In this issue

New member of the Advisory Board

Dear Readers,

Our network is growing. We are pleased to welcome a new member of the Advisory Board: Thomas Pein, Head of Employment Policies (Labor Relations Germany) at Merck Group, has joined the club.

In any company, trade secrets are the crown jewels. That makes the recently enacted German Trade Secret Act highly important. Pascal R. Kremp and Till Basfeld have taken a practitioner’s view to the new legislation’s implications for labor law. This is a must read.

The economic engine is beginning to stutter and long-forgotten words are coming to mind again: short-time work, for example. Markus Künzel and Dr. Erik Schmid describe an important legal instrument that can save jobs in the event of an economic downturn. You shouldn’t miss this article either.

Sincerely yours,

Thomas Wegerich
Trade secrets and 'reasonable protective measures'

Labor law implications of the new German Trade Secret Act (GeschGehG)

By Pascal R. Kremp, LL.M. (Wake Forest), and Till Basfeld

On April 26, 2019, the German Trade Secret Act (Geschäftsgeheimnisgesetz or GeschGehG) entered into force, introducing a number of important novelties to the German legal system. Two of the most important introductions were the need for “reasonable protective measures” and the legalization of reverse engineering, which was previously severely restricted. With this new law, Germany has finally implemented Directive (EU) 2016/943 – ten months late, as the Directive’s deadline expired on June 9, 2018. The legal regulations previously governing trade secrets, namely sections 17 to 19 of the Act Against Unfair Competition (UWG), have now been completely abolished.

The aim of the EU Directive was to provide uniform minimum standards of know-how and trade secret protection throughout Europe and improve enforcement possibilities.

Until now, the EU member states have provided very different levels of protection for trade secrets and know-how. German law contained only fragmented and incomplete regulations, and there were only a few rulings from the German Federal Supreme Court addressing the subject.

Reasonable protective measures

The most important new aspect of the Trade Secret Act is the owner’s obligation to take reasonable protective measures to protect trade secrets. Thus far, merely the intent to keep information secret was sufficient, and the presence of such intent was often presumed in favor of the owner.

The extent of the protective measures an owner needs to take in order for information to qualify as a trade secret has not yet been elaborated in detail. The answer depends on which measures are usually expected in each particular situation. Relevant criteria are company size, development costs and both the importance and nature of the trade secret. Protective measures can be of a concrete nature (for example, IT security, access restrictions, etc.) or a legal nature (for example, confidentiality agreements), as set out later in this article under the heading “Consequences for companies.”

If no protective measures are taken or the measures taken are insufficient, information will not be considered confidential information and thus will not be protected as a trade secret. Furthermore, even →
if information qualifies as a trade secret, the level of legal protection depends on the extent of the protective measures taken. Courts will take this into account when deciding on remedies to the owner of a trade secret in case of an infringement.

Legalization of reverse engineering

Another novelty in German law is the lifting of the prohibition on reverse engineering. Germany had a very restrictive approach regarding reverse engineering compared with international standards. The new Trade Secret Act explicitly permits reverse engineering.

Trade secrets vs. whistleblowing

The debates regarding EU Directive 2016/943 in the European Parliament as well as in the German Bundestag mainly focused on the potential for the effects of the new regulations to be too restrictive regarding whistleblowing and journalism.

Consequently, a provision was included that explicitly stipulates exceptions to the prohibition on obtaining, using and disclosing trade secrets without authorization. According to these exceptions, it is not prohibited to obtain, use or disclose trade secrets if these actions are necessary to protect legitimate interests. In particular, this protects the right to free expression and freedom of information, the right to expose illegal activity or wrongdoing if such exposure is suitable to protect public interest, and the right of employees to enable employee representation bodies to fulfill their duties. It remains to be seen what role these exceptions will play in practice as a defense for persons breaching secrecy.

Remedies

The new Trade Secret Act provides for a number of civil procedural instruments as remedies to the secret owner in case of a trade secret violation.

The secret owner has certain information rights against the infringer regarding products that infringe a trade secret. The owner can demand cessation and prohibition of the use of the trade secret, destruction or handing over of documents and data, and recall and withdrawal of infringing products from the market. Damage claims are also possible.

Consequences for companies

As mentioned in the beginning, the most important novelty here is the need for secret owners to take reasonable protective measures to safeguard their trade secrets. Therefore, companies are advised to review whether sufficient protective measures have been taken to secure their trade secrets. At the present time, it is not yet clear which protective measures are required in each individual situation. Generally speaking, however, the following protective measures should be considered:

- Rigorous labeling of documents as confidential if their sensitive nature is not obvious
- Implementation of IT-related protective measures, such as password protection for folders and documents, setting up of firewalls and authentication procedures
• Review and conclusion of non-disclosure and confidentiality agreements with employees, customers and business partners – ideally these should particularly emphasize the scope of information to which the individual employee, customer or business partner has access

• Limitation of the number of people with access to trade secrets to the necessary minimum – that is to say, only people with a compelling need to know should have access to trade secrets

• Establishment/review of a comprehensive know-how compliance system aligned with general compliance and IP strategy

Due to the many unanswered questions associated with the Trade Secret Act, companies should monitor developments regarding legislation and court decisions on this subject in the coming years. This will require companies to regularly review their know-how compliance systems.

