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I. Equal Treatment Act – AGG

The German Parliament has passed the Allgemeines Gleichbehandlungsgesetz – Equal Treatment Act (AGG) in June 2006. It came into effect on August 18, 2006. The AGG which transposes four EU-directives on equal treatment and anti-discrimination into German domestic law does not provide for any transitional provisions, but is already fully applicable since its entry into effect. In consequence, the companies and their managerial staff already have to adhere to it. The Act obliges the employer to treat its employees in an appropriate way.

The purpose of the AGG is to prevent or to abolish discrimination by reason of

- race or ethnic origin
- sex
- religion or philosophy of life
- disability
- age
- sexual identity.

The Act is supposed to offer a protection against both, direct and indirect discrimination. However, not every case of different treatment will qualify for an unlawful discrimination. The AGG will provide for several possible justifications. In future, employees who face discrimination by reason of one or several of the criteria mentioned above will have a statutory right to lodge complaint. The employer will have the duty to investigate any complaint made, and inform the respective employee about the result of its investigation.

Under the AGG employees will not only be entitled to compensation for material damage but may also assert separate claims for compensation in connection with non-monetary damage they suffered on the occasion of discrimi-

nation. In consequence, employers must be prepared for severe sanctions in case their employees or job applicants can prove disadvantage.

Moreover, the AGG contains a specific provision with respect to the allocation of the burden of prove. According to such provision, it will be sufficient if the employee can furnish circumstantial evidence to accredit that discrimination in the sense of the AGG could have occurred. The full burden of prove for establishing the fact that different treatment was not given will then lay with the employer. Against this background, future hiring and promotion processes will have to be documented precisely in order to allow the employer to comply with the afore-mentioned burden of prove.

Furthermore, the AGG obliges the employer to point out in an appropriate manner that discrimination is inadmissible and to work towards preventing any discrimination. The wording of the Act expressly states that an employer who has provided training to his employees with the aim to prevent discrimination has thereby implemented the required anti discrimination measures. In addition, it should also be less difficult for employers to comply with their burden of prove in a scope of court proceedings if they can provide evidence that their employees have received appropriate training.

From an employer's perspective, at least HR-staff and managers who are in charge of subordinate staff should receive training and detailed information about the new AGG and the regulations it brings along. Moreover, in particular hiring, promotion and transfer processes within the enterprise have to be re-

viewed and, if necessary, adjusted on the basis of the requirements in the AGG.

Our firm offers assistance in providing appropriate staff training and developing the required guidance and instructions.

*Julia Homfeld, LL.M., Düsseldorf office
Chulalongkorn University*

II. Statistic from the German Labour Market

Hard Working German Managers

A study by the London School of Economics which involved 700 companies in Germany, Great Britain, France and the USA has led to the finding that German managers work longer hours than their British or French colleagues. On average, German managers work 45 hours whereas in France executives only work 37 hours. In the UK the work schedule of managers averages at 43 hours.

*Julia Homfeld, LL.M., Düsseldorf office
Chulalongkorn University*

III. Focus On...

1. Working Time and Business Trips -

BAG Urt. v. 11.07.2006 – Az. 9 AZR 519/05

Under German employment law, the working time is from the beginning until the end of work (§ 2 sec. 1 Working Time Act – Arbeitszeitgesetz; ArbZG). Therefore, the travelling time from the employees' domicile to the office cannot be considered as working time in the sense of § 2 sec. 2 ArbZG. The travelling time spent on the occasion of business trips can also not be considered as working time. Rather, such times are rest periods as long as the employer does not stipulate the employee to drive by car strictly personal or to work on

files carried along when travelling on company business. Since rest periods do not substantiate a legal compensation claim, such travelling time must not be reimbursed under German employment law.

*Julia Homfeld, LL.M., Düsseldorf office
Chulalongkorn University*

2. Frustration of Receipt of Termination Notice -

BAG Urt. v. 22.09.2005 – Az. 2 AZR 366/04

If an employer wishes to terminate an employment contract with an employee, the termination note has to be served to the employee in such way that the employer can demonstrate that the employee has received the notice. If the employer cannot prove the receipt of the termination notice by the employee because the employee has frustrated the arrival of the termination letter, the employer can be relieved from his duty to prove the receipt, if he can provide evidence that the employee has frustrated the receipt on purpose and that the employer has done everything necessary and reasonable in order to serve the termination letter upon the employee.

