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UK: Cutting Back the Red Tape? The Latest Proposals to Reform UK Employment Law

By Sarah Gadd

The UK Enterprise and Regulatory Reform Bill¹ (the Bill), which sets out a number of proposed reforms to UK laws relating to employment, executive pay, copyright, green investment and competition, was published and laid before the UK parliament on May 23, 2012. The Bill is the latest in the UK coalition government's attempt to cut back the "red tape," which is viewed as limiting the flexibility of businesses operating in the UK. Since then, the government has announced two additional proposals relating to the ability of employers to have "protected conversations" with employees with immunity from unfair dismissal allegations and potential dramatic reforms to the UK "say on pay" rules. This article examines the Bill's proposals to reform UK employment law and executive pay rules and compares such proposals to a more extensive government report² published in the fall of 2011 that covers many of the same issues.

Proposed Executive Pay Reforms

The Bill proposes one seemingly innocuous amendment to the UK Companies Act 2006 that could have a significant impact on the existing "say on pay" rules for UK listed companies. The proposed amendment would remove the statutory provision that prevents an executive director's entitlement to remuneration from being conditional upon the company's

shareholders approving the director remuneration report at their annual general meeting. This would permit listed companies to make executive director remuneration packages conditional upon shareholder approval. This change is seen as paving the way for more far-reaching amendments to the UK "say on pay" rules as detailed in "Recent Developments in Say-on-Pay in the US and the UK" in *The Working World*, Issue 14.³ Indeed, a note in the government's press release that accompanied publication of the Bill states that the government aims to bring forward at a later stage further detail of how its proposals to give shareholders binding votes on executive director pay will work in practice.⁴

On June 20, 2012, the UK business secretary, Vince Cable, announced that the government is considering introducing a requirement for listed companies to publish total annual pay for executive directors in the companies' annual remuneration reports and hold a binding shareholder vote on their executive remuneration proposals every three years. The government envisages that such reforms will begin to be implemented in October 2013. Clearly, further detail will be required before the impact of these reforms may be properly understood — in particular, guidance will be needed on how long-term remuneration awards should be disclosed in the annual remuneration reports and how companies may vary their executive directors' contractual

entitlements if the shareholders vote down their proposed remuneration packages. Some commentators are predicting that the proposed amendment could simply lead to a further escalation in executive director pay as it becomes easier for companies to benchmark their remuneration packages against their competitors.

Proposed Employment Law Reforms

The Bill proposes a number of reforms to the rules relating to Employment Tribunal proceedings. These reforms are intended to improve the efficiency of the tribunal system, encourage early resolution of disputes and reduce the cost to employers of litigating employee claims. In particular, the Bill proposes:

- *A requirement for a potential claimant (i.e., an employee or former employee) to send ACAS⁵ certain information about his or her claim before issuing tribunal proceedings. ACAS has the power to help parties conciliate certain proceedings if the parties choose to accept ACAS's involvement. The proposal would essentially require the parties to attempt ACAS conciliation before issuing proceedings. This is designed to ensure a mandatory period of ACAS conciliation with a view to promoting settlement and encouraging early conciliation of employment disputes.*
- *An extension of employment claim limitation periods to allow for ACAS conciliation.*
- *The introduction of "legal officers" who are empowered to make decisions in certain cases, without a tribunal hearing, provided that all parties agree in writing to submit to this process. The Bill does not yet specify which types of claims may be subject to this process.*
- *A relaxation of the rule that the Employment Appeals Tribunal must be comprised of an employment judge and two laypeople. In certain cases, the employment judge may sit alone.*

- *A new Secretary of State power to increase or decrease the limit on the compensatory award for unfair dismissal (currently £72,300). The Bill contains three alternative proposals: (1) the amount of an unfair dismissal award would be capped at one year's earnings; (2) the amount of the award would be no less than the national median annual earnings and no more than three times the national median annual earnings (the government's Department of Business, Innovation and Skills anticipates that this would result in awards being capped in the range of £26,000 (one year's earnings) to £78,000 (three years' earnings)) and (3) the amount of the award would be capped at the lower of the amounts in (1) and (2). The Bill also states that different limits may be specified "in relation to employers of different descriptions," but no guidance has been provided as to what this might mean (e.g., size, sector, corporate status or some other criteria). However, there has been extensive pressure from industry groups representing employers to relax certain employment laws for smaller employers, so this could be one method used to differentiate employers if these rules are introduced.*
- *A power for Employment Tribunals to impose a penalty on employers where there are "aggravating features" relevant to a case. These so-called aggravating features have not yet been defined. The amount of the penalty would be 50 percent of any financial award, subject to a minimum of £100 and maximum of £5,000, with a 50 percent discount if payment is made within 21 days of the imposition of the penalty.*

The Bill also calls for "Compromise Agreements"⁶ to be renamed "Settlement Agreements," a change the government believes will help avoid circumstances in which a party refuses to sign an agreement on the grounds that the party does not want to be seen as "compromising."

Implementation of the Bill

The Bill has begun its passage through both houses of the Parliament where it should come under further scrutiny and is likely to be amended. We can only hope that some of the unclear details will be filled in as part of this process so that employers know where they stand under the new rules. In particular, we anticipate that the requirement for an ACAS conciliation period and the impact this will have on claim time-limits may inadvertently add more red-tape to the already complex process of dealing with an employee dispute. Employers will be looking for more clarity on their obligations in this respect.