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Saving jobs with short-time work

A very important instrument for preventing layoffs in times of economic downturn

By Markus Künzel and Dr. Erik Schmid

Concept and purpose of short-time work

Short-time work is an instrument of employment policy to prevent employers from being forced to dismiss their well-trained, experienced and qualified workforce when the capacity of their existing employees is currently being underutilized.

Following the introduction of short-time work, the working time and wages of employees in an enterprise are reduced. This loss of earnings is partially compensated for by the German Federal Employment Agency (Bundesagentur für Arbeit) by means of allocation of a short-time working allowance. By choosing this option, employers reduce their personnel costs and are able to avoid the frequently high cost of severance pay and subsequent re-employment.

Short-time work gained in importance enormously during the economic crisis that unfolded in the wake of the financial crisis that started in the second half of 2008. At that time, however, the conditions under the existing legal framework were clearly improved in favor of employers for a temporary period. As a result, when short-time work was introduced, the framework facilitated a higher level of flexibility and greater cost relief for employers. At its peak, approximately 1.5 million employees were on short-time work contracts, while at present approximately 50,000 employees work short-time.
Legal requirements for the introduction of short-time work

The introduction of short-time work always requires an agreement – either with the employees directly or, if the business has one, with the works council. The employer cannot unilaterally order a reduction of working time that includes an associated reduction in wages.

Matters requiring regulation in a typical works agreement that concerns the reduction of working time at a business normally include: start and duration of short-time work, location and distribution of working time, divisions and employees affected, scope of short-time work and potential reasons for a premature termination of short-time work.

In enterprises without a works council, short-time work can only be introduced by entering into an individual agreement with each employee. However, standard employment agreements can already specifically include the entitlement to introduce short-time work, which facilitates its introduction.

Apart from the inclusion of short-term work clauses in standard employment agreements, there are numerous collective bargaining provisions regarding the introduction and arrangement of short-time work. They are only valid for businesses in which such collective bargaining agreements are applicable (for example, due to the business’s membership in an employer organization or as a result of applicable references in the relevant employment agreements). The subject matter in such collective bargaining agreements is, as a rule, an additional and collectively agreed upon allowance that goes toward short-time working compensation and results in increased cost relief to the employer.

Qualifying conditions for short-time working allowance (section 95 and after of the German Social Code Book III)

For employees to qualify for a short-time working allowance, there must be a loss of work resulting from economic causes or an inevitable event. This is the case, for example, when the number of orders placed at a business declines or customers are lost.

However, it is always required that the loss of working time is only temporary. This requirement is met if it is anticipated with a certain level of probability that employees will be able to transition back to full-time work in the foreseeable future.

Furthermore, it is not permissible for the loss of working time to have been avoidable – that is to say, the employer must have taken every reasonable precaution to prevent the loss of working time.

The loss of working time must also have reached a minimum level. This means that in a calendar month in which short-time work should take place, at least one-third of the employees working at the business must be affected by a loss of wages amounting to more than 10% of their monthly gross earnings.

The entitlement to short-time working allowance further requires that the employee affected continues his or her employment relationship and thus the employment continues to be subject to compulsory insurance. These requirements are not met if the employment relationship comes to an end by notice of termination or a termination agreement.

The application for the payment of short-time working allowance has to be filed with the competent employment agency in writing or in electronic form. The business then pays the short-time working allowance to its employees.

The amount of a short-time working allowance is based on the unemployment benefit amount; in the event of a complete loss of working time, employees receive 60% of their net wage lost as their short-time working allowance. If a child is living in the household, the employee receives 67% of his or her net wage lost.

The maximum eligibility period for short-time working allowance is 12 months.

No linear reduction of costs upon introduction of short-time work

If an agreement concerning short-time work is concluded with a business’s works council or an employee directly, the employee will only receive payment directly from the employer for work that is in fact performed. If, for example, 50% short-time work is agreed upon, the employee will only receive half of his or her contractual earnings and will only work half of his or her normal weekly hours. For the work performed, employer and employee will each still bear half the social insurance contributions. However, when a short-time working allowance is paid, the employer alone also must continue to pay contributions to health, care and pension insurance.
calculation base for these contributions is 80% of the difference between the employee's former full-time earnings (planned gross remuneration) and the lower earnings payable following the reduction in working time (actual gross remuneration).

