal Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*) on the constitutionality of the Act of Collective Bargaining Unity (*Tarifeinheitsgesetz*). Introduced in 2015, this act states the exclusive applicability of the collective bargaining agreement that represents the majority of members of workers unions in the establishment (inter alia ref. no. 1 *BvR* 1571/15). This decision will also have a broad impact on transactions, for example when majorities change through a transfer of undertaking or with respect to the destiny of minor collective bargaining agreements. ←



**Prof. Robert von Steinau-Steinrück**

Honorary Professor for Employment & Labor Law at University of Potsdam; Attorney, Specialist Attorney, Partner in Employment & Labor Law Luther Rechtsanwaltsgesellschaft mbH, Berlin

[robert.steinrueck@luther-lawfirm.com](mailto:robert.steinrueck@luther-lawfirm.com)



**Stephan Sura**

Research Assistant in Employment & Labor Law Luther Rechtsanwaltsgesellschaft mbH, Cologne

[stephan.sura@luther-lawfirm.com](mailto:stephan.sura@luther-lawfirm.com)

[www.luther-lawfirm.com](http://www.luther-lawfirm.com)



# When the whistle blows

## Lack of specific German legislation provides scope for action by employers

By Pascal R. Kremp, LL.M. (Wake Forest), and Thomas Wiedmann

**W**histleblowing still receives a lot of attention: The media regularly reports about serious abuses that would have only come to light from information provided by insiders. The biggest recent scandals have even yielded whistleblowers who have become world famous. But away from the spotlight, employees in Germany also demonstrate moral courage by exposing corruption, publicizing tax evasion and reporting environmental crimes. Employers have to deal with all of this properly.

However, the topic remains a complex matter involving opposing interests: On the one hand, there is the public interest in ensuring that companies, authorities and organizations comply with the law. Then on the other hand, there is the importance of employees maintaining their fiduciary duty of fidelity to their employers as well as employers' interest in protecting their reputation and their desire to internally remedy any possible misconduct before having to go public. In the midst of all this, there is uncertainty

about the legal consequences for the employee who blew the whistle.

### Legal protection of whistleblowers

Other than a few regulations regarding civil servants and employees in the finance sector, Germany lacks specific legislation concerning whistleblowing: No general laws encourage employees to raise concerns about corporate wrongdoing. As a result, whistleblowers are only protected from termination or other detrimental actions taken by the employer through general laws such as the Dismissal Protection Act (*Kündigungsschutzgesetz, KSchG*), which states that employees can only be terminated for a specific reason.

Generally speaking, internal rather than external reporting is encouraged. An employee may even be obligated to disclose wrongdoing to the employer because he or she holds certain functions or special agreements are in place or as a result of the employee's general duty to exercise loyalty as a secondary contractual obliga-

tion. Therefore, internal reporting, especially when carried out in good faith and due to a legitimate concern, usually cannot be classified as a valid reason for termination. In contrast, external reporting may constitute a breach of contract and therefore a valid reason for termination, especially if the employee made deliberate or grossly negligent false claims or the information disclosed would likely damage the employer's reputation.

Furthermore, external reporting may also violate the employee's general legal obligation to not disclose the employer's business secrets as stated in Section 17 of the German Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb, UWG*). However, disclosing information outside the company might also be justified by the whistleblower's civil obligations as well as his or her freedom of speech with regard to public interest. The question of whether whistleblowing must be classified as a breach of duty or

a legitimate action has to be decided on a case-by-case basis.

Generally, the employee has to report any concerns to the employer first before he or she discloses information outside the company. In addition, external whistleblowing is only permissible if internal reporting has proved unsuccessful or appears unreasonable, for example in the case of an employee reporting a criminal offence committed by an employer.

If an employee is dismissed for having disclosed information and the termination has no valid reason, the employer either must continue to employ the employee under the same conditions →



Whistleblowing isn't easy at all.

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as before or attempt to end the employment relationship by making a severance payment.

### Corporate whistleblowing programs

Companies do not have to notify regulatory bodies or obtain their approval prior to establishing a corporate whistleblowing program, nor do they have to consult with employees and obtain their consent. There are, however, certain aspects of such a program that may be subject to works councils' codetermination rights as stated in the Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*). Furthermore, as such programs typically collect personal data, they are subject to the Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*), and the employer should consult with the internal data protection officer prior to implementing such a program.

There are no statutory limits on who may submit a report as part of a corporate whistleblowing program, and operating corporate programs that solely encourage employees to report concerns generally tends to be compliant with German laws. However, programs imposing obligations on employees to report all wrongdoing no matter the circumstances of the individual case may not be covered by the

employer's right to give directions, and the corresponding provisions may be void.

### Whistleblowing hotlines

Whistleblowing hotlines or online portals implemented by the employer to enable employees to anonymously report concerns are permissible, however these hotlines are viewed critically as their anonymity may encourage false and malicious reporting. In contrast, hotlines requiring users to reveal their identity may discourage employees from using them because of fears about the consequences of taking this step; as a result, they might not be as effective.

Because these hotlines collect personal data on the user as well as the accused person, they are also subject to data protection laws.

Employers offering whistleblowing hotlines often provide an option to report anonymously as well as an option to report openly with personal information that is then handled confidentially.

### Latest developments

In July 2016, new legislation regarding employees in the finance sector was enacted to protect whistleblowers.

Anyone can now provide information on violations of regulations that fall under the supervision of the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*). Such information can be provided anonymously; otherwise, the Federal Financial Supervisory Authority is legally obliged to protect the identity of the whistleblower and the individual under investigation.

This does not, however apply where court rulings or other laws demand disclosure of the person's identity. If employees in the finance sector provide such information, no criminal or employment-law consequences may be attached to this action. Moreover, an exemption from any claims for damages applies unless a false notification was made with intent or gross negligence. These whistleblower rights are not subject to contractual agreements.

Most importantly, this demonstrates that the issue is acknowledged by both society and political leaders.

### Conclusion

Due to the lack of specific legislation on whistleblowing in Germany – despite the fact that the topic is receiving more attention – employers are well advised

to provide clarification about the procedure at their companies for making such a disclosure. Employers should consider whether it is appropriate to introduce a policy for disclosing such information. A whistleblowing policy might include a whistleblowing hotline or an online portal. Introduction of a whistleblowing policy is subject to codetermination rights of the works council.

However, it is not possible to reach an agreement with an employee (in advance) that he or she will not submit a legitimate disclosure. Any term of agreement between an employee and his or her employer is null and void insofar as it purports to preclude the employee from making a permitted disclosure. ←



**Pascal R. Kremp, LL.M. (Wake Forest)**  
Rechtsanwalt, Partner  
DLA Piper UK LLP, Munich

[pascal.kremp@dlapiper.com](mailto:pascal.kremp@dlapiper.com)



**Thomas Wiedmann**  
Rechtsanwalt, Associate  
DLA Piper UK LLP, Munich

[thomas.wiedmann@dlapiper.com](mailto:thomas.wiedmann@dlapiper.com)

[www.dlapiper.com](http://www.dlapiper.com)

# Driven by numbers

## German employment law: a slightly different overview

By Dr. Jan Tibor Lelley, LL.M., and Franziska Rothe

For some it might come as a surprise, but German labor and employment law is driven by numbers. From a labor- and employment-law perspective numbers create legal consequences, lead to claims and determine a company's destiny:

### Practical examples: five to 20 employees

Starting with five employees in the business, a works council has to be elected (Section 1, paragraph 1 of the Works Constitution Act [*Betriebsverfassungsgesetz, BetrVG*]).

