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Market Intelligence

LABOUR & EMPLOYMENT 2022

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

This *Labour & Employment* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Regulatory trends
Sector focus
#MeToo movement
Restrictive covenants

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Germany

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Stephanie Koch (Frankfurt) is an expert in the hotel industry. For one of her clients, she acts as an outsourced employment law department and ensures overall support from disputes with employees over negotiations with works councils to restructuring operations.

Munich-based Matthias Sandmaier advises national and international (in particular US) clients. The focus of his work is on restructuring, works constitution law and representation in negotiations with employee representatives and in court, up to and including the European Court of Justice. Matthias is a key contributor to expanding the firm's expertise in the automotive sector.

Julia Viohl (Berlin) provides employment law advice to national companies and international company groups. She represents her clients both in out-of-court negotiations and in court proceedings. Julia's experience with internal investigations has also made her a key contact for leading media on topics such as sexual harassment and discrimination.

QUESTIONS

1 What are the most important new developments in your jurisdiction over the past year in employment law?

The most important developments in German employment and labour law are moving in different directions and, at first glance, are not consistent in their objectives, but rather appear contradictory. It has become apparent that policy is still struggling to arrive in the new age of agile and flexible working forms and keeping up with the speed of innovations in the business world.

This contradiction is evident, for example, in the area of digitisation. On the one hand, the German parliament has strengthened the possibilities for digital communication. This applies to works councils, which can hold meetings and pass resolutions virtually. There is also an option of holding works meetings and meetings of the conciliation board virtually in a digital way. However, these options are still limited in time and it remains uncertain whether they will be permanent. Also, works councils still cannot be digitally elected in general, which would significantly reduce the financial burden on employers, who are legally obliged to bear the costs of the election. The trend towards digitisation is also reflected in the option for employees to call in sick to their employer digitally in the future.

On the other hand, it has become more difficult to conclude employment contracts in a digital way (eg, via DocuSign), because working conditions will have to be recorded and documented in detail and in writing in the future. Here, the direction is clearly pointing to increased bureaucracy and more formal requirements. Employers will also be obliged by a recent decision of the German Federal Labour Court to record employees' working hours detailed in a reliable way, and will therefore no longer be able to use systems such as trust-based working time as before. In a nutshell, the trend here clearly is back to time clock work and to a more formalised working environment.

> "The question is whether the legislator will provide for customised and practicable obligations for certain groups of employees - employees in field services with lots of travel time or employees in home offices, for example."

It can be observed that the German parliament is attempting to regulate the flexible and agile forms of work that have developed in recent years to a greater extent and to force them into the framework of existing legal regulations. Labour legislation still seems not to be able to keep pace with developments of the new working world. Whether parliament will react more quickly to the innovations of companies in the future and adapt more flexibly to the ever-changing world of employment remains to be hoped for and to be seen.

In line with these general observations, there is still no general legal entitlement for working from home or mobile working in Germany. In practice, however, reliable and flexible solutions have developed even without government intervention, demonstrating that employers and employees are able to find balanced and viable solutions together in their best interests.

However, policy does not seem to trust the individual parties everywhere. The development of stronger state regulation can also be observed for the statutory minimum wage. Where previously an independent collective bargaining commission made up of representatives of employers and employees had determined increases in the minimum wage, Parliament has extraordinarily increased the minimum wage by almost 15 per cent as at October 2022.

On the one hand, there are certainly very much welcomed tendencies toward greater flexibility and agility. However, these are mainly connected to the area of employee protection. This is also illustrated by the statutory support of collective employee representation, for example, through the possibility of simplified establishment of works councils and extended protection of employees in the context of establishing a works council. On the other hand, employers and companies must prepare themselves for increased regulation and formalisation of the employment relationship due to the legal changes and developments of the past year.

2 What upcoming legislation or regulation do you anticipate will have a significant impact on employment law in your jurisdiction?

Since May 2019, employers have been waiting to see how German legislation will implement a decision by the European Court of Justice (ECJ) on the recording of working hours. The ECJ had ordered EU member states to oblige employers to set up a system to measure employees' daily working hours. In a recent decision, the German Federal Labour Court indicated that such an obligation already exists, resulting from a general occupational health and safety regulation, according to which employers must provide suitable organisation and means to comply with the applicable occupational health and safety regulations. Nevertheless, or precisely because of this decision, everyone continues to look to the legislator. After all, there is still a need for regulation regarding the modalities of this mandatory

recording of working hours - for instance, whether there needs to be a certain form or system. In its decision, the ECJ stipulated 'reliable, objective and easily accessible recording'. Whether this necessarily means electronic time recording or whether manual recording remains possible needs to be clarified. This question is already of great importance, as mandatory electronic time recording would be accompanied by a corresponding cost burden for software licences and IT support, which would particularly harm small and medium-sized companies. In addition, the introduction of such software would also involve considerable administrative effort (eg, by triggering co-determination rights of works councils).