On the basis of various collective bargaining agreements, a collectively agreed upon surcharge on the short-time working allowance also has to be paid. One example of such a collective bargaining agreement is the Collective Agreement Concerning Short-time Work and Employment concluded between the Federation of the Metal and Electrical Industry of Baden-Wuerttemberg (Verband der Metall- und Elektroindustrie Baden-Württemberg e.V.) and the Metal and Engineering Workers’ Trade Union (Gewerkschaft IG Metall) in 2012. In this agreement, it is regulated that in cases of a reduction in the employees’ monthly gross remuneration due to short-time work, in addition to the reduced monthly earnings and the short-time working allowance, the employer must also grant the employees a surcharge. This surcharge is calculated on the basis of the difference between, on the one hand, the sum of the actual monthly net remuneration during the period of short-time work plus the short-time working allowance, and, on the other hand, a certain percentage of the full net remuneration. This percentage varies depending on the percentage of earnings lost. In case of a loss of earnings totaling up to 10%, for example, the percentage for this calculation amounts to 97%. In case of a loss of earnings of more than 80% as a result of short-time work, it amounts to 86.5%.

Even if no collective bargaining agreement of this kind applies at the business concerned, in the event of an introduction of short-time work, the employment costs are never reduced to the same extent as the working time due to social insurance contributions.

In cases of reduced working time, a linear reduction in personnel costs is possible on the basis of various collective bargaining agreements, for instance in the metal industry. The Collective Agreement Concerning the Safeguarding of Employment in the Metal and Electrical Industry of North Rhine – Westphalia of May 24, 2012, for example, provides for a reduction of working time in cases of temporary employment problems for the sake of preventing dismissals for operational reasons, in accordance with the respective works agreement. Consequently, weekly working hours can be reduced uniformly for all employees or for parts of the business, though only to a level ranging between 30 and 35 hours. The working time can thus only be reduced by one-seventh, which in many cases is insufficient for handling the company’s economic situation.

Actual legislative proposals

The economic downturn in 2019 also did not escape the notice of politicians. Federal Minister for Employment, Hubertus Heil, intends to respond to this increasingly difficult economic situation by providing new rules concerning short-time work and promoting further training by the Federal Employment Agency (Bundesagentur für Arbeit). He wants to submit a draft of an “Act on Tomorrow’s Labor” in September. The subject matter of this act should consist, among other things, of crisis-related provisions that allow the short-time working allowance to be paid more quickly and in a less complicated manner. This is obviously intended to help industry revert to tried and tested instruments of the 2009 economic crisis.

Conclusion

As in the former time of economic crisis, the new rules will also provide for a short-time working allowance eligibility period exceeding 12 months. In addition, access to short-time working allowance will be facilitated for employees in transfer companies. The Federal Minister is also considering further developing the Qualification Opportunities Act, which has only been in force since the beginning of 2019. The act grants more employees access to state-subsidized further training opportunities than has hitherto been the case.
reduction impossible. In cases where employers have a collectively agreed upon obligation to make additional payments on top of the short-time working allowance, this is even more true. Since a company’s total personnel costs are generally not reduced in proportion to the loss of working hours, the costs per hour worked rise the loss of working hours escalates. In addition, unit labor costs at manufacturing companies are increasing.

The employment minister’s initiative is to be welcomed. It remains to be seen how the regulations will be drafted in detail.

However, we must not forget that if structural adjustment measures become necessary at a business to safeguard its existence or improve its economic situation in a sustainable way, short-time work is not a reasonable and appropriate solution. In such a situation, making use of a short-time working allowance would likely only delay necessary steps and thus contribute to a worsening of the economic situation. In such cases, fundamental restructuring measures combined with a reduction in employment could hardly be avoided.
Hidden no longer

Leave pay for commission-based employees, an often-overlooked pitfall for employers

By Pauline Moritz

Employers love commissions, as employers naturally benefit from commission-based remuneration systems. Employees themselves bear the responsibility for part of their salary, only receiving bonus payments when they generate turnover for the benefit of the company.

But employers often overlook one vital fact: All the components of a salary must be taken into account for the calculation of leave pay. Calculating leave pay to include vacation, sickness, bank holidays and other paid absences can be a difficult undertaking for employers in cases where commission-based salary components fluctuate. Where a proper calculation system has not been established, accurate payment of these statutory components of remuneration is particularly challenging, and employers often get it wrong out of ignorance. While it seems the problem of miscalculated leave pay had lurked under cover of darkness for a long time, it can now be found on the agendas of many company auditors. High back payment obligations and, where intent can be proven, even criminal prosecution can be the unpleasant results.

Calculation of vacation pay

According to the German Federal Leave Act (BUrlG), every employee is entitled to vacation pay during his or her vacation. The rate of vacation pay is calculated on the basis of the employee’s average earnings during the 13 weeks prior to the first day of leave. In principle, all the components of remuneration received by the employee in return for his or her work during this 13-week period are to be included in the average earnings. The standard case of an employee with a constant monthly salary does not require much effort of calculation; the employee will simply receive his or her monthly salary as vacation pay.