Generally, the Employment Protection Act (*Kündigungsschutzgesetz, KSchG*) applies starting with 11 employees in the business. All employees who were continuously employed for more than six months are protected against dismissal. In concrete terms, this means that only socially justified dismissals are allowed. According to Section 1, paragraph 2 of the *KSchG*, these are dismissals that are justified for a person-related, conduct-related or operational reason (such as the

loss of the need for the position through restructuring). The employer has to prove the facts justifying the dismissal (Section 1, paragraph 2, sentence 4 of the *KSchG*).

And starting with 10 employees who work on the automated processing of personal data, the company has to appoint a data protection officer (Section 4 f, paragraph 1, sentence 3 of the Federal Data Protection Act [*Bundesdatenschutzgesetz, BDSG*]). A company employing at least 10 executives has to establish an executives' committee (Section 1, paragraph 1, Act on Executives' Committee [*Sprecherausschussgesetz, SprAuG*]).

Starting with 11 employees, a company has to establish a break room (Section 4.1, paragraph 2, ASR A 4.2).

In a company with more than 15 employees, workers are fully or partially released from work if they are caring for close relatives in a domestic environment (Section 3, paragraph 1 of the Home Care Leave Act [*Pflegezeitgesetz, PflegeZG*]). For emergency situations, the act defines a temporary

inability to work as leave for up to a maximum period of 10 working days (Section 2, paragraph 1 of the *PflegeZG*). For long-term-care situations, the act defines a right to exemption for an up to six-month care period (Section 4, paragraph 1 of the *PflegeZG*). Starting with 16 employees, a claim to part-time work exists (Section 8, paragraph 7 of the Act on Part-Time Work and Fixed-Term Employment [*Teilzeit- und Befristungsgesetz, TzBfG*]).

A company employing up to 20 people can come to an agreement on a shorter notice period in an individual employment contract than prescribed by law. This right is limited by Section 622, paragraph 5, No. 2 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) by setting a minimal notice period of four weeks. This means that employers can come to an agreement on a four-week notice period with their staff, instead of, e.g., the statutory notice period of two months to the end of the calendar month in the case of five years of employment.



Numbers count on the road to success.

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Starting with 20 employees, a company is required to offer at least 5% of its jobs to severely disabled persons (Section 71, paragraph 1 of Volume IX of the Social Insurance Code [*Sozialgesetzbuch, SGB IX*]). Special arrangements exist for employers providing fewer than 40 or 60 jobs on average. Employers not complying with this duty are obliged to pay a countervailing charge (Section 77 of the *SGB IX*).

### More than 20 and fewer than 100 employees

A company that employs more than 20 employees has to establish an industrial safety committee (Section 11 of the Occupational Safety Act, [*Arbeitssicherheitsgesetz, ASiG*]). This committee consists of the employer, two members →

of the works council, company doctors, a specialist for occupational safety and a security officer. The security officer is only appointed in companies with more than 20 employees (Section 22 of the *SGB VII*, Section 20, paragraph 1 of the Social Accident Insurance [*Gesetzlichen Unfallversicherung, DGUV 1*]).

Starting with 21 employees, a company must notify the Employment Office (Agentur für Arbeit) of any mass layoffs according to Section 17, paragraph 1 of the *KSchG*.

And starting with 21 employees who are entitled to vote, the works council in the company consists of three members. The number of members then increases: Starting with 51 workers with voting rights, it consists of five members; starting with 101 workers with voting rights, it consists of seven members, and so on (Section 9, of the *BetrVG*).

Starting with 21 employees, it is mandatory that the minority gender (typically women) is represented in the works council (Section 15, paragraph 2 of the *BetrVG*). And starting with 21 employees, the works council has to give its consent to individual personnel measures (recruitment, transfer, restructuring) according to Section 99, paragraph 1 of the *BetrVG*.

The same threshold of 21 employees and up applies to participation in a works council in cases involving operational changes. This means there is an obligation to negotiate a reconciliation of interests and a social plan (Section 111, sentence 1 of the *BetrVG*).

Starting with 26 employees, an employee caring for a close relative in a domestic environment is partly released from work duties for a maximum period of 24 months (Section 2 of the Family Care Leave Act [*Familienpflegezeitgesetz, FpFZG*]). In contrast to the aforementioned Home Care Leave Act, the Family Care Leave Act only supports the partial release through a reduction in working time.

Starting with 31 employees, the employer's health insurance benefit lapses from the pay-as-you-go system concerning wages paid for sick leave (Section 1 of the Expenditure Compensation Act [*Aufwendungsausgleichsgesetz, AAG*]).

An employer with fewer than 50 employees does not require permission for temporary employees who serve to prevent short-time work [*Kurzarbeit*] or avoid layoffs for a period up to 12 months (Section 1a, paragraph 1 of the Labor Lease Act [*Arbeitnehmerüberlassungsgesetz,*

*AÜG*]). Prior written notice concerning the temporary employment must be submitted to the Federal Employment Office (Section 1a, paragraph 1 sentence 1, paragraph 2 of the *AÜG*).

Starting with 60 employees, the company must notify the Employment Office about mass layoffs if 10% of the regularly employed workers or more than 25 workers are dismissed within 30 calendar days.

### More than 100 employees

Starting with 101 permanently employed workers, an economic committee is required in addition to the works council (Section 106, paragraph 1 of the *BetrVG*). Management must comprehensively inform the economic committee in a timely manner about economic matters by presenting necessary documents. Such economic matters include, e.g., the company's economic, financial, production and sales situation as well as its rationalization measures and the like.

Starting with 200 employees in the business, one member of the works council is released from employment duties to handle the work of the works council. The number of exemptions increases as the number of employees increases: Starting with 501 employees, an exemption

for two members of the works council is necessary; starting with 901 employees, an exemption for three members is necessary and so on (Section 38, paragraph 1 of the *BetrVG*).

Starting with 201 employees, the works council has to form a works committee to run its day-to-day business (Section 27, paragraph 1 of the *BetrVG*). The works committee consists of the chairperson of the works council, his or her deputy and at least three other members. The number of the committee members varies depending on the size of the works council.

Starting with 301 employees, the works council may request a consultant on business costs in cases of operational change (restructuring, reorganization). Such consultants are usually economic experts or lawyers or both (Section 111, sentence 2 of the *BetrVG*).

### More than 500 employees

Starting with 500 employees, a company must notify the Employment Office of dismissals of 30 workers or more (Section 17, paragraph 1 of the *KSchG*).

Starting with 501 employees, an employee representative must be appointed to →

the supervisory board for corporations that have them (Section 1, paragraph 1 of the One-Third Participation Act [*Drittelbeteiligungsgesetz, DrittelbG*]).