Furthermore, the question is whether the legislator will provide for customised and practicable obligations for certain groups of employees - employees in field services with lots of travel time or employees in home offices, for example. The implementation of participation in an electronic time recording system is hardly practicable; in any case, the possibility of the classic 'checking in' at a terminal in the company obviously would not work. However, even more challenges arise in the case of employees with trust-based working time. This working time model is effectively undermined by an obligation to record working time. The core element of trust-based working time is precisely that the employee does not have to account for the concrete time of their work. The focus is on the quality of work performance rather than the mere completion of specific working hours. Explaining to these employees that they need to record and report their daily working hours is likely to present challenges. Finally, it is also interesting to determine what purpose the recording of working hours will serve: either the pure simplification of official controls to ensure compliance with statutory maximum working hours or even the facilitated argumentation of overtime compensation for employees. After all, working time can be seen differently, depending on the purpose. There is working time according to occupational health and safety regulations, where a daily maximum limit of

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10 hours (eight hours on average over a six-month period) may not be exceeded. Then, however, there is also compensable working time, which can include services performed by employees that do not constitute working time within the meaning of occupational health and safety legislation but are still subject to compensation. This applies, for example, to forms of on-call duty or travel time. Here, too, the question for employers remains of which working time should be recorded.

3 How has the #MeToo movement impacted on the investigation or settlement of harassment or discrimination claims in your jurisdiction?

Although there has not been a change in German legislation within the past five years since the start of the #MeToo movement, society's sensitivity to sexual harassment was raised. Also, a consequence is that cases of sexual harassment in the workplace are more

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often reported by the victims since they now have the courage to no longer tolerate harassing behaviour. Furthermore, companies take such complaints more seriously and almost always start internal investigations to clarify the facts.

Having said this, the #MeToo movement has had a discernible influence also on the case law. Before the start of the #MeToo movement, in many cases of sexual harassment at the workplace, German labour courts held that a dismissal of the harassing employee was not justified since the employer was obliged to give the employee a second chance. Now, more and more cases are decided in favour of an employer who follows a zero-tolerance policy and therefore immediately terminates the employment relationships of harassing employees. However, although an increasing number of companies have implemented compliance policies that stipulate a zero-tolerance policy, according to German employment law, the employer does not have the authority to regulate that any kind of sexual harassment will justify an immediate dismissal. In Germany, labour courts always decide on a case-by-case basis whether a breach of duty is severe enough to justify a termination of the employment relationship without a prior (written) warning. However, since the start of the #MeToo movement, many companies nevertheless stick to their zero-tolerance policy and are therefore also willing to pay potentially high severances to harassing employees in order to reach a mutual agreement on the termination of the employment relationship.

For many years, German anti-harassment and anti-discrimination law has stipulated the employers' duty to take preventive action and therefore provide mandatory training to make their employees aware of where sexual harassment and discrimination begins. However, in practice, before the #MeToo movement, only a small number of companies had such training programmes implemented. Now, more and more employers understand that it is highly important to not only provide preventive training, but also keep monitoring the company

atmosphere. These developments are still ongoing, and it remains to be seen how the #MeToo movement will continue to impact on employment in Germany in the years ahead.

4 What are the key factors for companies to consider regarding the enforcement of restrictive covenants against departing employees?

First and foremost, take formalities seriously. Post-contractual restrictive covenants need to be in written form to be enforceable. Email exchanges of pdf documents or most electronic signatures such as DocuSign, etc, will not be sufficient. The lack of correct written form will render the restrictive covenant unenforceable. Also, it is necessary to hand over a signed original. Without such handover or sufficient documentation of it, the company will not be able to enforce the restrictive covenant.

Second, make sure to provide for a sufficient non-compete compensation. Section 74 paragraph 2 of the German Commercial Code provides that the employer needs to pay the employee at least a non-compete compensation of 50 per cent of their latest contractual remuneration. A higher compensation may be necessary if the restrictive covenant is especially burdensome on the employee. The calculation needs to include not only base salary but also variable bonuses, the money's-worth benefit of the private use of a company car, etc. It helps that the Federal Labour Court held recently that stock options or restricted stock units (RSUs) provided not by the employer, but its mother company shall not be considered in calculating the non-compete compensation unless the employer made its own commitment to provide such options or RSUs. Any insufficient non-compete compensation renders the post-contractual non-compete covenant unenforceable.

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Third, if you want to enforce, act quickly. Any enforcement will be achieved by preliminary injunction. Any waiting by the company to enforce the restrictive covenant while being aware of its violation will make a court consider whether the necessary need for quick injunctive relief is given.

Finally, be careful when defining the scope of the post-contractual non-compete for managing directors. Rules are stricter than for normal employees and any scope exceeding the area of legitimate interest will lead to a void restrictive covenant. In particular, watch out when including affiliated companies in the scope.

5 In which industry sectors has employment law been a hot topic recently? Why?

From an employment and labour law perspective, the past two years have been a challenge for all companies. The pandemic has hit the healthcare sector particularly hard because of vaccination

requirements and issues recruiting sufficient and qualified personnel. Obligations to provide proof of vaccination status met a workforce often not completely willing to vaccinate. The problems of filling necessary positions have been particularly difficult given the already strained personnel situation in the sector.