Often overlooked: Average commissions must be taken into account

Far more complex are those cases where the employee’s salary fluctuates, typically in cases where a sales employee receives commissions for business transactions he or she has mediated. According to the settled case law of both the German Federal Labor Court (Bundesarbeitsgericht) and the European Court of Justice (ECJ), commissions have to be taken into account and included in the calculation of vacation pay. The average of all commissions earned by an employee in the 13 weeks prior the start of his or her vacation period are to be paid while the employee is on vacation.
Employees must not be deterred from taking their annual leave

The ECJ (Case No. C 539/12, Lock v. British Gas) takes the view that a commission-based employee may end up being deterred from exercising his or her right to take annual leave. This is a result of the financial disadvantage he or she genuinely suffers due to the loss of a chance to generate new commissions during the leave period. Such a reduction in an employee's remuneration with respect to his or her paid annual leave is contrary to the objective pursued by the provisions on paid annual leave, enshrined in article 7 of EU Directive 2003/88. Accordingly, the ECJ has confirmed long-standing German case law according to which, in cases where the employee's salary consists of both a basic salary and a commission-based component, the average commission-based earnings are to be paid during the vacation period. Long before the ECJ made its decision, the German legislature had already dealt with the issue and laid down the aforementioned 13-week reference period in the Federal Leave Act (section 11 of the German Federal Leave Act).

Little room for flexible solutions

Contractual agreements with an employee according to which commission-based pay is not to be included in vacation pay are inadmissible and unenforceable.

In addition, the 13-week reference period generally still applies even if the employee's commissions fluctuate considerably over the course of the year and/or are significantly above or below the usual average 13 weeks before the start of the vacation period. Consequently, there can be significant differences in the amount of vacation pay, sometimes in favor of the employer, sometimes in favor of the employee. While such arbitrary results are generally accepted by the labor courts, the German Federal Labor Court acknowledges that the 13-week period may be replaced by a broader reference period, such as 12 months, depending on the individual circumstances of the commission payment system in place. In this case, the average commission amount over the last 12 months would be used for the purposes of calculating an employee's vacation pay. However, such an approach, which clearly deviates from the written law, must always be reasonable and must not be applied arbitrarily. At the same time, an alternative approach will be subject to a court's review in cases of dispute, which leaves little room for individualized and flexible calculation methods.

Sick pay and bank holiday pay

Similar calculation requirements apply for other types of paid leave as well. The German Continued Pay Act (EFZG) regulates sick pay and bank holiday pay. Average commission payments must also be considered for these types of paid leave. Other paid absences, such as garden leave, follow the same principle.

How to avoid negative consequences

The principles for the correct calculation of leave pay call for a detailed calculation in each individual case of leave. This can be burdensome for HR departments if employees are granted fluctuating commission-based pay. While a certain amount of bureaucratic effort is inevitable, a well-thought-out system and proper HR training will, in the end, keep the effort expenditure within reasonable limits, while negative consequences – be they in the form of additional payment demands, company audits or even criminal prosecution – can be avoided.

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Sound compensation

Three good reasons why non-institutions should consider regulatory remuneration requirements when drafting their remuneration policies

By Dr. Alexander Insam; Dr. Theofanis Tacou, LL.M.; and Dr. Moritz Kaus

Introduction

The current version of the Remuneration Ordinance for Institutions (Institutsvergütungsverordnung or IVV 3.0) contains minimum supervisory requirements for the remuneration systems of German financial institutions. The ordinance regulates the way employees are remunerated according to position and performance and restricts the free movement of banks in favor of bank stability and the stability of the financial market. This includes the restriction of harmful incentives to take disproportionately high risks. Banks are thus forced to design remuneration systems that comply with the rules laid down in IVV 3.0. In practice, affected banks are confronted with substantial challenges. They must invest a considerable amount of time in the development and optimization of their remuneration processes. Although a remuneration system’s complexity depends on the size, nature and complexity of a bank’s activities, all institutions that fall within section 1 paragraph 1b and section 53 paragraph 1 of the German Banking Act (Kreditwesengesetz or KWG) are affected, as well as all members of their management bodies and staff. As a result, the scope of application is extensive. The ordinance makes a distinction between major institutions and non-major institutions. In essence, for a company to be classified as a major institution, the balance sheet total for the last three completed financial years needs to reach or exceed an average of €15 billion, unless the institution provides a risk analysis and proves it is not a major institution (section 25n paragraph 1 of the KWG). There are also other specific cases in which an institution must be classified as a major institution. Though the IVV 3.0 contains special requirements for major institutions, even non-major institutions face the problem that their remuneration systems must comply with the general requirements of IVV 3.0.

However, from the point of view of institutions, these extensive and labor-intensive requirements also have their positive facets. A comprehensively regulated remuneration system increases internal acceptance among employees and provides a clear mission statement, leading to greater transparency and traceability on the subject of remuneration. The benefits of this system reach beyond employees. Managers of these institutions are also provided with comprehensive guidelines regarding the remuneration of employees, which enables them to react to special situations in a clearly defined manner. Ultimately, this leads to greater comparability. From a performance management perspective, target agreements can have an especially positive impact for
employers, given that employees need to reach their ambitious targets to obtain bonus compensation. The regulating authority intends to prevent agreements involving payments that are not sustainable for companies, thereby helping employers set sustainable goals and secure strong employee performance over a longer period.