#### More than 1,000 employees

And starting with 1,000 employees, a European works council must be established for companies with at least 150 workers in two states (Section 3 of the European Works Councils Act [*Europäische Betriebsräte-Gesetz, EB RG*]). Furthermore, information on

the company's economic situation and development must be provided quarterly to the workforce for companies with 1,000 employees or more (Section 110 of the *BetrVG*).

Starting with 2,001 employees, formation of a codetermined supervisory board is mandatory according to the Codetermination Act (*MitbestG*). At least 12 board members have to sit on the board, from which half must be employee representatives (Section 1, 7 paragraph 1 of the *MitbestG*). <–



**Dr. Jan Tibor Lelley, LL.M.**

Rechtsanwalt, Partner

Certified Specialist in Labor and Employment Law  
Buse Heberer Fromm, Essen and Frankfurt am Main

[lelley@buse.de](mailto:lelley@buse.de)



**Franziska Rothe**

Paralegal

Buse Heberer Fromm, Essen

[rothe@buse.de](mailto:rothe@buse.de)

[www.buse.de](http://www.buse.de)

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# How to make employers unhappy

## New legislation ahead? Employees' right for a reduction in working time

By Dr. Guido Zeppenfeld, LL.M., and Marco Maurer

**S**ubject to certain conditions, German employment law entitles employees to unilaterally demand a reduction in working time from their employers. Conversely, employees are entitled to extend their individual working time only in exceptional cases. As a result, employees demanding a reduction in working time often find themselves on a one-way street into a part-time working relationship.

At the beginning of 2017 it became public that this situation might soon change. A draft bill issued by the German Federal Ministry of Labor and Social Affairs (*Bun-*

*desministerium für Arbeit und Soziales, BMAS*) now proposes to implement a general employees' right to demand part-time work on a temporary basis. These developments provide employers with good reason to acquaint themselves with the current law on employee demands for reductions in working time.

### Employees' general right to demand a reduction in working time

Various regulations in Germany provide employees with a right to reduce working time in certain situations, including cases where employees are disabled or where they care for children or other dependents. This article will, however, focus on the general regulation stipulated in Section 8 of the German Part-Time and Temporary Working Act (*Teilzeit- und Befristungsgesetz, TzBfG*). According to this law, every employee working at a company with a headcount of more than 15 employees is entitled to demand a reduction in working time as soon as he or she has been employed with the company for more than six months. The

employee must apply for such a reduction at least three months in advance as well as specify his or her desired working time schedule.

### Employer's reasons to refuse a demand to reduce working time

The employer may refuse an employee's application. To enforce his or her demand, the employee has to challenge the employer's refusal by initiating legal proceedings. According to the law, the employer has then to demonstrate and prove before court that the refusal was justified by adverse operational reasons. Even though a legal definition of this term does not exist, Section 8 of the TzBfG does provide some examples.

### Substantial impairment of the business unit's organization

According to this stipulation, an operational reason particularly exists if the demand in reduction of working time would substantially impair the business unit's organization. However, such an

argument raised by the employer would have to pass a three-stage test before the employment court.

In the first stage, the employer has to demonstrate that the company has established an organizational concept that required a certain system of working hours. In the second stage, the intended reduction in working time is examined to determine if it is actually incompatible with this system. In the third and final stage, the court assesses if the impairment of the established organization caused by the intended reduction in working time is substantial enough to justify the employer's refusal.

This example illustrates this process: An employer who intends to ensure a single-contact solution for the company's customers might argue that part-time work was incompatible with its established service-oriented concept. Such an argument may, per se, be considered a sufficient organizational concept in the sense discussed above. But the organizational concept does, of course, need to →



Is part-time work a one-way street?

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be plausible and has to be implemented steadily. This means for this example that referring to the single-contact solution would not likely be successful if the company's shop hours significantly exceeded the working time of a full-time employee or if other employees in comparable positions with customer contact were already employed with reduced working time.

#### Further operational reasons for a denial

Further operational reasons the employer might cite include a shortage of qualified workers, an overload caused by multiple demands for a reduction in working time or, in particular, if the reduction in working time would incur disproportional costs. Disproportional costs in this sense might incur if

- the employer was required to lease additional office premises or install additional and expensive technical equipment, or
- organizing a substitute workforce would be very expensive – for example, if the complexity of the work process requires a long training period.

On the other hand, costs that typically occur when splitting working places, such as increased expenditure on the human

resources department, have to be accepted and cannot justify an employer's denial of a demand for part-time working hours.

#### Legal procedure following an employee's application

If the employer (partially or totally) disagrees with the employee's demand, the consensus-orientated law urges the parties to discuss the desired reduction in working time with the aim of reaching agreement. Employers cannot be forced into such a discussion, however an employer is well advised to seek dialogue with the employee and to state the company's position at this stage: The employer's objections to the employee's demand might be precluded in a possible lawsuit if they were not previously brought up for discussion.

If the parties fail to find a mutual solution, the employer has to unilaterally decide about the employee's demand at least one month prior to the intended reduction in working time. The decision does not need to contain a statement of reasons (at this point) but has to be issued in written form – i.e., with the handwritten signature of the employer or the employer's legal representative. If the decision is negative and issued in due form

and time, the employee is required to request a substitution of the employer's consent before the employment court. In the absence of such a decision by the employer, the working time is automatically reduced and scheduled according to the request by the employee.

This procedure is, of course, obsolete if the employer consents to the employee's demand. The parties may even accelerate the legal process and implement the new working time earlier than the point in time for which the employee had initially applied.

Regardless of whether the employer consents to or justifiably refuses an employee's application, the employee has to wait at least for two years before he or she is entitled to reapply for a reduction in working time.

#### Draft bill to implement a right for a temporary reduction in working time

In the current legal situation, employees who demand a reduction in working time do not have a statutory right to return to their original working time. Only within narrow limits does Section 9 of the *TzBfG* allow part-time employees to apply for an extension in their working hours. The employer has to preferentially consider

such applications only when filling a corresponding workplace that is vacant. It has to be assumed that the legal risk of getting stuck in a part-time employment relationship actually prevents a lot of employees from applying for a reduction in their working hours. Even though details about the draft bill from the *BMAS* have not been published yet, it is clear the proposed right for a temporary reduction in working time would significantly strengthen employees' legal position. Employers' are already criticizing the draft bill for substantially interfering with their right to organizational autonomy. In the end, however, it remains unclear whether the draft bill will ever be implemented into law. <–



**Dr. Guido Zeppenfeld, LL.M.**  
Rechtsanwalt, German Managing Partner  
Mayer Brown LLP, Frankfurt am Main

[gzeppenfeld@mayerbrown.com](mailto:gzeppenfeld@mayerbrown.com)



**Marco Maurer**  
Rechtsanwalt, Associate  
Mayer Brown LLP, Frankfurt am Main

[mmaurer@mayerbrown.com](mailto:mmaurer@mayerbrown.com)

[www.mayerbrown.com](http://www.mayerbrown.com)

# The (un)known territory of involuntary and voluntary noncompliance

## Working time: regulations in Germany

By Prof. Anja Mengel, LL.M. (Columbia)

**G**lobalization and digitalization of the economy has increased the frictions between the mandatory statutory limits on (regular) working hours under German (and European) law on the one hand and the requirements of employers and, ultimately, customers and clients on the other. Often, employers, in particular managers of small and medium-sized operations and/or subsidiaries or branches of foreign companies, do not even know in sufficient detail about the rather strict statutory limits. Hence, noncompliance with working-hours regulations is by far not an exception, even though it may result in heavy fines and even criminal proceedings in the event of a review or investigation by the authorities – for instance, one instigated by a disgruntled employee or competitor – as the working-time laws are part of workplace health and safety regulations.