The “Beecroft Report”

Separately, a more radical report prepared by Adrian Beecroft (the Beecroft Report),⁷ a venture capitalist commissioned by the government to suggest employment law reforms, was leaked and then published around the same time as the Bill was laid before parliament. The purpose of Beecroft’s task was to identify areas of employment law that could be improved or simplified in order to help UK businesses create jobs. The Beecroft Report sets out significantly more far-reaching proposals on how to remove the “red tape” to allow employers more flexibility in how they employ their staff.

Amongst the Beecroft Report’s proposals, the following have sparked the most public debate:

- Reforming or removing the existing “unfair dismissal” rules. The Beecroft Report sets forth a number of alternate proposals designed to free employers from the risk of unfair dismissal claims. These proposals include removing the entire concept of an “unfair dismissal,” raising the qualifying service period for an employee to bring an unfair dismissal claim (recently increased from one year to two years), simplifying the dismissal procedures recommended by the ACAS Code of Practice, changing the burden of proof rules in unfair dismissal cases and introducing the concept of a “compensated no-fault dismissal” whereby a dismissal would be deemed fair if the employer had given the employee his or her full contractual notice plus a statutory redundancy payment.
- *Beecroft’s view* is that making it easier for employers to dismiss employees will ultimately lead to a decrease in unemployment as underperforming employees will be replaced by more competent employees; therefore, businesses will thrive and be in a position to recruit more staff.
- *Small business exemptions.* The Beecroft Report suggests introducing a number of “opt-outs” or exemptions for small businesses so that companies employing fewer than five or 10 employees are not required to comply with certain UK employment laws, including, but not limited to, laws relating to unfair dismissal, the new pension auto-enrollment regime, flexible parental leave and equal pay audits.
- *Harassment.* The Beecroft Report calls for the third party harassment provisions of the Equality Act 2010 to be rescinded. These rules, which have applied to sex discrimination since April 2009 and all other protected characteristics since October 2010, cause an employer to be liable where an employee has suffered harassment on the grounds of a protected characteristic by a third party in certain employment-related circumstances. In Beecroft’s view, the rules may tempt employees to conspire with each other or with customers to create a harassment situation resulting in a lucrative claim against the employer.
- *Retirement.* The Beecroft Report recommends a review of the recent decision to abolish the default retirement age. In Beecroft’s view the abolition of mandatory retirement will reduce employers’ willingness to recruit older workers.
- *Redundancy consultation.* The Beecroft Report suggests slashing the statutory redundancy consultation period by two thirds from 90 days (where 100 or more

employees are affected) to 30 days, bringing it into line with the current requirement of 30 days where fewer than 100 employees are affected.

- *TUPE reform.* The Beecroft Report recommends a watering down of the current Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) — the UK implementing legislation of the European Acquired Rights Directive. In particular, Beecroft recommends scrapping the provisions that mean that TUPE applies to a service provision changes (such as an outsourcing or insourcing). These provisions have long been criticized by employer groups as an example of UK legislation unnecessarily “gold-plating” the European directive at the expense of UK employers. Beecroft also recommends disapplying TUPE to businesses that are in administration.

When the Beecroft Report was published, the UK government announced that it would be calling for evidence on the proposals concerning TUPE, collective redundancy consultation, simplified dismissal procedures and compensated no-fault dismissal. Although the government has tried to distance itself from some of the more controversial elements of the Beecroft Report (in particular the “no-fault dismissal” proposal), the Beecroft Report may provide insight into the government’s next wave of employment law reform, and it will be interesting to see whether any of these proposals make their way into the amended Bill as it passes through the parliamentary process.

On June 19, 2012, the government tabled the amendment to the Bill that was intended to allow an employer to have “protected conversations” with its employees that would not be taken into account by an Employment Tribunal in deciding whether a dismissal was unfair. While this concept of a “protected conversation” has been under debate for several months, it is surprising that the government’s proposal would have only applied to potential unfair dismissal claims and not other employment claims

(e.g., breach of contract, discrimination or whistleblowing claims). It remains to be seen whether this proposal will be implemented and, if so, how it will work in practice. In particular, it’s not clear how the proposal will sit alongside an employee’s right to resign and claim “constructive dismissal” in response to an employer’s breach of contract, as this could arise in the context of a difficult conversation with the employer. ■

Endnotes

- ¹ Enterprise and Regulatory Reform Bill, 2012-3, H.C. Bill [7] (U.K.).
- ² DEP’T FOR BUS., INNOVATION & SKILLS, EXECUTIVE REMUNERATION: DISCUSSION PAPER (2011), available at <http://www.bis.gov.uk/assets/biscore/business-law/docs/e/11-1287-executive-remuneration-discussion-paper.pdf>.
- ³ *The Working World*, Issue 14, March 2012 can be found at <http://www.lw.com/thoughtLeadership/working-world-newsletter-march-2012>.
- ⁴ Press Release, Dep’t for Bus. Innovation & Skills, Enterprise and Regulatory Reform Bill Published (May 23, 2012), <http://news.bis.gov.uk/Press-Releases/Enterprise-and-Regulatory-Reform-Bill-published-67a68.aspx>.
- ⁵ ACAS, or the Advisory, Conciliation and Arbitration Service, is the UK government funded body that offers conciliation services to parties involved in employment tribunal claims and provides other advice and guidance on workplace issues to both employees and employers.
- ⁶ Under English law, statutory employment claims can only be waived under a formal “compromise agreement” upon which the employee has received independent legal advice.
- ⁷ ADRIAN BEECROFT, REPORT ON EMPLOYMENT LAW (2011), available at <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/12-825-report-on-employment-law-beecroft.pdf>.