**Remuneration policy options for non-institutions**

These positive facets of the IVV 3.0 regulations may also prove fruitful for non-institutional sectors – that is to say, for corporations. Especially considering the government’s draft of the act implementing the Second Shareholder Rights Directive (Gesetz zur Umsetzung der zweiten Aktionärserrichtlinie, ARUG II), which stipulates that a “clear and comprehensible” system of remuneration for members of the board of managing directors must be adopted in listed companies (section 87a of the AktG-E), it is clear that the importance of this issue outside the banking sector is bound to increase. The legislature is increasingly focusing its attention on other sectors. Thus, remuneration policy is an issue that corporations should already be addressing. Recognizing the benefits of individual elements of a remuneration system should give companies a competitive advantage.

**Specific regulations regarding remuneration**

Three aspects of the IVV 3.0 – namely, the regulations regarding target agreements, severance payments and remuneration strategy – are particularly highly relevant for corporations and therefore have bearing beyond the financial sector.

**Core objectives are the control unit’s objectives, such as core capital ratio**

**Target agreements**

Most companies claim a “pay for performance” philosophy. Target agreements are therefore often (but not exclusively) made with top executives to set incentives for higher performance. Executive compensation plans define how top executives are paid. The importance of group targets and individual performance relative to an employee’s variable compensation depends on his or her management level. This means the remuneration of managers and executives depends more on a bank’s overall outcomes. The IVV 3.0 regulates the procedure for variable remuneration. In general, the remuneration parameters shall be defined in such a way that target achievement levels can be clearly delineated. Section 19 of the IVV 3.0 makes special demands on significant institutions. According to section 19 paragraphs 1 and 3, variable remuneration of risk-takers must be connected to all risks and the success of the bank as a whole, as well as the organizational unit and the individual employee (BaFin interpretation aid, p. 52). The process of setting target parameters should function as a cascade, starting at the organizational level and descending to each specific risk-taker and non-tariff employee. The fixed part should carry more weight in remuneration agreements with control functions, and the variable part should not be highly dependent on business goals. Market-oriented business goals (such as income and return on equity) are thus generally inadmissible. Core objectives are the control unit’s objectives, such as core capital ratio. Conduct that runs contrary to ethics or duties may not be balanced out with positive performance contributions, but instead must reduce the variable remuneration amount (section 19 paragraph 2 of the IVV 3.0). These clear guidelines are intended to prevent risk assumption by workers and ensure bank stability.

For noninstitutions such as corporations, similar systems would carry the advantage of providing incentives for better performance while simultaneously discouraging employees from taking extraordinary risks for the company. Clarification concerning the admissibility of individual target parameters regarding variable remuneration for support and control units prevent target agreements from being handled without proper supervision. Moreover, under such a system, each employee is aware of the specific level of performance he or she is responsible to reach. At the same time, public confidence in companies using such systems would increase, as risky behavior would not be rewarded with financial gain.

**Severance payments**

Pursuant to section 5 paragraph 6 sentence 1 of the IVV 3.0, severance payments are also to be regarded as variable remuneration. However, sentence 5 contains simplifications for...
the privileged forms listed there with regard to the applicability of sections 7 and 20 of the IVV 3.0 (reservation of the performance capacity of the institution; ex-post risk adjustment) and section 25a paragraph 5 of the KWG (bonus upper limit). Section 2 paragraph 5 of the IVV 3.0 defines severance payments as remuneration received by an employee in connection with premature termination of employment, agency or a service relationship. Since the IVV 3.0 regulations provide guidelines for a written framework, institutions must regulate maximum payment amounts and criteria for determining such payments in their internal guidelines. Severance payments may not constitute an unreasonably high reward, but instead must generally be regarded as compensation for an employee in the event of premature termination of an employment relationship. In addition, severance payments must take into account the previous performance of the person concerned. In particular, negative profit contributions and misconduct must also be taken into account (BaFin interpretation aid, p. 17). BaFin’s interpretation aids, which specify specific groups of cases in which severance payments should not be made, provide further orientation for process optimization.

Since employment termination occurs in every company, this aspect of the ordinance could also be fruitful for non-institutions. The implementation of a system that clarifies internal specifications for severance payments would have a positive impact. HR managers would have the advantage of being able to conduct exit interviews more quickly and efficiently, since transparency would already clarify the severance payments that can be expected. This would also minimize the risk of long-term litigation. In addition, the risk of developing a negative public reputation could be reduced, especially where severance payments for executives is concerned. Many corporate cases have fueled heated public discussions as to whether low performers received too much money. If corporations gain more public trust regarding their severance payments for executives, this could increase their share prices and thus lead to a win-win situation for employers and shareholders.

