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GERMAN BUSINESS LAW *News*

Stefan Winheller

Dear readers,

The current issue of our quarterlynnewsletter *German Business Law News* covers the latest legal developments in important areas of German business law in which my colleagues and I have been successfully representing our national and international corporate clients.

If you have any questions regarding the cited decisions in this newsletter or if you desire more information regarding the covered issues and any area of business law in general, please do not hesitate to contact us. Our team will happily answer your questions and assist you with our expertise.

Enjoy reading!

Sincerely yours,

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Managing Partner

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CONTENT

I. Labor and Employment Law

Dr. Eric Uftring, German Attorney at Law, Certified Employment Law Specialist, Certified Tax Law Specialist

STRIKE FEVER IN GERMANY: ALSO PARENTS FACE CONSEQUENCES

Employees are in principle obligated to work at the agreed times. But what is the legal situation when working parents watch their children at home because staff at the day care center goes on strike?

First important detail: If an employee does not arrive at work or comes too late, his first obligation is to notify his employer in due time. Otherwise, he is at least at risk of receiving a written warning. An entitlement to continued remuneration only exists under very strict conditions. The law requires that the employee is prevented from working at short notice without any fault on his part due to an unforeseen event. Fault exists, however, if the employee can be accused of having been able to find an alternative.

If it comes to a dispute between employer and employee, it must therefore be assessed: Did the unions announce the strike on short notice? What are the actual possibilities of obtaining alternative care? Only if the strike was not announced and alternative care cannot be found, parents can claim a continued remuneration.

PLEASE NOTE: This legal situation is anything but clear. It can be explicitly disputed in the individual case. Therefore, it may be appropriate to find an amicable solution. It can be considered, for example, whether employers possibly support their employees to organize emergency care, perhaps even at the company itself. Apart from that, employers and employees could find a solution by means of granting vacation or by means of a reduction of outstanding overtime hours. In companies with works councils, such problems can also be solved with the help of a company agreement.

II. Corporate Law

Thomas Schwab, German Attorney at Law

GMBH SHAREHOLDERS HAVE FAR-REACHING INFORMATION RIGHTS

Shareholders of a German Limited Liability Company (GmbH) have a legally established right to information and inspection, which may be denied by the managing director only under strict conditions.

According to Section 51a of the Limited Liabilities Company Act, the managing directors of a GmbH have an obligation to the shareholders to provide information and to allow an inspection immediately upon request. The right of access and information may only be denied, if there is a concern that they may be used for non-company purposes. This cannot be regulated differently in the articles of association.

In the case at issue, a shareholders' resolution decided that an inspection of the corporate books could happen only quarterly. Essen District Court declared this to be invalid. Indeed, it is permitted to regulate the process of requests for information and the provision of information. These regulations may, however, not result in the entitlement to information being restricted in regards to content.

PLEASE NOTE: The rights of the shareholder to information are quite far-reaching. Shareholders are, however, obligated to be specific about their request. For example, according to prevailing opinion, a right to information does not need to be granted without reference to specific documents; shareholders must specify what they would like to know. Shareholders and managing directors to whom information is denied or who want to be informed about their information obligation should urgently obtain legal advice.

Essen District Court, decision of July 04, 2014, 45 O 49/13

III. Tax Law

Johannes Fein, German Attorney at Law

BUSINESS APPOINTMENTS BY PLANE? - PROFESSIONAL EXPENSES OF MANAGING DIRECTORS

A managing director of a German Limited Liability Company (GmbH) was the owner of a small private plane and in possession of a corresponding pilot's license. Of the 111 flight hours per year, approx. 30 were attributable to flights for keeping business-related outside appointments. For the latter he claimed professional expense deduction at the revenue office. In doing so, he invoked the time saved, the emergency nature of the appointments, and the saving of accommodation costs.

The Finance Court of the Federal State of Hessen decided that the expenditures claimed for the use of the private plane are not deductible as professional expenses. Pursuant to the overall circumstances, the businessman had chosen the private plane for the joy of flying and thus it were private motives deciding the type of transport.

Indeed, the traveling or absence time has been shortened by the use of his private plane. At the same time, however, in contrast to scheduled flights and train rides, there was no time for telephone calls, review of business documents or electronic communication. Therefore, the court did also not consider the pro-rated expenses in the amount of EUR 25,000 to EUR 30,000 for the acquisition of the international flight license to be deductible. The managing director did not need the pilot's license for the job activities carried out by him.

PLEASE NOTE: Caution should be exercised in allowing such costs to be borne by the company. Here, under certain circumstances, the risk of criminal liability exists due to breach of trust. The possibility of deducting expenses as professional expenses always depends on the respective context. We will gladly advise you as to which of your expenses are deductible and which ones are not.

Finance court Hessen, decision of 14.10.2014, Az. 4 K 781/12

BANKS MUST PAY INVESTMENT TAX FOR INTEREST ON REIMBURSED PROCESSING FEES

According to the current case law of the Federal Court of Justice, processing fees agreed upon by way of loan agreements are invalid. Therefore, the borrowers are entitled to repayment of already paid fees. The claim of the borrowers also extends to the benefits derived.