Germany: Employee Inventions and Improvements: A Perspective from Employers and Investors

By Christian Engelhardt

Employers in technology-centric industries are often insufficiently aware of the relevance of patent law and, specifically, employee invention regulations in Germany. It is not uncommon for a patent to be registered in the name of a company, while it in reality belongs to the employee or freelancer who made the invention. Further, employee claims for additional remuneration based on inventions, technical improvements or even non-technical improvements can raise major issues in the context of a transaction or in business practice. This article provides a basic overview of the relevant laws and some of the most common issues and tripwires in this area.

Employee Inventions

Section 6 of the German Patent Act (*Patentgesetz* or PatG)¹ provides that the so-called right to obtain a patent (*Recht auf das Patent*) vests in the inventor as an individual. If the inventor is an employee, there is no “work for hire” doctrine, which is commonly found in the US (among other jurisdictions). If the employer desires ownership of the invention and the issuance of a patent, it is necessary for the employer to comply with specific statutory requirements under the German Act on Employee Inventions (*Arbeitnehmererfindungsgesetz* or ArbNErfG)² and, depending on the facts of the case, the contractual obligations in any employment agreements and agreements with third party inventors.

The ArbNErfG does not adhere to “work for hire” principles, but instead gives an employer the option to claim an invention made by an employee, provided that certain requirements are fulfilled. This Act also entitles the employee to additional compensation as described below.

The ArbNErfG applies to both patentable inventions and unpatentable technical improvements made by employees (including interns, trainees and similar persons within an organization), regardless of whether such

inventions or improvements are referenced in an employment agreement, although such reference is advisable. The ArbNErfG does not apply to freelancers, general managers, comparable executives, retired employees or agents. The scope of the ArbNErfG extends throughout Germany’s territories, irrespective of the nationality of either employee or employer.

Formalities, Rights and Obligations Regarding Employee Inventions

Once an employee has made an invention, the ArbNErfG obligates him or her to report such invention to his or her employer. This report triggers several legally important consequences:

- Upon receipt of the invention report, only the employer is entitled to apply for patent protection for the invention and is obligated to do so “without undue delay.” This obligation may conflict with the employer’s four-month deadline to “claim” or “free” the invention (as discussed further below). However, these two obligations are independent, such that the employer must apply for patent protection even if the decision of whether to claim or free the invention has not yet been made. Failure to apply for patent protection “without undue delay” may result in liability to the employer for damages suffered by the employee, including, but not limited to, loss of patentability.
- The employer has four months from the time of the invention report to decide whether to claim (*i.e.*, appropriate the exploitation rights in) the invention. If the employer does not claim the invention, it becomes “free,” meaning that it becomes the employee-inventor’s property and the employee alone may then decide whether to (i) continue any patent application process already initiated by the employer in his or her own name, (ii) apply for



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patent protection himself or herself or (iii) forego patent protection altogether. The employer may be required to negotiate with the employee to obtain a license should the employer subsequently desire to use the invention. The employer may also face claims for unjust enrichment or damages if the employer had already been using the invention. In addition, the employee may sell or license the invention to a competitor of his or her employer. On the other hand, if the employer expressly claims the invention for itself, the employer will own all exploitation rights and the employee may claim additional compensation in accordance with the ArbNErfG (as discussed further below). If the employer does not act to claim or free the invention, the invention is deemed to have been claimed by the employee, but only with respect to inventions made and reported on or after October 1, 2009. This assumption that the employer has claimed the invention by remaining silent does not apply to inventions made and reported before October 1, 2009. Pursuant to the law previously in effect, an employer was required to expressly claim an invention in writing to prevent it from reverting to the employee or becoming “free.”

If these requirements of the ArbNErfG are not satisfied, uncertainty may result for purposes of determining who holds the rights in the invention and whether a patent may be issued for it. These issues may be resolved by subsequent agreement, including by a nonverbal or implied agreement.

Additional Compensation for Employee Inventions

Once an employer has claimed (or is deemed to have claimed) the invention, the employee-inventor is entitled to reasonable additional compensation. A compensation claim does not affect the ownership of the claimed invention or the patent that may be issued for it and can be enforced only as a claim for payment.

In principle, a claim for additional compensation persists for the life of the patent issued for the invention. Prior payments, however, cannot be reclaimed by the employer if the invention is later found to be

unpatentable. The additional compensation generally becomes due and payable three months after the date on which the invention is first used by the employer.

The employer and the employee are free to negotiate and agree on reasonable compensation, which may be subject to judicial review for “reasonableness” in the event of a dispute or failure to reach an agreement. The compensation for employee inventions may also be subject to shop agreements. While there are certain “guidelines” governing compensation for employee inventions, they are non-binding and there are various types of compensation available for employee-inventors. Among the most common are one-time lump-sum payments and running payments based on the benefits that the employer reaps from the use of the invention similar to license fees or one-time or recurring lump-sum payments. While the employer initially may decide on the type and amount of additional compensation, the employee may subject this employer decision to judicial review and even claim an unspecified “reasonable amount” of additional compensation. Therefore, it is important for the employer to take into account all relevant factors in deciding on the compensation, including, but not limited to, the value of the invention, the type of invention, the employee’s role and responsibilities with respect to the invention and common license fees within the industry.