**Written remuneration policy**

The implementation and monitoring of remuneration strategies can also be advantageous for non-institutions, as these steps ensure the issue is dealt with on a regular basis. Clear documentation of a mission statement helps to ensure acceptance of a company’s chosen remuneration system. A regular annual review including an adjustment of remuneration systems, as provided for in section 12 of the IVV 3.0, also helps organizations stay up-to-date and to react promptly to changes. The time spent writing a remuneration policy is well-invested, as it helps prevent misunderstandings within a company while simultaneously strengthening public trust and employer branding.

**Summary**

The IVV 3.0 and its regulations confront banks with major challenges. The enormous organizational effort of compliance ties up resources and makes daily business more difficult. Nevertheless, the binding requirements also have positive facets. The development of clear guidelines leads to greater acceptance of the remuneration system applied within a company. This acceptance within a company’s workforce is growing in importance, especially as Generations Y and Z make their way into the labor market. These generations are confidently demanding more transparency and participation. In this light, company-wide sustainable remuneration strategies help companies become more attractive employers.

In addition, executives and managers may also benefit from a clear remuneration strategy and policy. First, such a strategy enables them to more easily assess if their performance is in line with their bonus payments. Secondly, such a policy can help regain public trust and justify bonuses as sustainable and well-deserved.

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There is a need for a common European approach

International social security compliance challenges of intra-EU mobility of the third-country nationals under the EU ICT scheme

By Siobhan Owers, Zuzana Jasenovcova and Iskra Nicolic Uskokovic

Introduction

In the ever evolving mobility industry, where businesses work globally, there is an increasing need to manage talent across borders. The right of free movement and freedom to provide services, are some of the fundamental freedoms upon which the European Common Market is based. The EU has sought to safeguard and facilitate these freedoms with its focus on the seamless intra-EU mobility of temporarily posted workers, whether they are EU citizens or non-EU citizens.

The right of free movement and free provision of services was initially restricted to European citizens, with third-country nationals (TCNs) normally excluded. The European Court of Justice recognized that this approach would seriously hinder the freedom of provision of services in the EU highlighted in the decision of the Vander Elst case (C-43/93), allowing third-country nationals to be posted freely across the EU to provide services without the need for an

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The right of free movement and freedom to provide services, are some of the fundamental freedoms upon which the European Common Market is based.
additional work permit in the country of posting. The Court specified that the host EU member state should not impose administrative formalities or conditions on TCN posted workers, providing services in another EU state, if they were legally employed by a service provider established in the EU.

**EU intra-corporate transfers immigration scheme for third-country nationals**

The EU seeks to ease the current administrative burden related to temporary assignment of highly skilled workers in order to facilitate EU mobility even further. These efforts are also aimed at mobility of TCNs within the EU and the goal is also to establish a common set of rights for such transferees when working in the EU, to avoid exploitation and distortion of competition. To achieve this, in 2014 the European Council adopted Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (EU ICT Directive).

The EU ICT Directive sets out regulations regarding the transfer of non-EU employees, employed with a sending entity outside the EU, to a host entity within the same group of companies inside the EU under the 'EU ICT Card’ work permit. This provides greater immigration flexibility for non-EU employers with non-EU assignees who may need to work at several affiliated entities throughout Europe.

The intra-EU mobility scheme of TCNs under the EU ICT Directive is unique and responds to the needs of multi-national companies operating across borders. Nevertheless, practice has revealed some complications. One of which is the social security coverage in case of intra-EU mobility of the intra-corporate transferees, who are TCNs.

**Social security compliance in case of intra-EU mobility of EU ICT**

While EU ICT permits have been created to meet the demand of many international companies allowing their non-EU nationals to work in different EU countries, the consideration of social security compliance appears to have fallen by the wayside. This may have a serious impact and even result in an unexpected and costly social security non-compliance, even if all immigration formalities of EU ICT permit are in order.

Contrary to the immigration arena, where the EU ICT Directive was transposed to the local jurisdictions of the EU member states, there is a diverse landscape of bilateral social security agreements between the individual EU member states and third countries, which potentially may become applicable to third-country nationals, who are EU ICT transferees utilizing intra-EU mobility.

As a basic rule, the social security liability and coverage of a TCN may remain in the third (home) country (where the employment contract with the employer is maintained) in case a bilateral social security agreement exists. In such cases the TCN can demonstrate coverage in the home country by means of a social security compliance document, *Certificate of Coverage* (COC), issued by the third (home) country. If there is no bilateral agreement, or the individual is not eligible for a COC in the home country, social security liability will, in most cases, arise in the EU country that issues the EU ICT permit.

- **EU ICT permit intra-EU mobility into countries with a bilateral social security agreement**

  In case of intra-EU mobility in EU countries that do have a bilateral social security agreement with the third country, additional social security COCs may have to be issued by the country of origin because the host EU mobility countries will also ask for proof of social security coverage. This is problematic however, as some third countries refuse to issue several COCs for more countries for the same period.