Tightened requirements to document employment conditions forced start-up companies to check their employment contracts. This can be seen in a broader context of the legislator to provide more protection for employees in the gig economy or on labour platforms. Also, so-called precarious employment relationships have come into focus, in particular the various delivery service providers and the delivery personnel, who are often paid a minimum. One major step here was the increased duties to provide employees with a written document stating their employment conditions under the new Documentation Act. The idea is to enable employees to assert their contractual claims using such documentation.

6 What are the key political debates about employment currently playing out in your jurisdiction? What effects are they having?

The current political debate is clearly dominated by issues of stronger and more powerful collective rights for employees, works councils and trade unions. In that sense, the debate has become more fundamental and general and less focused on details.

The government's aim is to increase employee co-determination at the workplace and at the company level. The trend is aiming towards more employee participation rights in matters of day-to-day work as well as in matters of the overall economic direction of the company in supervisory boards. Exceptions and arrangements that contradict these purposes are to be excluded, and deliberate circumventions and obstructions are even to be prosecuted by the Public Prosecutor's Office as an official offence.

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Another declared goal of the German government is to strengthen employers' commitment to collective bargaining agreements. There has been a significant decline in this area in recent years, with fewer companies being bound by collective bargaining agreements. Even though collective bargaining autonomy remains a fundamental right of every employer in deciding whether to conclude collective bargaining agreements, public pressure is to be increased. For example, exemptions from certain laws and regulations are supposed to be possible only based on a collective bargaining agreement. Likewise, public tenders and contracts should only be assigned to employers bound by such collective bargaining agreements.

In times of high inflation and rocketing energy costs, employers are confronted by demands for public compensation. Employers have been given the option to grant a so-called inflation allowance of up to €3,000 free from tax and social insurance. In general, companies must be prepared for significantly increased salary demands both on an individual level during annual salary reviews and collectively during negotiations with trade unions or works councils.

Another issue in the current political debate is the establishment of binding quotas for women in management positions and on supervisory boards. So far, voluntary solutions have not had the desired effect of increasing participation, so there is an ongoing debate about more binding obligations and also sanctions where the quotas are not met. After roughly 10 years of negotiations, at the beginning of 2022, the European Union states agreed by a majority to introduce a quota for the under-represented gender, which is mostly women. By 2027, listed companies are to have at least 40 per cent persons of the under-represented gender on their supervisory boards, or 33 per cent on supervisory and management boards.

Finally, there is an ongoing political debate as to whether employees should have a general statutory entitlement to work from home or remotely. While during the pandemic employers and employees introduced flexible and hybrid working regimes, the current trend is towards more in-person work again and reducing remote work options. So far, the intention to implement corresponding laws has been announced several times, but a general statutory entitlement apart from exceptional situations such as a pandemic has not yet been implemented. Currently, a statutory claim to work from home is rather unlikely to come soon.

As for all current political debates related to employment and labour law, it is not surprising that these topics will continue to be discussed controversially, depending on the individual political and economic point of view.

QUESTIONS

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QUESTIONS

The Inside Track

What are the particular skills that clients are looking for in an effective labour and employment lawyer?

Employers are looking for both a legal counsel and also a partner for their daily labour and employment law challenges. Someone who understands their industry and therefore both their economic needs and their values. Clients look for supporters from the very first brainstorming to actively create the best starting position for any new project. They want to work with empathic persons who are able to break down complex legal issues and support the client in building a plan for the future, not only internally, but also when negotiating with third parties.

To be able to face their complex daily employment law challenges, clients are furthermore looking for law firms with experienced specialists for topics such as data protection, litigation and internal investigation. Apart from these hard skills, clients attach more and more importance to factors such as diversity when it comes to their legal counsel. This enables them to assemble the right team for each employment law project.

What are the key considerations for clients and their lawyers when handling employment disputes?

Disputes under labour law are often emotional, especially when they involve conflicts with individual employees. Therefore, the facts of the case must always be objectified to reflect on the further steps of action and decide with foresight. Hasty actions often result in high severance payment offers by employers in court proceedings to settle disputes. In negotiations with employee representatives, the key to fast and appropriate results is objectivity and empathy – the solution tends to lie outside the actual dispute. Employers should therefore involve their advisers in the overall situation to guarantee the best possible holistic advice.

What are the most interesting and challenging cases you have dealt with in the past year?

Besides numerous restructuring projects, we worked with our clients on projects to implement new work schemes to provide for a modern set-up of work processes following the pandemic. For example, we managed the global New Work project for a major international mechanical engineering company spanning 20 countries. The biggest challenges were the often completely different starting points and various work cultures at the client's different entities and consulting them on their projects to get state-of-the-art remote or mobile work policies adopted to prepare them for the post-pandemic workplace.

Besides providing seamless global advice to local clients, vangard | Littler also acts as go-to adviser for major US corporations when planning their European or German market entries. Over the past year, our practice provided strategic pan-European and local labour and employment advice to two listed US multinationals, both leading players in their respective industries, before entering the European market and has since accompanied their European expansion efforts.