Inventions Not Made by Employees

Since the ArbNErfG only applies to employees, companies using freelancers or other external service providers in technical capacities should ensure that agreements with such individuals include specific provisions on inventions made in the context of their services to the company. Otherwise, inventions made by such third parties will belong to them alone and the company may need to obtain licenses to use them. In addition, it is important to include confidentiality provisions with regard to technical developments to ensure that such technical developments cannot be published before a decision has been made as to whether to apply for patent protection.

Depending on the type of agreement and the identity of the third party, it may be sufficient to incorporate the ArbNErfG as part of the agreement. In addition, the best choice for an employer may be to design an agreement that includes obligations to report inventions accompanied by options to have inventions assigned to the principal or a fully comprehensive assignment provision. The law allows for great flexibility in this regard, as each individual case should be carefully considered.

In some cases, it is of equal importance to include provisions on inventions and the rights therein in service agreements with managing directors and similar executives because such directors and executives do not fall within the scope of the ArbNErfG. This concern is especially relevant with regard to managing directors who hold equity in the company and are or were heavily involved in the technical developments that contributed to the company's success.

Non-Technical Improvements

As noted above, the ArbNErfG does not apply to unpatentable and non-technical improvements or suggestions made by employees. However, the courts recognize that such improvements or suggestions may result in an employee's claim for additional compensation in certain cases. Furthermore, shop agreements are common in Germany and sometimes include major risk factors. For example, if a shop agreement includes a calculation method for additional compensation based on added revenue or savings caused by the improvement, but does not provide for a cap on such compensation, the calculation may result in economically unreasonable compensation accompanied by lengthy and difficult disputes.

Risks and Consequences

From the employer's perspective, the potential risks that may arise from improper handling of inventions and improvements made by employees, freelancers and other third parties include:

- Failure to obtain rights to an invention or the issuance of a patent

- Loss of rights to an invention or the issuance of a patent
- Exposure to claims for damages or unjust enrichment
- Disputes concerning claims for additional compensation
- Obtaining a license on terms that are less favorable than those that could have otherwise been obtained
- Unreasonable compensation claims for relatively minor improvements

Consequently, from the perspective of an investor or purchaser, these risks may translate into:

- A lack of certainty of ownership of intellectual property of a target company
- Difficulty calculating potential exposure to third party claims for damages or additional compensation
- Unforeseeable potential exposure to litigation

Hence, employers should institute policies to ensure the proper handling of employee invention matters, including compliance with the requirements of the ArbNErfG and the calculation of reasonable compensation. It is of equal importance to carefully consider provisions safeguarding the company's rights to inventions made by third parties in the course of certain agreements and to use caution in drafting and negotiating shop agreements in connection with inventions or improvements.

From the perspective of an investor or purchaser, employee inventions and related issues must be a focal point of due diligence concerning technology-dependent target companies. Both the due diligence process and the subsequent negotiation of the transactional documents, including the particular representations and warranties contained therein, should be individually tailored depending on the type of target company, its technology and the risks identified. ■

Endnotes

¹ Patentgesetz [PatG] [Patent Act], Dec. 16, 1980, BGBl 1981 I. at 1, § 6 (Ger.) (as amended).

² Arbeitnehmererfindungsgesetz [ArbNErfG] [Act on Employee Inventions], July 25, 1957, BGBl I. (Ger.) (as amended).



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US: *Asahi*: The PBGC's Pursuit of Foreign Affiliates for US Pension Liabilities

By Austin Ozawa and Toby D. Lewis, Jr.

This article explores the current status of a pending litigation that exemplifies the continuing effort by the US Pension Benefit Guaranty Corporation¹ to seek to recover pension underfunding from foreign affiliates of US pension plan sponsors.

ERISA and the PBGC

Under the Employee Retirement Income Security Act of 1974, as amended (ERISA), the US Pension Benefit Guaranty Corporation (the PBGC)² is responsible for the administration and funding of terminated pension plans covered by Title IV of ERISA. Such plans include tax-qualified single-employer defined benefit pension plans as well as multiemployer plans.³ In the event a pension plan is terminated or receives insufficient contributions from its sponsor, ERISA allows for a PBGC lien on the assets of that plan's sponsor and certain affiliates thereof to ensure adequate funding for the liabilities relating to that plan.⁴ Such liabilities may include termination liability of an underfunded plan, liability for a failure to satisfy minimum funding requirements and associated excise taxes, liability for unpaid premiums due to the PBGC, termination premiums and withdrawal liability for multiemployer plans.⁵

Controlled Group Liability

Each member of the "controlled group" of a pension plan sponsor is jointly and severally liable for obligations related to such plan. Generally, an entity will be within a pension plan sponsor's controlled group if such entity and such sponsor share at least 80 percent common ownership.⁶ Such common ownership may exist if a pension plan's sponsor and an entity have the same owner (*i.e.*, a brother-sister relationship) or if an entity owns or is owned by the pension plan sponsor (*i.e.*, a parent-subsidiary relationship).