### The main limits to comply with

German (and European) law imposes a general daily working-time limit of eight hours excluding breaks. This limit is then



Working-time laws are part of workplace health and safety regulations.

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reached if a full-time employee is obliged to work 40 hours a week under his or her employment contract – assuming the full-time employment is carried out during the rather standard five working days a week. Does that mean overtime work is impossible under the statute? No, the working-time regulations does not impose a week consisting of merely five working days, but instead permits a six-day week only prohibiting employees

from working on Sundays (to the largest extent). Hence, the regulations set the overall maximum number of working hours per week at 48 hours (six days at eight hours).

### Maximum daily working hours ...

Does this require all overtime work to take place on Saturdays then? No again, as there is another important rule to

consider for the maximum number of daily working hours: While the maximum is eight hours per working day on average within a certain time frame, the (most important) German statute, the Act on Working Hours (*Arbeitszeitgesetz*) permits a maximum of 10 hours a day for a short-term period, namely for about a few months. The statute requires that in a period of 24 weeks or six months the average daily working time of eight hours not be exceeded. This in turn permits employees to work up to 10 hours a day (absolute maximum of daily working time) and up to 60 hours a week (absolute maximum of weekly working time unless Sunday work is permitted by way of special exception) as long as the employer grants free time to correspondingly average out the daily working time to just eight hours a day over six months. The six-month period must be averaged “on a rolling basis.”

### ... and resting time

The matter is further complicated by the statutory requirement to comply with →

providing an uninterrupted resting time of 11 hours between two working days. Hence, an employee working up to the maximum daily working time of 10 hours for a few days in a row, for instance from 8 am to about 7 pm (a minimum break of 45 minutes must be added in), may do so only if the resting time between 7 pm and 6 am the next morning is free of any work. While this requirement did not pose any problems for most employees in the nonglobalized and nondigital old economy, the requirement placed on a lot of managers as well as regular employees to work “between the global time zones” and to be electronically available outside standard office hours, creates intense friction with the resting-time regulation. Being available for late-evening or early-morning telephone conference calls or at least to check and briefly reply to e-mails after having left the office or workplace, translates into an interruption of the resting time and requires, under the statute, postponing the beginning of the next working day. This also applies to very short interruptions, for instance by just a few minutes. These frictions with the modern digitalized and globalized working environment are so intense that even the Federal Ministry of Labor, traditionally leaning to political positions of the German Social Democratic Party and the

unions plans to test further exceptions to the current strict statutory rules soon.

### **Working at night, in shifts and on Sundays**

Further strict limits apply to work at night (11 pm to 6 am) and to shift working hours. The German statutes define a long list of exceptions to these strict limits, however they are almost all based on the application of collective bargaining agreements and/or at least the existence of a works council and the conclusion of agreements with the works council. Companies or operations that do not employ collective bargaining agreements or do not have elected works councils (and there are good reasons to have such a setup) must therefore comply with the “plain” and strict statutory rules. In addition, work on Sundays is generally prohibited but the statute does define a rather long list of special exceptions according to branch. This means, for instance, that work in hospitals, restaurants and bars as well as for employment related to entertainment, sport, media and the like is permitted. However, most jobs in the service industries, commerce and retail are not covered by exceptions and therefore work must be suspended on Sundays.

### **Trust-based flexitime**

Some managers might think they should simply ignore the regulations and grant the option of trust-based working hours. In this approach, the employee’s (regular) weekly working hours are not stipulated in the employment contract and hence not monitored for overtime or missing working hours; this concept leaves it to the employee to “work as much as needed to get the work done.” However, while such trust-based flexitime is permitted under employment contract law, the public-law regulations on the maximum number of working hours still apply, and they require the employer to monitor and document the daily working hours of each employee and maintain records for at least two years for inspection by the authorities. If the authorities review the company or operation as part of a general audit or a special investigation instigated by a whistleblower or as a result of a similar occurrence, the tendency will be

to consider missing documentation as an indication the employer’s organization has not been set up in a compliant manner, which could potentially lead to higher fines.

### **Practical advice**

Is it possible to achieve compliance with the German (and European) working time regulations? Yes. For a lot of employers, however, it requires foregoing the idea that employees may be requested to work more than 40 or 48 hours a week over long periods of time and requires active management of working hours by shifting between highly intense periods of work and periods of free time in an effort to set off (excessive) overtime. Depending on the individual circumstances, the application of collective bargaining agreements might also provide more flexibility. ←



**Prof. Anja Mengel, LL.M. (Columbia)**

Rechtsanwältin, Fachanwältin für Arbeitsrecht, Partner  
Altenburg, Fachanwälte für Arbeitsrecht, Berlin

[a.mengel@altenburg.net](mailto:a.mengel@altenburg.net)

[www.altenburg.net](http://www.altenburg.net)

# Aspects of employee leasing in international assignments

## Recent challenges and successful management: the inbound perspective

By Yvonne Schmidt and Sachka Stefanova-Behlert

It is no secret that international employee assignments are a complex matter. To achieve an optimal structure, a strategic approach accommodating labor, tax, social-security and immigration laws is required. In some cases, a tension may appear between tax- and labor-law implications. In order to avoid a tax-permanent establishment in the host country, home companies tend to structure international assignments in a way that may give rise for concerns under employee leasing laws of the host jurisdictions.

Generally, there are two forms of employee assignments from a labor-law perspective: a) in the framework of the provision of services and b) in the framework of employee leasing. The latter is often subject to national requirements for registration, licensing, certification, financial guarantees or monitoring. Noncompliance with the requirements normally triggers various adverse consequences for companies: financial penalties, management liability, drawbacks in potential



International employee assignments are a complex matter.

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labor-law disputes and disqualification in public procurement procedures, etc.

International assignments are not exempted from such requirements. Moreover, national laws concerning employee leasing often contain mandatory provisions for the jurisdictions involved that

have an impact on cross-border activities. This is another reason why companies not specializing in commercial employee leasing try to avoid the application of employee leasing laws.

As a consequence, finding the balance between tax- and labor-law implications

presents one of the core tasks for management when planning and designing international employee assignments.

### Recent labor-law challenges in Germany: the concept of “employee leasing”

Companies conducting employee leasing in Germany require a license. However, the concept of employee leasing under German law may vary from the one in the home country and trigger uncertainty as to the proper qualification of (international) assignments to Germany.

Starting on April 1, 2017, employee leasing in Germany is explicitly defined in Section 1 (1) of the German Law on Labor Leasing (*Arbeitnehmerüberlassungsgesetz, AÜG*) as the assignment of employees by the contractual employer to a user employer to perform temporary work while being integrated into the work organization of the user employer and bound by his or her directions. Apart from certain statutory exceptions, the maximum leasing period should not exceed 18 months (Section 1 (1) of the AÜG).

