Employment Law Information in a Nutshell (No. 1 / 2004)

Amendments with respect to Labor Law as of January 1, 2004

Agenda 2010: Amendments with respect to Labor Law as of January 1, 2004

After many seesaw changes, the negotiations of the Lower House of German Parliament (*Bundestag*) and the Upper House of German Parliament (*Bundesrat*) came to a conclusion: The Act of Law with regard to job-market reforms entered into force as from January 1, 2004. Beside a set of new regulations in other fields, this Act of Law results in amendments with regard to the Termination of Employment Act, Part-Time and Time-Limited Employment Act and Act of Working Time. In the following, I would like to inform you thereon:

1. Termination of Employment Act

a) Threshold value

Protection against Dismissal according to §§ 1-14 Termination of Employment Act does not apply to new recruits employed from January 1, 2004 or later unless **more than 10 employees** are employed with the respective employer's company. Up to now the threshold lied at 5 employees. However, this regulation still applies to employees being employed with a company with more than 5 employees on December 31, 2003. Thus, Protection against Dismissal according to the Termination of Employment Act is still granted to the these employees. However, this continues to apply only as long as more than 5 employees are employed who have already been employed since December 31, 2003. Should the number of employees decrease to 5 or even less, and should there be less than altogether 10 employees in the company, no employee continues to be subject to the Protection against Dismissal.

b) Social Selection

The criteria for the social selection with regard to operational notices of termination were restricted. Such a notice of termination has been socially unjustified up to now, in case the employer did not consider **social aspects** or at least not sufficiently while selecting the employee. Instead by now only the following criteria are to be assessed: seniority, age, maintenance obligations and severe disability.

Also with regard to the opportunity to exclude individual employees from the social selection, some amendments have arisen: up to now, the **requirement** for **further employment** of such an employee had to be operational, economical or any other justified operational needs. From now on, it is sufficient when **further employment** of the employee is based on the employee's skills, abilities and services or for the maintenance of a balanced personnel structure being the **justified operational interest**.

Furthermore, an old regulation was re-initiated, such referring to changes in operation, as for instance a significant reduction in staff. The regulation was first introduced in 1996 but then again abandoned after the change of government in 1998. The examination of the social selection by the Labor Courts is (again) restricted to gross faultiness pursuant to § 1 Sec. 5 Termination of Employment Act if employer and works council have agreed on a **reconciliation of interests** and have named the employees to be terminated in an **index of names.**

Without paying to much attention, a regulation being effective up to now has been changed in the employees favor: so far the examination of the social selection was altogether restricted to gross faultiness when it was determined in a collective bargaining agreement, in a works agreement according to § 95 Works Council Constitution Act or in a corresponding principal pursuant to the Staff Representation Acts which social aspects are to be considered with regard to the selection of the employee to be given notice to, and how these aspects are to be assessed in proportion to each other. Thus, the restriction also referred to the examination implicating which employees are to be included in the social selection. Henceforth, the restricted examination only applies to the assessment of the social aspects. Thus, the determination of the group of comparable employees could be unrestrictedly examined by the courts.

c) Compensation claim

A statutory compensation claim has been introduced: if an employer dismisses an employee due to operational reasons and points out to the employee that he will receive the statutory compensation if he does not bring an action within the three-week period for filing an action, thus the employee - in case he does not file an action against the dismissal - will receive a compensation amounting to the half monthly salary per year of employment. The employee can choose between an action on protection against dismissal or the compensation claim.

It will be an interesting question for practical business whether the compensation claim will contribute to prevent action proceedings. In spite of the compensation offer given to the employee, he will certainly take into consideration to file an action against the dismissal in order to possibly reach a higher compensation through negotiations at the Labor Court.

There could possibly also arise some difficulties for the employee to draw unemployment benefits upon acceptance of the compensation offer. Pursuant to recent judgments of the Federal Social Court a ban is only placed if the unemployed person actively caused the unemployment. This condition is not yet met if the unemployed person does not fight against a dismissal, which is obviously invalid. There is still uncertainty, however, as the office instructions of the Federal Employment Agency to date provide for the possibility to place a ban in this case. It remains to be seen whether the situation will be clarified by an amendment of the office instructions.

d) Standard period for filing an action

The three-week period for filing an action is no more valid only for the reprimand of the social adverseness of the dismissal but also for other reasons of ineffectiveness.

Therefore, the employee has to file an action against the dismissal within three weeks in case the ineffectiveness of the dismissal is founded for instance on the grounds of a missing hearing of the works council. There is only one exception if the employer did not comply with the statutory requirement of written form pursuant to section 623 German Civil Code. This reason for ineffectiveness of the notice of termination can be stated also later than three weeks after the notice of termination was given verbally. It should be noticed that the three-week period for filing an action is henceforth also valid in case an employee is not subject to the field of application of the Protection against Dismissal Act for reasons like not being employed for 6 months or being employed in a small business.

2. Law of Part-Time and Time Limit Employment Act

Extended limitation opportunities were developed for founders of a new business. A new founded company offers the opportunity to conclude time-limited employment contracts within the first four years after foundation without any justifying objective reason not as previously usual for at most 24 months but for at most 48 months (with regard to recruits pursuant to the requirement of § 14 Sec. 2 Part-Time and Time-Limited Employment Act). However, a company is not considered to be newly-founded when the new foundation arises in connection with the legal restructuring of companies and groups.

3. Act of Working Hours

Within the framework of the labor-market reforms, the legislator responded to the judgment of the European Court of Justice of September 9, 2003. The European Court of Justice decided that the time spent during stand-by duty (employee has to be at a certain place in order to be called on by the employer if necessary) is to be assessed as working time. Henceforth German law considers time spent on the readiness to work and the time spent during stand-by duty are altogether assessed as working time. However, time spent on on-call duty (employee must not be at a certain place) in case the employee was not called on by the employer continues not be regarded as working time. Further scope of design are granted to the parties to collective bargaining agreements. They are allowed to agree on longer working hours under certain circumstances.

If you have any questions to these amendments to law as well as further labor-law issues, please feel free to contact me at any time.

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