Foreign Affiliates as Members of a Controlled Group

Under the definition of "controlled group," foreign affiliates of a pension plan sponsor may be considered members of the sponsor's controlled group. Nonetheless, historically, the PBGC has not actively pursued the assets of foreign affiliates for controlled group liability. The PBGC's recent actions and success in *Asahi*,⁷ however, may indicate its increased willingness and ability to bring claims against these foreign affiliates.

Asahi

In *Asahi*, the PBGC moved closer to successfully reaching a judgment against a foreign controlled group member by withstanding a motion to dismiss based on lack of jurisdiction.

Asahi Tec Corporation, a Japanese corporation (*Asahi*), acquired a US manufacturing company (the Company) for \$1.2 billion in January 2007.⁸ Thereafter, the Company's pension plan was terminated following its bankruptcy in May 2009.⁹ Following such termination, the PBGC asserted that *Asahi* was liable for any underfunding and related liabilities with respect to the Company's terminated pension plan as a member of the Company's controlled group. After giving *Asahi* more than a year to respond to its 2009 letter demanding that *Asahi* assume liability for the Company's terminated pension plan, the PBGC filed a complaint in US District Court for the District of Columbia on November 12, 2010, requesting that *Asahi* pay termination liability and accrued interest, termination premiums and litigation costs.¹⁰ *Asahi* moved

to dismiss the PBGC's claim due to lack of personal jurisdiction and, in a victory for the PBGC, the district court rejected such motion.¹¹

In rejecting such motion, the district court applied a two-prong legal analysis to support its finding that it had personal jurisdiction over Asahi.¹²

First, the district court analyzed whether Asahi purposefully directed activities at the United States and held that it had.¹³ The district court noted that Asahi understood, through its due diligence, that the acquisition of the Company would result in Asahi's becoming a member of the Company's controlled group and therefore becoming jointly and severally liable for the Company's pension plan underfunding and other pension-related liabilities.¹⁴ Such understanding was apparent through Asahi's engagement of a consultant to investigate the nature and scope of the Company's pension and employee benefits liabilities in connection with the acquisition.¹⁵ Further, the district court noted that Asahi specifically took into account any potential controlled group liability when determining the US \$1.2 billion purchase price.¹⁶ Consequently, the district court held that Asahi acquired the Company with "its eyes wide open"¹⁷ and that Asahi purposefully directed activities at the United States by "not only the acquisition but the knowing assumption of the risk of future controlled group liability."¹⁸

Second, the district court analyzed whether Asahi's acquisition of the Company and its assumption of the risk of controlled group liability were the bases from which the PBGC's claims arose and thus were sufficient to provide personal jurisdiction over Asahi. Specifically, the district court examined whether the PBGC's claims arose out of (i) the Company's own actions after the merger (*i.e.*, the actual termination of its plan) or (ii) Asahi's particular activities directed at the United States (*i.e.*, Asahi's acquisition of the Company and its purposeful assumption of controlled group status).¹⁹ Asahi maintained that it had no involvement in the termination of the Company's pension

plan and argued that personal jurisdiction could not be established solely due to its status as the Company's parent company.²⁰ While the district court acknowledged that status as a parent entity does not create personal jurisdiction as a general principle of corporate law, the district court concluded that the PBGC's claim was unique, in that, "under ERISA ... if a [pension] plan is terminated, the [US] corporation and the [foreign members of the] control[led] group incur joint and several liability ... by [such foreign members'] mere ownership of the [US] company at the time of termination."²¹ Thus, the district court found that Asahi's lack of involvement in the termination of the Company's pension plan was irrelevant and its status as the Company's parent, and thus a controlled group member, alone was a sufficient basis to establish personal jurisdiction for purposes of the PBGC's lawsuit.²²

Consequently, on March 14, 2012, the district court rejected Asahi's motion to dismiss, holding that the PBGC made a *prima facie* showing of specific jurisdiction.²³

Implications of *Asahi*

The PBGC's procedural victory in *Asahi* evidences both the PBGC's efforts to expand the reach of its authority and the US courts' willingness to enforce such authority against foreign affiliates of pension plan sponsors.

As a result, pension plan sponsors should work closely with their legal counsel and other advisors and carefully consider the assumption and imposition of controlled group liability in the early stages of a merger, acquisition, bankruptcy or other corporate transaction. Absent such careful consideration, foreign affiliates may unexpectedly be subject to significant liability or litigation at the hands of the PBGC. ■

Endnotes

¹ Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1302 (2012).

² *Id.*

³ § 1321; § 1301(a)(3) (defining a "multiemployer plan" as a plan that is sponsored by more than one employer and is subject to a collectively bargained agreement).

⁴ § 1368.

⁵ §§ 1361–1364, 1381.

⁶ § 1301(a)(14) (citing I.R.C. § 414(b) (2012) (citing I.R.C. § 1563(a))).

⁷ Pension Benefit Guar. Corp. v. Asahi Tec Corp., Case 1:10-cv-01936-ABJ, Civ. Action No. 10-1936, slip op. at 4 (D. D.C. filed Mar. 14, 2012).

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 7 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–73 (1985)).

¹³ *Id.*

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ *Id.* at 8–9.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 9.

²⁰ *Id.* at 11.

²¹ *Id.* at 14–15.