→



The above definition clarifies that employee leasing in Germany is not limited to commercial employee leasing and may encompass any international assignment. It does not seem to be a helpful qualification tool in the following situations:

- Often the degree of integration of the assigned employee into the work organization of the user employer (here the host company) evolves in the course of the assignment regardless of the initial intention of the parties.
- International assignments are often characterized by the shared exercise of supervision through the home and host company. In many cases, the assigned employee performs services on behalf of both companies. A clear allocation of services may be difficult.

According to German law, the formal content of contractual arrangements between the parties is not decisive; it is the actual execution of contracts that should determine the character of assignments. As the examples (above) show, the actual performance of international assignments may appear difficult to fit into the recognized forms of employee assignments.

In cases of intercompany assignments, companies often make use of the group privilege doctrine pursuant to Section 1 (3) No. 2 of the *AÜG* (*Konzernprivileg*), which implies that the *AÜG* is not applicable to employee leasing between companies in a single group within the meaning of Section 18 of the German Stock Corporation Act (*Aktiengesetz, AktG*) if the employee is not hired and employed for the purpose of leasing. Therefore, group companies whose purpose is to hire out personnel to other group companies cannot make use of this privilege. Furthermore, the *Konzernprivileg* requires that the intercompany assignment is limited in time (not necessarily limited to 18 months) and a repatriation of the assigned employee to the home company is intended. Therefore, group companies whose purpose is to hire out personnel to other group companies cannot make use of this privilege. If these requirements are not met, companies must clarify the character of the assignment in advance.

#### Obligations of the companies involved

Starting on April 1, 2017, the home and host company are obliged to disclose the assignment as employee leasing in the underlying intercompany agreement in cases of employee leasing (Section 1 [1] of the *AÜG*), and the home company must

inform the leased employees about the character of their assignment (Section 11 [2] of the *AÜG*). Apart from any financial penalties, violations of these obligations trigger the same legal consequences as cases involving the conduct of employee leasing without a license or in exceeding the maximum leasing period. Pursuant to Section 9 No. 1a of the *AÜG*, the contractual relationship between the home company and the assigned employee is deemed invalid and an employment relationship with the host company is established unless the assigned employee exercises his or her objection right.

The consequences are twofold:

- Companies can no longer avert sanctions in cases of improper qualification of assignments by obtaining a precautionary license – the practice in the past.
- Companies must clarify the character of the assignment in advance; they bear the full risk of improper qualification since there is no binding preliminary procedure to determine the status of the assignment before the competent authorities in Germany.

#### Successful management

##### Step 1: Clarify the character of assignments in advance

Should the planned assignments trigger employee leasing, companies must also consider the requirements of the home country when clarifying the character of the assignment. German audit authorities may require compliance with the home country's laws in order to approve assignments to Germany under the *AÜG*.

##### Step 2: Choosing the proper contractual setup

#### Secondment agreement with the home company

Domestic secondment agreements are a popular contractual tool for international assignments. Social-security considerations and the application of the more familiar domestic law account for this trend.

From an employee-leasing perspective, this tool remains appropriate in the following scenarios:

- Assignments in the form of the provision of services.

- Assignments in the form of privileged employee leasing (*Konzernprivileg*) provided that the assignment is fixed term (not necessarily limited to 18 months) and a repatriation opportunity of the assigned employee is ensured.
- Assignments in the form of nonprivileged employee leasing provided that both the secondment agreement and the intercompany agreement are limited to the maximum leasing period of 18 months and identify the assignment as employee leasing in addition to the license requirement.

In the first two scenarios, companies are well advised to provide for the objection of the assigned employee to the fictional establishment of an employment relationship with the host company in the secondment agreement should the audit authorities unexpectedly qualify the assignment as employee leasing.

The best approach to dealing with the uncertainties about the proper qualification of assignments is, however, to either treat assignments as cases of unprivileged employee leasing or to conclude a local contract with the host company.

### Local contract with the host company

Conclusion of a local contract is the way to proceed if companies want to avoid employee-leasing restrictions or if the requirements for legal employee leasing cannot be fulfilled.

In addition, this contractual tool offers the following benefits:

- It creates legal clarity for the parties regarding the applicable law by avoiding the application of both home and host jurisdictions. In light of the European Commission's proposal to apply the labor law of the host country to assignments over 24 months (see Proposal for Amendment of the Directive 96/71/EC concerning posting of employees as of March 8, 2016), this contractual tool is the preferable option for long-term assignments. This also applies to privileged employee-leasing scenarios.
- It does not hinder the retention of social-security coverage and benefits from the home country in the prevailing number of assignments.
- The tax deductibility of business expenses is not noticeably reduced by the conclusion of a local contract.

### Summary

Given the statutory sanctions in cases of noncompliance with the *AÜG*, companies are strongly advised to proactively tackle aspects of employee leasing in international assignments to Germany. Determining the character of the assignments may appear to be a difficult task for companies due to the various uncertainties characterizing the concept of employee leasing in Germany, nevertheless companies have considerable leeway to structure assignments in a way that keeps their exposure to employee-leasing risks manageable. Choosing the proper contractual setup is one of the steps



**Yvonne Schmidt**  
Senior Legal Counsel  
Zalando SE, Berlin

[yvonne.schmidt@zalando.de](mailto:yvonne.schmidt@zalando.de)

[www.zalando.de](http://www.zalando.de)



**Sachka Stefanova-Behlert**  
Rechtsanwältin, Manager  
KPMG Rechtsanwälts-gesellschaft mbH, Berlin

[ss Stefanovabehlert@kpmg-law.com](mailto:ss Stefanovabehlert@kpmg-law.com)

[www.kpmg-law.com](http://www.kpmg-law.com)

forward toward successful management. In many cases, the conclusion of a local contract with the host company appears to be the preferable option in a cross-border context.

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# Labor leasing in Germany

## Legal handling of labor leasing arrangements: an immigration law perspective

By Andreas Meier



The immigration law influences the legal handling of labor leasing.

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After a rather long wait, the German Parliament has finally passed an amendment to the German Labor Lease Act (*Arbeitnehmerüberlassungsgesetz*) that will take effect on April 1, 2017. While the reform has been widely discussed since the beginning of 2015, the discussion has predominantly focused on potential labor law implications.

But there are also several important aspects of immigration law that influence the legal handling of labor leasing that are often neglected in practice. These will be addressed in this article.

### Labor leasing models in Germany

Generally speaking, labor leasing is the assignment of temporary workers from

one legal entity, the “staffing company,” to another legal entity, the “user company” or “hirer.” During the assignment, temporary workers are under the supervision of the user company while employed by the staffing company.

There are two types of labor leasing arrangements, the professional labor lease and the unlicensed labor lease, that exist in practice. While professional labor lease arrangements require a specific license from the Federal Employment Agency (*Bundesagentur für Arbeit*), unlicensed labor lease arrangements do not. “Intra-group labor leasing”, an arrangement encompassing employee transfers among companies of the same group, is one example of an unlicensed labor lease. For such arrangements, the German Labor Lease Act does not generally impose a license requirement unless arrangements are pursued under the umbrella of personnel pool entities (*Personalführungsgesellschaft*).