- **EU ICT permit intra-EU mobility into countries without bilateral social security agreement**

  In EU countries that do not have a bilateral social security agreement with the third country, the posted ICTs, may become liable to the local social security in the target EU mobility countries, because they do not recognize the COC issued by the third country that issued the main EU ICT permit.
Practical example

The EU ICT Directive does not consider, whether the exemption from social security liabilities based on the bilateral social security agreement with a non-EU national’s home country and their first EU member state will apply to the other EU member states. For example, a situation of a US national with an EU ICT permit issued by Spain and a COC issued under the US/Spain Bilateral Social Security agreement, could trigger social security liabilities if then required to work in Germany.

The German authorities are not bound in any way by the COC obtained based on a bilateral treaty between Spain and the US, and could theoretically require that the transferee registers with the German social security system and starts paying contributions. This leaves an open question as to whether the transferees should obtain an additional COC, under the bilateral US/Germany social security agreement because of the intra-EU mobility to Germany.

The lack of legal certainty caused by the different approaches in the individual EU member states, carry risks of double social security liability, if one of the EU countries does not have a bilateral social security agreement with the third country of the intra-corporate transferee.

Conclusion

As global cross-border activities are an inevitable way of conducting business now and in the future, and as the sharing of information between different governments increases, comprehensive compliance in respect of intra-EU mobile workers is key for businesses. Immigration compliance can no longer be considered in isolation. Based on the example of EU ICT scheme, it is clear there is a distinctive inter-connection between immigration, social security and also labor law aspects of intra-EU mobility compliance requirements for the EU ICT transferees.

The unclear social security compliance consequences of the EU ICT scheme have not been resolved yet and are still under discussion today, at both EU member state and European level. Companies are advised to review their internal processes, and be cognizant not to view immigration and social security compliance in isolation of one another to ensure pre-arrival compliance for their EU ICT transferees.

In order to bring legal certainty for employers posting their third-country workers under the EU ICT, there is a need for a common European approach, to make sure that EU ICT scheme is as easy to use in practice as the intention of the law-makers undoubtedly was. A pan-European agreement on the social security approach to the third-country EU ICT transferees would also assure social security rights for these migrating workers and would facilitate the EU core values free movement of workers and free provision of services across the EU.
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The A1 certificate and requirements for last-minute and short-term business travel

A discussion regarding the Federal Ministry for Employment and Social Welfare’s statement from June 2019

By Dr. Julia Schweitzer and Janine Weber

It was just at the beginning of 2019 that the topic “applying for A1 certificates” made waves in the media – even though employers had been legally obliged to report cross-border work activities in the European inner market to the competent institutions since the regulation came into effect in 2010 (EC 883/2004). Until now, this duty had been simply ignored by many employers due to scant controls and the often prohibitively large administrative effort on the part of businesses. The media response was thus even greater when the electronic application and acceleration procedure became mandatory in Germany on January 1, 2019. A paper application was only possible in justified individual cases until June 30, 2019. These innovations have been accompanied by increased controls and the levying of fines.

A short time later, a press release by the European Commission on March 20, 2019, caused an uproar. In that press release, it was announced that the European Parliament, the Council and the European Commission had at least temporarily agreed that the A1 certificate of coverage requirement for business travel to another EU country would be abolished in the future. Reality set in a few days later, however, after the European Council was unable to come to an agreement on the abolishment of the A1 certificate in its meeting on March 29, 2019.

Interest in this topic has not flagged even now. Most recently, the statement by the Federal Ministry of Employment and Social Welfare in June 2019 breathed fresh air into this topic by noting that, under the applicable law, an A1 certificate is not mandatory in every case of last-minute or short-term work in a foreign country, thus Member States have discretionary power. Can employers now breathe a sigh of relief? Does this mean the end of the A1 certificate for last-minute and short-term cross-border work in other EU and EEA countries and in Switzerland? The following is a discussion of precisely this question.

What does the A1 certificate mean in practical terms?

To avoid creating a double duty to contribute to social security when per-
sonnel is assigned work in a foreign country, for posted workers permanently based in Germany, the law of the European Communities provides that under certain conditions, only the German legal provisions must be applied. An A1 certificate then verifies that contributions are being paid in Germany.

**Does the A1 requirement apply no matter how brief the foreign business travel, such as for a day visit or a project meeting?**

There is a lot of uncertainty surrounding this in practice, particularly in light of the fact that the EU regulation (EC) 883/2004 does not define any lower thresholds below which the requirement to apply for and carry an A1 certificate can be waived.

**The statement by the Federal Ministry of Employment and Social Welfare from June 2019**

In its statement from June 2019, the Federal Ministry of Employment and Social Welfare notes “that, under the applicable law, an A1 certificate is not mandatory in every case of last-minute or short-term work in a foreign country and that Member States thus have discretionary power.” Although an A1 certificate must generally be applied for in advance at the competent institution, it can also be applied for after the fact. In the case of irregular business trips that are planned at the last minute and/or last only a short period, as well as in the case of other very short assignment periods of up to one week, it can be expedient to refrain from applying for an A1 certificate.