²² *Id.* at 11, 16 (noting that, in addition to its two-prong legal analysis, the district court relied on the fact that, in an unrelated action, Asahi conceded on the issue of general jurisdiction in the United States, which the district court opined made Asahi's assertions that it would be "unjust and unreasonable" for the district court to find specific jurisdiction with respect to the PBGC's claims "less than compelling").

²³ *Id.* at 18. In response to the district court's decision, Asahi filed a petition for permission to file an interlocutory appeal with the US Court of Appeals for the District of Columbia. On July 16, 2012, the court of appeals denied Asahi's petition, holding that Asahi failed to show "exceptional circumstances" that justify an interlocutory appeal.

BCE Group Highlights

Latham's BCE group frequently produces thought leadership and webcasts that may be of interest. A selection of recent offerings appear on the BCE Practice page at <http://www.lw.com/practices/BenefitsCompensationAndEmployment>.

Thought Leadership

The Affordable Care Act Ruling: How Is Your Plan Affected?

For those who delayed implementation of the ACA requirements pending the US Supreme Court's ruling, now is the time to review plans and make important decisions.

Proxy Season 2012: The Role of Supplemental Proxy Solicitations

At the midpoint of the 2012 annual shareholder meeting season for Russell 3000 companies, this article focuses on the role of supplemental proxy solicitations.

State Wage Theft Prevention Laws

New York and California have enacted laws requiring all private-sector employers, regardless of size, to make certain written disclosures to employees.

California Supreme Court Clarifies Meal and Rest Break Rules

Employers must relieve employees of all duties, but need not prevent employees from working during breaks.

April 2012 Key Changes to UK Employment Law and Employment Related Tax

A summary of the key changes to UK tax rules and employment law announced or due to be implemented in Spring 2012.



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UK: Social Media Considerations for Employers

By Kathryn Ramsden

Following on from the article “NLRB Guidelines on Employer Social Media Policy” in the last edition of *The Working World*,¹ in which John Shyer and Hayley Moore examined the NLRB guidelines for US employees, and their update on the guidelines in this issue, Kathryn Ramsden examines the development of law and good practice guidelines in the UK in the social media arena.

In a similar way to the US position, UK law and good practice around the fairness of an employer’s disciplinary sanction for employee use of social media comment is evolving. However, the mode of challenge in the UK to date has not related to employees’ collective bargaining rights or right to freedom of association but has instead centered on the right of UK employees not to be unfairly dismissed. The most significant best practice guidance for employers in the UK has been issued by the Advisory, Conciliation and Arbitration Service (ACAS),² whose guidance is considered by UK Employment Tribunals when examining the reasonableness of an employer’s actions. ACAS emphasizes the importance of employers having clearly communicated specific guidance to employees on the appropriate use of social media before disciplinary sanctions for social media activities will generally be thought fair.

Experience Thus Far

There have been several research reports on the use of social media by employees in the UK, and the key theme emerging is that employers are generally behind the technology curve when it comes to formulating and revising policies on the use of work-related technology, bullying and harassment and disciplinary matters. The main areas in which UK employers have taken disciplinary action against employees for their use of social media appear to be (i) the posting of information/comment about the employer and/or employees’ work activities online, (ii) the amount of working time spent by employees using social media and (iii) the posting of information/comment about work colleagues online.

There have been relatively few cases reported in the UK given the explosion of social media in our personal lives, the press, and often our working lives as well. These cases have concerned the fairness of an employer’s dismissal of an employee for reasons connected to comments on social media sites.

Unfair Dismissal

In the UK, an employer may only dismiss an employee if (i) it has a reason that UK law prescribes as fair (in the context of the use of social media, the potentially fair reason will usually be misconduct), (ii) such reason is sufficient to justify dismissal and (iii) a fair dismissal procedure has been followed. Employees in the UK generally must have accrued one or two years’ service in order to bring an unfair dismissal claim (noting that the requisite level of service increased in April 2012 from one year to two years for employees whose employment commences on or after April 6, 2012). When an employee files a claim, the onus is on the employer to prove that it had a fair reason, dismissal was a reasonable response to that fair reason and it followed a fair process. In the absence of doing so, the employer is liable to sanction, commonly in the form of damages, which are generally capped at £85,200 (this cap changes every year).

The key UK cases have concerned (i) the dismissal of an employee who worked at London Fashion Week while absent from her employment on sick leave whilst receiving full sick pay, whose actions were discovered through social media postings, (ii) a soccer historian dismissed by Aston Villa Football

Club for comments made by him about the club on a fan forum and (iii) a bar manager dismissed for posting social media site comments about some of the bar customers during her bar shift.

The case involving the dismissal of the bar manager is perhaps the most interesting. The employee had been subjected to verbal abuse and threats of physical violence from some customers at the bar, and as a result she expelled and “barred” them from returning — action subsequently supported by her employer. She also made social media site posts about the customers during working time to her group of social media site contacts, which included other regular customers of the bar. She was dismissed as a consequence of these comments. In considering her unfair dismissal claim, the Employment Tribunal focused on the content of the employer’s applicable policies, whether those policies were drawn to the employee’s attention, whether those policies were backed up by training, whether postings were made “in the heat of the moment” in difficult circumstances when there was no other forum to “let off steam” (which was not the case here), whether the employee had sought the advice of a supervisor and the thoroughness of the employer’s investigation of the incident. In this case, the Tribunal concluded that she had been fairly dismissed.