Personnel pool entities are established with the sole purpose of employing and

administering staff that will be assigned to operating companies within a corporate group. In practice, this is widely used to maintain flexibility in staff deployments and to standardize labor conditions. Under such circumstances, a license is required.

### The impact of the German immigration law

The German immigration law makes a significant distinction between professional and unlicensed labor leasing simply because unlicensed labor leasing arrangements receive special attention and are distinguished under this law.

In Germany, citizens of non-EU or non-EEA countries are generally required to obtain a work and residence permit when considering employment. Immigration law differentiates between work and residence permits in that some permits require approval from the Federal Employment Agency while others do not.

If a citizen of a non-EU or non-EEA country intends to pursue labor lease assignments, for instance, the Federal Employment Agency generally must refuse work authorization approval. Consequently, employees who are assigned to Germany as part of a professional labor leasing arrangement are not eligible for such work authorization. In those cases, employees and companies should try to obtain work and residence permits that don't require approval. These types of permits typically require employees to meet higher standards in terms of qualifications, salary and job title.

For unlicensed labor leasing arrangements, all permit types may be applicable; in some circumstances this may result in lower requirements for qualifications, salary and job titles.

#### **Work and residence permits without approval requirement**

The most common work and residents permits without an approval requirement are the EU Blue Card, the permanent residence permit and the family reunion permit.

For highly skilled workers, the EU Blue Card may be obtained without approval from the Federal Employment Agency.

This generally applies when certain requirements are fulfilled by the employee. The main requirements include:

- A gross annual salary of €50,800
- Possession of an acknowledged university degree or a university degree comparable to a German degree
- A German employment contract

In combination with an intended labor leasing arrangement, the EU Blue Card will face the challenge of needing a German employment contract. Due to its very nature, labor leasing takes the form of assignments or secondments, where no employment contract is issued.

To address this issue with an alternative solution, some employers will commonly resort to issuing temporary contracts or secondment agreements. Experience does, however, show that authorities typically insist on the submission of a German employment contract.

Due to that fact that employers with an entity in Germany may want to exercise the option of issuing a German employment contract in order to obtain an EU Blue Card and assign or lease their employees to clients in Germany.

Besides the EU Blue Card, permanent residence permits and family reunion permits may be obtained without additional approval from the Federal Employment Agency. These types of permit grant full access to the German labor market and therefore cannot be refused due to an individual's intention to pursue labor leasing. To be eligible for a family reunion permit, the employee has to reunite with a principal family member living in Germany. In addition to other demands, obtaining a permanent residence permit generally requires the employee to have a prior stay in Germany of at least five years. However, employers should bear in mind that the issuance of those types of permits is subject to personal employee requirements that are beyond a company's influence and are therefore not a practical corporate option.

#### **Work and residence permits that require approval**

For work and residence permits that require approval, employers mainly use ICT permits (inter-company transfer), "specialists" permits, and permits for citizens of privileged countries.

ICT permits concern international staff exchange programs that employers may use if they are registered with the Federal

Employment Agency and have both an equal number of inbound and outbound staff transfers.

"Specialists" permits may be applicable to employees who are highly specialized in a particular field, may demonstrate specific company knowledge and are able to beneficially contribute to projects.

Residence and work permits for citizens of privileged countries are generally applicable to employees with certain nationalities (e.g., the US, Canada, Australia, etc.) and who maintain an appropriate job title related to their qualifications.

In addition, other individual requirements should be considered, including minimum salary levels and the like, that vary depending on the different permit types.

#### **Consequences of noncompliance**

Should an employee hold work and residence permits that require approval from the Federal Employment Agency and this individual engages in a professional labor lease assignment, his or her work authorization will be revoked. Consequently, his or her work and residence permit will also be revoked and the employee might have to leave Germany. This may cause disruption.

→



tions, a loss of work authorization in Germany and possible penalties.

#### Brief example

A company based in the US intends to lease an employee to Germany. The employee does not qualify for an EU Blue Card or any other work or residence permit that does not require approval from the Federal Employment Agency.

The employer now wants to understand if labor leasing is possible and if the company is indeed compliant.

Generally speaking, the employer will not be compliant if the hirer is unaffiliated with the corporate group of the sending company.

However, should the hirer be affiliated with the sending company and the employee qualifies for any other work and a residence permit in Germany, the

employer is compliant, as this would fall under unlicensed labor leasing – i.e., the intra-group labor leasing exemption would apply.

#### To summarize

The most recent amendments to the German Labor Lease Act have brought to light that not only labor law but also immigration law influences the legal handling of labor leasing arrangements.

German immigration law distinguishes between professional and unlicensed labor leasing and therefore dictates what work and residence permits are applicable.

Noncompliance could result in disruptions and in the loss of authorization to work in Germany. And that is in addition to that penalties that could be imposed. <–



**Andreas Meier**  
Fragomen Worldwide LLP  
Frankfurt am Main

[ameier@fragomen.com](mailto:ameier@fragomen.com)

[www.fragomen.com](http://www.fragomen.com)

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# Not without consulting the ombudsperson

## Dismissals of severely disabled persons: strict new rule is in effect

By Dr. Gerald Peter Müller

If an employee has been officially recognized as a “severely disabled person” or has a comparable status, the employer must generally seek to obtain consent from the relevant public authority charged with ensuring equal employment opportunities of disabled persons (Integrationsamt) prior to a dismissal. Terminations without prior consent from this public authority are void (Section 85 of the ninth book of the Code of Social Law [*Sozialgesetzbuch, SGB IX*] and Section 134 of the German Civil Code [*Bürgerliches Gesetzbuch, BGB*]).

In businesses with at least five severely disabled persons or persons with comparable status (hereafter: “disabled persons”), an ombudsperson (*Vertrauensperson*) is to be appointed. It is the responsibility of this ombudsperson to safeguard the interests of disabled employees, and the employer must consult with the ombudsperson in any cases that may affect a single disabled employee or the group of disabled employees (Section 95, paragraph 2 of *SGB IX*). In cases of dismissals, this consultation must take



The employer must consult with the ombudsperson if a disabled employee may be affected.

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place prior to issuing the termination (and arguably also prior to seeking the *Integrationsamt*’s consent).

This is nothing new, and until December 29, 2016, valid dismissals of disabled persons without proper consultation with the ombudsperson were possible. To be precise: Noncompliance with the rules of

consultation did not directly affect the validity of the termination itself. While the employer was subject to administrative fines, the disabled person could not argue in an employment court that noncompliance with Section 95, paragraph 2 of *SGB IX* rendered the termination void.

### New law

As of December 30, 2016, this considerably changed: As part of a broader reform of, among other codes, *SGB IX*, a new sentence 3 was added to Section 95, paragraph 2 of *SGB IX* that explicitly renders terminations void where the ombudsperson was not consulted in advance. As a result, a new potential pitfall for terminations of disabled persons has been in place since December 30, 2016.