*Julia Homfeld, LL.M., Düsseldorf office
Chulalongkorn University*

3. Compensation by Reason of Mobbing-

LAG Schleswig Holstein, Urt. v. 28.03.2006 – Az. 5 FA 595/05

An employee who claims damages by reason of mobbing must, when bringing an action to court, particularise and – as the case may be – prove to the court whether the rejected be-

haviour was unlawful or discriminating and whether such behaviour has caused the illness of the employee. Thus, the employee is obliged to provide evidence in terms of causation between the acts constituting the offence and the medical disease. In the context of the examination of contributory negligence, the court has to take into consideration whether the employee attempted to defend himself or herself against the rejected behaviour, as an employee is obliged to reduce any harm or damage caused to him or her.

This ruling shows the great demands of German labour courts regarding the demonstration of mobbing claims under German law. Against this background it becomes obvious that in Germany, employers do not have to be too afraid of damage claims based on alleged mobbing.

*Julia Homfeld, LL.M., Düsseldorf office
Chulalongkorn University*

Introduction:

Service Line Employment Law

We advise companies of all sizes and lines of business in individual and collective employment law and social security law. We assist employers with the execution of all personnel-related measures such as collective redundancies, individual dismissals, mergers and relocations of plants, negotiations with employee representatives and trade unions. We also represent clients at courts and within conciliatory hearings.

In addition, we assist employers in all individual or collective labour conflicts. We can help with the drafting of employment and service contracts, the configuration of compensation models, applications for residence and work permits and all questions arising from collective bargaining agreements.

Our employment law practice has a particular focus on:

- HR-aspects of re-organisations and M&A-transactions
- collective redundancies
- industrial relations
- company pension schemes
- equity plans
- temporary labour lease
- restrictive covenants
- international mobility of staff
- IT use and data protection at the workplace
- litigation and mediation proceedings

In all cross-border issues, our clients benefit from our involvement within the worldwide network of first class law firms co-operating with Deloitte & Touche. In the most important developed countries, we can swiftly involve highly qualified and reliable lawyers, releasing the client from time consuming investigations.

Should you desire more information about our legal services, please feel free to get in touch with

one of the contact persons listed on the following page.

Contact Persons:

Berlin Office

Neues Kranzler-Eck
Kurfürstendamm 23
10719 Berlin
Germany
Tel.: +49 (0) 30/2 54 68-04
Fax: +49 (0) 30/2 54 68-1 36

Contact Person:

Rechtsanwalt Eckhard von Voigt, MBA
evonvoigt@raupach-we.de

Hamburg Office

Hanse-Forum
Axel-Springer-Platz 3
20355 Hamburg
Germany
Tel.: +49 (0) 40/37 85 38-0
Fax: +49 (0) 40/37 85 38-11

Contact Person:

Rechtsanwalt Dr. Sebastian Baum, EMLE
sbaum@raupach-we.de

Munich Office

Rosenheimer Platz 6

81669 Munich
Germany
Tel.: +49 (0) 89/2 90 36 89-01
Fax: +49 (0) 89/2 90 36 89-11

Contact Person:

Rechtsanwalt Dr. Martin Imbeck
mimbeck@raupach-we.de

Düsseldorf Office

Schwannstraße 6

40476 Düsseldorf
Germany
Tel.: +49 (0)2 11/87 72-25 87
Fax: +49 (0)2 11/87 72-26 59

Contact Person:

Rechtsanwalt Carsten Keienburg
ckeienburg@raupach-we.de
Rechtsanwältin Frauke Heudtlaß
fheudtlass@raupach-we.de
Rechtsanwältin Julia Homfeld, LL.M.
(Chulalongkorn University)
jhomfeld@raupach-we.de

Hanover Office

Georgstraße 52

30159 Hanover
Germany
Tel.: +49 (0)5 11/30 75 59-3
Fax: +49 (0)5 11/30 75 59-50

Contact Person:

Rechtsanwalt Klaus-Dieter Tammer
kdtammer@raupach-we.de
Rechtsanwalt Claus Wilker
cwilker@raupach-we.de

Stuttgart Office

COMPAS Commerce Park Stuttgart
Löffelstraße 42
70597 Stuttgart (Degerloch)
Germany
Tel.: +49 (0)7 11/6 69 62-0
Fax: +49 (0)7 11 6 69 62-62

Contact Person:

Rechtsanwalt Hans-Joachim Reuter
hreuter@raupach-we.de

Frankfurt am Main Office

Franklinstraße 48
60486 Frankfurt am Main
Germany
Tel.: +49 (0) 69/7 19 18 84-0
Fax: +49 (0) 69/7 19 18 84-4

Contact Person:

Rechtsanwalt Dr. Peter Fischer, M.C.J. (NYU)
pfischer@raupach-we.de
Rechtsanwalt Dr. Michael Meissner, LL.M. (UCLA)
mhmeissner@raupach-we.de