What Employers Should Do

ACAS has produced guidance on managing the impact of social media, and its key recommendations are that employers must set clear guidelines on the appropriate use by employees of social media. While ACAS has not gone as far as the NLRB in prescribing that policies should not restrict the rights of employees to express a collective grievance, ACAS does caution: “Many employees see use of social media in the wider context of freedom of speech. Employers might be seen as trying to gag employees from expressing personal views if they are over proscriptive about the use of social media channels.”

ACAS recommends that employers put in place clear policies on the use of social media by employees, including whether that use is restricted to work purposes. Such policies should clearly state whether the employer will monitor employee communications involving social media, and, if so, such monitoring must be in compliance with data protection and monitoring legislation. Social media policies should tie-in with existing policies on disciplinary matters, giving examples of what amounts to misconduct and what misconduct is considered so serious by the employer as to justify immediate dismissal without notice or pay in lieu of notice. Most significantly of all, ACAS recommends that such a policy is drawn to employees’ attention and supported by training.

Collective Rights: The Next Battleground?

Although disputes concerning the reasonableness of an employer’s sanctions for social media usage in the UK have not yet turned to the arena of collective rights (as they have done in the US), collective rights may well come under scrutiny in the future, particularly as more UK employers introduce and refine social media policies that explicitly provide them with the power to impose disciplinary sanctions in the sphere of individual employment rights, such as unfair dismissal. It is entirely possible that, if claims for unfair dismissal in relation to sanctions for the use of social media by employees are frustrated by well-drafted employment policies, employees may argue that the curtailment of their use of social media by their employers limits their freedom of expression and their ability to express collective frustration. ■

Endnotes

¹ *The Working World*, Issue 15, May 2012 can be found at <http://www.lw.com/thoughtLeadership/the-workingworld-issue-15>.

² For a copy of the ACAS research and guidance paper, see ANDREA BROUGHTON ET AL., INST. FOR EMP’T STUDIES, WORKPLACES AND SOCIAL NETWORKING: THE IMPLICATIONS FOR EMPLOYMENT RELATIONS (2011), available at http://www.acas.org.uk/media/pdf/b/d/1111_Workplaces_and_Social_Networking.pdf.



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NLRB Updates Guidelines on Employer Social Media Policies

By John Shyer and Hayley Moore

As previously detailed in *The Working World*, Issues 10¹ and 15,² the US National Labor Relations Board (the NLRB) is not afraid to challenge employers' decisions to discipline employees for their use of social media sites. On May 30, 2012, the NLRB issued a third report further clarifying its position in the ever-evolving legal arena of employer restrictions on social media usage.³

Section 7 of the National Labor Relations Act (the NLRA) guarantees an employee the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁴ Section 8(a)(3) of the NLRA prohibits employers from discouraging "labor organization," which is defined as "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁵ The NLRB has stated that any social media policy that "would reasonably tend to chill" the exercise of employees' Section 7 rights will be deemed unlawful.

The third NLRB report further refines a developing standard for social media policies: employer social media rules that include examples of clearly illegal or unprotected conduct, that would not reasonably be construed to include protected activity, are not unlawful. By contrast, social media rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context to clarify that the rule does not restrict Section 7 rights, are unlawful. As noted in our earlier discussion of this topic and as highlighted in this report, the inclusion of a savings provision in a social media policy will not by itself cure existing ambiguities in the policy. In one example, the NLRB noted that an automobile manufacturer's social media policy that prohibited "offensive, demeaning, abusive or inappropriate remarks" was unlawful, as employees could interpret the policy as a limitation on protected criticisms of the employer's labor policies or treatment of employees.

In addition, the NLRB expanded its guidance by providing certain precise rules for social media policies. Specifically, any policy that requires employees to secure permission from

an employer as a precondition to engaging in Section 7 activity is in violation of the NLRA. However, a rule requiring an employee to receive prior authorization before posting a message either in the employer's name or that could reasonably be attributed to the employer is not a restriction on Section 7 rights. The new guidance also states that a policy cannot restrict an employee's non-commercial use of an employer's logos and trademarks in social media while engaging in Section 7 activity (e.g., the posting of images of employees on a picket line).

Finally, the recent NLRB guidelines include certain recommendations for drafting social media policies. For example, in the absence of explicit clarifying language, frequently used language (including terms such as "confidential or proprietary" and "material non-public information") will always be deemed vague and overbroad. Notwithstanding the foregoing, the guidelines permit policies that require employees to include certain disclaimers. For example, a rule requiring all employee social media postings to identify the post as the employee's own and plainly state that the post does not represent the employer's positions, strategies or opinion is permissible.

As always, we encourage employers to review their existing social media policies in light of the recent NLRB guidance. For information specific to UK employers, please refer to Kathryn Ramsden's review of UK social media considerations in this Issue 16. Please do not hesitate to contact any member of the Latham & Watkins BCE team for assistance in drafting or modifying your company's policy to be compliant with the evolving law in this area. ■

Endnotes

¹ *The Working World*, Issue 10, December 2010 can be found at <http://www.lw.com/thoughtleadership/working-world-december-2010>.

² *The Working World*, Issue 15, May 2012 can be found at <http://www.lw.com/thoughtLeadership/the-working-world-issue-15>.

³ *Report of the Acting Gen. Counsel Concerning Social Media Cases*, N.L.R.B. OFFICE OF THE GEN. COUNSEL, May 30, 2012, available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd>.