It can be argued that the effects of this change in the law will not be all too grave since the *Integrationsamt*, in the past as well as at present, has to check whether or not the employer correctly involved the ombudsperson and will at least have to inform the employer about any discrepancies. However, there are possible cases where the *Integrationsamt* may have simply overlooked the error. And then there are cases where the *Integrationsamt*’s consent for a termination is not even required – e.g., during the first six months of a disabled person’s employment (Section 90, paragraph 2, No. 1 of *SGB IX*). →

Here, the omitted consultation may only be identified late in court proceedings. This can be catastrophic in cases of summary dismissals in terms of the limitation period in Section 626, paragraph 2 of the *BGB*. But for ordinary terminations, too, the loss of time and money can be considerable.

For these reasons, it is imperative to closely follow the rules of consultation with the ombudsperson in the event of a dismissal of a disabled person.

### Formal requirements for the consultation process

The revised Section 95, paragraph 2 of *SGB IX* does not detail the formal requirements for the consultation with the ombudsperson. Written consultation is not required but strongly advisable in order to document that a proper consultation process was followed.

The required content of such a consultation has also not been stipulated but must be construed in accordance with the underlying idea for involving the ombudsperson: The interests of the affected disabled employee are to be protected. Therefore, detailing the particulars of the disabled person and her/his situation in the employment relationship is sufficient.

The ombudsperson is not supposed to fully review the material reasons for the dismissal; this should be done by the works council (and, of course, by the employment courts later on). In practice, however, the consultation documentation for the ombudsperson will often match the documentation submitted to the works council. In the past, sending a copy of the very document prepared for the works council hearing and adding a specific cover letter to the ombudsperson has proven to be a helpful and pragmatic approach.

Another problem area is that lawmakers did not specify a deadline for the ombudsperson to react to the consultation. While this is a considerable flaw, it is safe to say that the time limits for consultation with the works council (Section 102, paragraph 2 of the Works Constitution Act [*Betriebsverfassungsgesetz, BetrVG*]) apply. Therefore, for ordinary terminations with notice, the ombudsperson will have to give a reasoned reply within one week of the consultation process having been initiated. In cases of summary dismissals, the reply must be made within three days. After this deadline, the employer may start to seek the consent of the Integrationsamt, even without the ombudsperson's reply.

### How to act when dismissing a disabled person

The consultations with the ombudsperson and the works council must be performed and the Integrationsamt's consent to the dismissal must be sought prior to issuing the termination itself.

In practice, consultation with the ombudsperson and the works council should be initiated at the same time. The applicable deadlines for both proceedings are the same and, as stated above, the documents for both processes can also be virtually the same.

The works council and the ombudsperson may, however, react differently to their respective consultations. While the employer need not find a consensus with the ombudsperson or the works council, Section 95, paragraph 2, sentence 1 of *SGB IX* requires the employer to inform the ombudsperson of the decision made.

For this reason, the employer must first examine the ombudsperson's reply before informing the ombudsperson of the decision made (to proceed with the dismissal). This should also be done in writing to create a paper trail. While it is uncertain whether the consultation with the ombudsperson must be concluded

before involving the Integrationsamt, it is strongly advised to do so: The employer should not take any unnecessary risks here.

Consultation with the works council may take place independently. The employer may initiate this process before involving the Integrationsamt, during that involvement or even after it.

Finally, the termination letter must be delivered to the employee within one month of receiving the Integrationsamt's consent in cases involving ordinary terminations with notice (Section 88, paragraph 3 of *SGB IX*). In cases involving summary dismissals, the termination letter must be delivered without undue delay (Section 91, paragraph 5 of *SGB IX*). In cases involving the latter, it is strongly advisable to involve the works council at the beginning of the whole process in order to ensure timely operation.

### Roadmap

Ordinary termination with notice:

- Consultation with the ombudsperson and the works council has been initiated at the same time.

- Responses to actual replies from the ombudsperson and works council have been made (e.g., further discussion of the details or receipt of information from the ombudsperson that the decision to go ahead with the dismissal has been made) or
  - After one week without receiving a reply from the ombudsperson, application for the *Integrationsamt's* consent has been made and the ombudsperson has been informed of that decision.
  - Termination letter delivered within one month of receiving the *Integrationsamt's* consent.
- Summary dismissal:**
- Consultation with the ombudsperson and the works council has been initiated at the same time.
  - Responses to the actual replies have been made (see above) or
  - After three calendar days without receiving a reply from the ombudsperson, application for the *Integrationsamt's* consent has been made and the ombudsperson has been informed of that decision.
  - Termination letter delivered immediately after receiving the *Integrationsamt's* consent. ←



**Dr. Gerald Peter Müller**

Rechtsanwalt (Attorney-at-Law, Germany)  
Licensed Labor and Employment Law Specialist  
Beiten Burkhardt Rechtsanwälts-gesellschaft mbH, Berlin

[gerald.mueller@bblaw.com](mailto:gerald.mueller@bblaw.com)

[www.bblaw.com](http://www.bblaw.com)

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[band.kristin@draexlmaier.de](mailto:band.kristin@draexlmaier.de)  
[www.draexlmaier.de](http://www.draexlmaier.de)



**Dr. Marc Kaiser**  
Leiter Arbeitsrecht, Versicherungs- / Schadenmanagement  
AUDI AG  
Ingolstadt

[marc.kaiser@audi.de](mailto:marc.kaiser@audi.de)  
[www.audi.de](http://www.audi.de)



**Stefan Braun**  
General Counsel EMEA, Fachanwalt für  
Arbeitsrecht, Fachanwalt für IT-Recht  
Diebold Nixdorf, Paderborn

[stefan.braun@dieboldnixdorf.com](mailto:stefan.braun@dieboldnixdorf.com)  
[www.dieboldnixdorf.com](http://www.dieboldnixdorf.com)



**Dr. Frank Kohls**  
Counsel, **Labour Law Europe**  
IBM Deutschland Management & Business Support GmbH  
Ehningen

[fkohls@de.ibm.com](mailto:fkohls@de.ibm.com)  
[www.de.ibm.com](http://www.de.ibm.com)



**Gerrit-Michael Böning**  
Deutsche Bank AG  
Managing Director | Head of Labour Relations  
Frankfurt am Main

[gerrit-michael.boening@db.com](mailto:gerrit-michael.boening@db.com)  
[www.db.com](http://www.db.com)



**Stefan Möhren**  
Director Labor Relations  
OSRAM GmbH  
München

[s.moehren@osram.com](mailto:s.moehren@osram.com)  
[www.osram.com](http://www.osram.com)



**Sandra Dreyer**  
Senior Counsel Labor & Employment  
GE  
Frankfurt am Main

[sandra.dreyer@ge.com](mailto:sandra.dreyer@ge.com)  
[www.ge.com](http://www.ge.com)



**Ellen Raahede Secher**  
Managing Director/Country Human Resources Director Germany  
Parker Hannifin Manufacturing Germany GmbH & Co. KG  
Kaarst

[ellen.raahedesecher@parker.com](mailto:ellen.raahedesecher@parker.com)  
[www.parker.com](http://www.parker.com)