According to information provided by the Federal Ministry of Employment and Social Welfare itself, the statement from June 2019 is merely an offer of information that is meant to make it easier for interested parties to understand the difficult legal situation, thus the statement only represents an interpretation of EU law regarding the carrying of A1 certificates during last-minute and short-term business trips of up to one week (Regulation [EC] 883/2004 and Regulation [EC] 987/2009). In any event, a binding effect for practitioners regarding the interpretation of EU law by other Member States cannot be derived from the statement.

**On what legal principles is the statement by the Federal Ministry of Employment and Social Welfare based, and can the application for an A1 certificate be waived on the basis of the statement?**

The Federal Ministry of Employment and Social Welfare uses the following aspects of European law to undergird its assumption that an A1 certificate is not supposed to be mandatory for last-minute and short-term work in foreign countries:

- Article 15 (i) Regulation (EC) 987/2009: Employers of persons who perform their work in another Member State inform the competent institution of the sending Member State “whenever possible in advance.”

- Practical Guideline of the Administrative Commission, item 11, page 17: “[A] business that sends an employee to another Member State must contact the competent institution in the sending Member State. This should take place wherever possible prior to the assignment.”

- ECI judgment from March 30, 2000 – C-178/97, margin number 53: “Moreover, when issuing the E 101 certificate pursuant to Article 11a, the competent institution of a Member State does no more than state that the self-employed person concerned remains subject to the legislation of that Member State throughout a given period in the course of which he carries out a work assignment in the territory of another Member State. Although it should preferably be made before the beginning of the period concerned, such a statement may also be made during that period or indeed after its expiry.”

According to this, the competent institution may issue the certificate after the fact and retroactively without defining a time limit. The Federal Ministry of Employment and Social Welfare draws the conclusion from this: one cannot speak of a “duty to carry” the A1 certificate, at least not on the basis of European law. According to the statement by the Federal Ministry of Employment and Social Welfare, such a duty is hardly reconcilable with the EU rights of freedom of services and freedom of movement for employees.

However, the Federal Ministry of Employment and Social Welfare explicitly notes the risks that may be associated with failure to apply for an A1 certificate or applying for it after the fact.

Some EU Member States have tightened their national regulations to combat social dumping and black work and...
therefore demand the application for an A1 certificate prior to the start of seconded activities. Stiff fines are threatened in the event of a violation. This currently pertains, above all, to Austria and France. The decisive factor is always the individual national rules, which can differ from country to country. In order to avoid the risk of having to pay fines, a review of the appropriate national regulations – which is associated with a large administrative effort – should be conducted before each cross-border activity. Moreover, as long as there is a duty to apply for the A1 certificate under the national laws of the state of destination, the Federal Ministry of Employment and Social Welfare does not recommend refraining from applying for the A1 certificate in advance.

If required by a monitoring body in another Member State, it may still be possible in individual cases to document the existence of a posting by applying for an A1 certificate after the fact, but the administrative effort remains the same as for an application made in advance.

Furthermore, the Federal Ministry of Employment and Social Welfare notes that applying for an A1 certificate can be advantageous in light of this: In certain countries (particularly Italy and Switzerland), in the event of a work accident, special non-monetary assistance can only be claimed under the statutory accident insurance if an A1 certificate is submitted in addition to the European health insurance card.

**Conclusion**

The question of whether the end of the A1 certificate for last-minute and short-term cross-border activities has been heralded by the statement from the Federal Ministry of Employment and Social Welfare must be answered, unfortunately, with a clear “no.” Although the Federal Ministry of Employment and Social Welfare establishes in its statement that, in its opinion, no legal duty to carry an A1 certificate exists on the basis of European law, the risks and disadvantages of not carrying an A1 certificate in individual EU States, the EEA and Switzerland are too great. First, the statement by the Federal Ministry of Employment and Social Welfare only offers a helpful interpretation of EU law and puts forth arguments against the mandatory carrying of an A1 certificate under EU law. This statement is not binding for other EU or EEA Member States and Switzerland, who could interpret EU law to mean that there is a duty to carry an A1 certificate, even if carrying one is not mandatory under the national law of the country of destination. Secondly, taking stock of which Member States require an A1 certificate prior to the start of the cross-border work is hardly possible, and then only with great administrative effort. In any event, businesses must precisely calculate whether the failure to apply for A1 certificates is worth the risk of fines and other disadvantages, or if it is preferable to accept a significant administrative effort.

The hope that the A1 “bureaucratic monster” can be abolished must not, however, be given up. In answer to a query, the Federal Ministry of Employment and Social Welfare stated that the Commission’s press release mentioned at the beginning of this article is only an interim finding regarding the “trialogue” between the European Parliament, the European Commission and the European Council on the topic of the A1 certificate. The trialogue has not yet been concluded. How negotiations progress and whether more business-friendly solutions will be found remains to be seen.