Generally, the banks concerned are obligated to issue the benefits derived in the form of interest in the amount of 5 percentage points above the respective base interest rate. On the basis of the case law of the Federal Finance Court, this compensation for use to be paid by the credit institutions for reimbursed credit processing fees (interest) is considered to be a capital gain. As a result, an obligation for an investment tax deduction exists in this respect.

PLEASE NOTE: In its notification of May 27, 2015, the Federal Ministry of Finance points out that credit institutions, which have paid interest without withholding investment tax/capital gains tax, must correct the tax deduction. The banks concerned should therefore make sure that they withhold taxes for the interest on reimbursed fees or rectify the tax deduction.

IV. Customs Law

Dirk Pohl, German Attorney at Law, Certified Tax Law Specialist

HONEYMOON AND WEDDING ABROAD: CUSTOMS SHOWS NO MERCY

Nowadays, many people search for new partners without minding any borders. More frequently, cross-border relationships lead to multi-national marriages. As a result, more couples take the opportunity to celebrate their wedding abroad.
On this occasion, wedding gifts are typically given to the newly-weds, in order to help them getting a good start in their shared future. Upon returning to the European Economic Area, however, distressing surprises can occur. Wedding presents, dowries, and trousseau are in principle exempted from import sales tax and customs duties by the Customs Exemption Regulation. However, looking at the details, several issues can occur.

Wedding presents are only tax-free as they do not exceed a value of EUR 1,000 per gift. While the regulation is quite simple, in reality it confronts the parties concerned with complicated problems. It is unusual to give the bridal couple the invoice for the gift at the same time as the present. As a result, the recipients do not know exactly what the value of the respective gift is.

In addition, in a number of countries the local habit includes providing the bride with gold jewelry as a wedding gift. The value of the jewelry can be subject to considerable fluctuations, depending on the weight and purity of the precious metal.

If gifts are imported without declaration, customs authorities respond by initiating criminal investigation proceedings due to tax evasion. The "good start" of the couples shared future then develops rapidly into a conviction due to tax evasion.

PLEASE NOTE: As in all situations with custom authorities, a customs declaration should be submitted in advance. In this way, the parties concerned know what documents are required for entry in order to avoid an unpleasant encounter with custom officials. Travelers who are not familiar with the Customs Exemption Regulation should always obtain legal advice.

V. Banking & Capital Markets Law

Lutz Auffenberg, German Attorney at Law

COURT DECLARES BANK FEE FOR OVERDRAFT IMPERMISSIBLE

In a much-noticed judgment at the end of last year, Frankfurt am Main Higher Regional Court held that a provision in the general terms and conditions of a major German bank was impermissible. The terms stipulated that bank fees may be levied for exceeding the overdraft credit line by private customers.

The plaintiff was the Federation of German Consumer organisations. The defendant bank already brought forward an appeal, so that the Federal Supreme Court will have to decide whether and under what conditions banks may demand fees from their customers in case of overdrafts.
The subject of the decision was a clause, according to which the bank may demand the agreed upon overdraft interest, in the case of an overdraft of an account. The clause set a minimum fee of EUR 6.90. In the case of a minor or short-term overdraft, according to the judge, this minimum fee represents an unjustifiable remuneration for the bank as measured in relation to the return at the market interest level. Since the Federal Court of Justice had already classified the levying of credit-processing fees as impermissible in the recent past, the outcome of this proceeding is eagerly anticipated.

PLEASE NOTE: The recent decisions of German courts show that the General Terms and Conditions used by banks frequently violate applicable law. Therefore, we recommend banks in creating and revising their terms to apply extreme care since minor offenses can lead to serious liability consequences.

BITCOINS: DOUBTS ABOUT THE ADMINISTRATIVE PRACTICE OF THE BAFIN

In 2011, the Federal Financial Supervisory Authority (BaFin) publicly stated that it classified Bitcoins and comparable virtual currencies as financial instruments under the Banking Supervisory Law.

In recent years, this opinion has led to an avoidance of the German market by many companies from this young as well as dynamic industry, because they are required to hold a banking license for a range of products. Since the regulatory authorities in other European states have abstained from the regulation of virtual currencies to a large extent until now, many entrepreneurs preferred to establish their companies abroad.

Nevertheless, the classification of Bitcoins as financial instruments has not been reviewed by German courts yet. Since the legal opinion of the BaFin is based on the fact that Bitcoins are units of account comparable to foreign currencies, there are good arguments disputing the sustainability of the administrative practice. Thus, a central issuing authority always stands behind foreign currencies with central banks, which in the case of Bitcoins does not even exist. Also, the common examples of units of account have fundamental differences with respect to virtual currency units.

PLEASE NOTE: A reasonable alternative to an application for a BaFin license can be a judicial clarification of the question as to whether the classification of Bitcoins as financial instruments by the BaFin is consistent with German law.