**Michael Fritz**  
Geschäftsführer Personal  
DB Engineering & Consulting GmbH  
Berlin

[michael.fritz@deutschebahn.com](mailto:michael.fritz@deutschebahn.com)  
[www.deutschebahn.com](http://www.deutschebahn.com)



**Frank Schürmann**  
Director Labor Relations Germany  
UPS Deutschland Inc. & Co. OHG  
Neuss

[fschuermann@ups.com](mailto:fschuermann@ups.com)  
[www.ups.com](http://www.ups.com)





**Alexandra Seemann**

Legal Department Manager / German Labor Relations, **Labor & Social Law**  
SAP SE  
Walldorf

[alexandra.seemann@sap.com](mailto:alexandra.seemann@sap.com)  
[www.sap.com](http://www.sap.com)



**Alexander Werner**

Head of Team Labor and Employment Law  
Merck  
Darmstadt

[alexander.werner@merckgroup.com](mailto:alexander.werner@merckgroup.com)  
[www.merckgroup.com](http://www.merckgroup.com)



**Christian Stadtmüller**

Head of HR Labor Relations  
Infineon Technologies AG  
Neubiberg

[christian.stadtmueller@infineon.com](mailto:christian.stadtmueller@infineon.com)  
[www.infineon.com](http://www.infineon.com)



**Christian Vetter**

Leiter Arbeits- und Sozialrecht Deutschland  
Dow Deutschland Inc.  
Hamburg

[christian.vetter.hamburg@t-online.de](mailto:christian.vetter.hamburg@t-online.de)



**Dirk Wasmuth**

Leiter Arbeitsrecht, **Versicherungs- / Schadenmanagement**  
Porsche  
Ingolstadt

[dirk.wasmuth@porsche.de](mailto:dirk.wasmuth@porsche.de)  
[www.porsche.de](http://www.porsche.de)



**Liana Weismüller**

Leiterin Arbeitsrecht und Betriebsverfassung/ Head of Labour Law  
Condor Flugdienst GmbH  
Frankfurt am Main

[liana.weismueller@condor.com](mailto:liana.weismueller@condor.com)  
[www.condor.com](http://www.condor.com)



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**Dr. Anja Mengel, LL.M. (Columbia)**  
Partner, ALTENBURG Fachanwälte für Arbeitsrecht  
Französische Straße 2-4, DE-10117 Berlin

[a.mengel@altenburg.net](mailto:a.mengel@altenburg.net)  
[www.altenburg.net](http://www.altenburg.net)

**FRAGOMEN**



**Dr. Axel Boysen**  
Partner, Fragomen Global LLP  
Neue Mainzer Strasse 75, DE-60311 Frankfurt am Main

[aboysen@fragomen.com](mailto:aboysen@fragomen.com)  
[www.fragomen.com](http://www.fragomen.com)

**BEITEN BURKHARDT**



**Markus Künzel**  
Partner, Beiten Burkhardt Rechtsanwaltsgesellschaft mbH  
Ganghoferstraße 33, DE-80339 München

[markus.kuenzel@bblaw.com](mailto:markus.kuenzel@bblaw.com)  
[www.bblaw.com](http://www.bblaw.com)

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**Caroline Bitsch**  
Partner, JUSTEM Rechtsanwälte  
Neue Mainzer Straße 26, DE-60311 Frankfurt/Main

[c.bitsch@justem.de](mailto:c.bitsch@justem.de)  
[www.justem.de](http://www.justem.de)

**BUSE HEBERER FROMM**



**Sabine Feindura**  
Partner, Buse Heberer Fromm  
Kurfürstendamm 237, DE-10719 Berlin

[feindura@buse.de](mailto:feindura@buse.de)  
[www.buse.de](http://www.buse.de)



**Dr. Thilo Mahnhold**  
Partner, JUSTEM Rechtsanwälte  
Neue Mainzer Straße 26, DE-60311 Frankfurt/Main

[t.mahnhold@justem.de](mailto:t.mahnhold@justem.de)  
[www.justem.de](http://www.justem.de)

**Dr. Jan Tibor Lelley**  
Partner, Buse Heberer Fromm  
Huyssenallee 86-88, DE-45128 Essen

[lelley@buse.de](mailto:lelley@buse.de)  
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Director, KPMG Rechtsanwaltsgesellschaft mbH  
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[www.kpmg-law.com](http://www.kpmg-law.com)

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**Pascal R. Kremp, LL.M.**  
Partner, DLA PIPER UK LLP  
Maximilianstraße 2, DE-80539 München

[Pascal.Kremp@dlapiper.com](mailto:Pascal.Kremp@dlapiper.com)  
[www.dlapiper.com](http://www.dlapiper.com)

**Luther.**



**Axel Braun**  
Partner, Luther Rechtsanwaltsgesellschaft mbH  
Anna-Schneider-Steig 2, DE-50678 Köln

[axel.braun@luther-lawfirm.com](mailto:axel.braun@luther-lawfirm.com)  
[www.luther-lawfirm.com](http://www.luther-lawfirm.com)

Luther.



**Prof. Dr. Robert von Steinau-Steinrück**  
Partner Employment, Luther Rechtsanwaltsgesellschaft mbH  
Friedrichstraße 140, DE-10117 Berlin

[robert.steinrueck@luther-lawfirm.com](mailto:robert.steinrueck@luther-lawfirm.com)  
[www.luther-lawfirm.com](http://www.luther-lawfirm.com)

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**Dr. Nicolas Rößler, LL.M.**  
Partner, Mayer Brown LLP  
Friedrich-Ebert-Anlage 35-37, DE-60327 Frankfurt/Main

[nroessler@mayerbrown.com](mailto:nroessler@mayerbrown.com)  
[www.mayerbrown.com](http://www.mayerbrown.com)



**Dr. Guido Zeppenfeld**  
Managing Partner, Mayer Brown LLP  
Friedrich-Ebert-Anlage 35-37, DE-60327 Frankfurt/Main

[gzeppenfeld@mayerbrown.com](mailto:gzeppenfeld@mayerbrown.com)  
[www.mayerbrown.com](http://www.mayerbrown.com)

TaylorWessing



**Marc André Gimmy**  
Partner, Taylor Wessing  
Benrather Str. 15, DE-40213 Düsseldorf

[m.gimmy@taylorwessing.com](mailto:m.gimmy@taylorwessing.com)  
[www.taylorwessing.com](http://www.taylorwessing.com)

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**Carsten Lüers**  
Board Member & Country Representatives Coordinator  
ACC Europe – Association of Corporate Counsel

[carsten.lueers@de.verizon.com](mailto:carsten.lueers@de.verizon.com)

## Imprint

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Number in the commercial register: 53454  
Local court: Frankfurt am Main  
Telephone: +49 69 7591 2217  
Fax: +49 69 7591 80 2217

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Managing director and publisher:  
Prof. Thomas Wegerich  
Stalburgstr. 8, 60318 Frankfurt am Main,  
Germany  
Telephone: +49 69 9564 9559  
Fax: +49 69 7591 80 2217  
E-mail: [editorial@laborlaw-magazine.com](mailto:editorial@laborlaw-magazine.com)  
[www.laborlaw-magazine.com](http://www.laborlaw-magazine.com)

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