⁴ 29 U.S.C. § 157 (2012).

⁵ *Id.* §§ 152, 158.

In Brief: US

IRS Issues Proposed Code Section 83 Regulations

By Larry Seymour, David Taub and Julie Crisp

On May 29, 2012, the United States Internal Revenue Service (IRS) issued proposed regulations¹ under Section 83 of Internal Revenue Code (Section 83) that are intended to clarify the circumstances under which property will (or will not) be treated as subject to a substantial risk of forfeiture (SROF) (*i.e.*, subject to a vesting condition) under Section 83.

By way of background, Section 83 requires an individual who receives property in connection with the performance of services to include the fair market value of the property (less the amount, if any, paid for such property) in his or her gross income during the first year in which it becomes substantially vested (*i.e.*, the first year in which the property is no longer subject to a SROF or in which it is transferable to a third party who is not bound by the SROF). Under the existing Section 83 regulations, a SROF generally exists when a recipient's rights in the property are subject to either (i) the future performance of substantial services by the recipient (or agreement to abstain from providing future services) or (ii) the occurrence of a condition relating to the purpose of the transfer. Whether a risk of forfeiture is "substantial" generally depends on the relevant facts and circumstances.

The proposed regulations would make the following clarifications as to SROFs:

- **Conditions Constituting a Substantial Risk of Forfeiture.** The current Section 83 regulations can arguably be read to suggest that a variety of types of conditions may constitute SROFs. The proposed regulations would clarify that only the following two conditions will be respected as SROFs: (i) "service conditions" (*e.g.*, requiring continued employment for a certain period of time) and (ii) conditions related to the "purpose of the transfer" (*e.g.*, requiring the achievement of financial or performance goals).

- **Likelihood That a Condition Will Occur and Likelihood of Enforcement of Forfeiture Must Both Be Considered.** The proposed regulations would further clarify that, for purposes of determining whether a condition constitutes a SROF, both the likelihood that the condition will occur and the likelihood that the forfeiture condition will be enforced must be taken into account. Under the current regulations, it is less clear that this assessment requires a consideration of the likelihood that the condition will occur.
- **A Transfer Restriction Is Not a Substantial Risk of Forfeiture.** The proposed regulations would also clarify that, by contrast to transfer limitations necessary to avoid "short-swing" liability under Section 16 of the Exchange Act (which limitations are defined statutorily to constitute SROFs), the imposition of other transfer restrictions on securities does not, by itself, create a SROF. For example, the proposed regulations indicate that property subject to lock-up, insider trading or similar restrictions will not be treated as unvested solely because of the existence of such restrictions, even though a violation of such restrictions may result in an actual forfeiture of all or part of the property.

The proposed regulations, if implemented, would apply to transfers of property occurring on or after January 1, 2013 (but should presumably be considered informative for purposes of analyzing SROFs currently). While the proposed regulations remain subject to comment, employers should take particular care in drafting future compensation arrangements to ensure that any substantial risk of forfeiture will meet the heightened standard set forth in the proposed regulations. ■

Endnote

¹ Prop. Treas. Reg. § 1.83-3, 77 Fed. Reg. 31,783 (May 30, 2012).



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New Developments in Germany's Vacation Laws: Expiration of Vacation Entitlements in the Event of Incapacity Due to Illness

By Norma Studt

This article explores recent decisions by the European Court of Justice (ECJ) and German Federal Labour Court that challenge the previous principles of forfeiture of vacation entitlements for employees in Germany. Although the law remains unsettled on this issue, these decisions suggest that unused statutory minimum vacation leave expires later than provided for in the German Federal Leave Act (the Act), if such expiration is caused by an employee's illness.

2009: The ECJ's Decision in *Schultz-Hoff* Sets Forth Minimum Annual Vacation Leave

Previously, under the Act, unused vacation leave for a given year expired at the end of that year unless urgent operational reasons or personal reasons of the employee (e.g., illness) required a carryover into the following year, in which case unused vacation leave would lapse no later than March 31 of that following year. However, in *Schultz-Hoff*,¹ a January 2009 decision, the ECJ determined that if employees are unable to work during the entire calendar year due to an illness, then such employees are entitled to a statutory minimum paid annual vacation leave with respect to such year. The ECJ reached this determination, in part, because the principal purpose of the vacation leave — relaxation — could not be achieved during an illness.

The statutory minimum annual vacation leave amounts are 20 days in the case of a five-day workweek and 24 days in the case of a six-day workweek. Nonetheless, it is common in Germany to grant 30 days of annual vacation leave to an employee who works five days per week.

2011: The ECJ's Decision in *Schulte* Limited *Schultz-Hoff*

After the *Schultz-Hoff* decision, it appeared that the minimum annual vacation leave

not taken due to illness would never expire. In November 2011, the ECJ limited the reach of *Schultz-Hoff* in its *Schulte*² ruling. In *Schulte*, the ECJ determined that expiration of the minimum annual vacation leave is generally possible and necessary because an employer may otherwise face untenable economic consequences (such as an employee's accumulation of unlimited vacation entitlements, particularly in the case of long-term work incapacity). Consequently, *Schulte* determined that statutory minimum leave entitlements may expire based on national laws and practices, such as collective bargaining agreements, even if the vacation cannot be taken due to illness. The carryover period, after which the entitlement to paid leave expires, must amount to at least 15 months.

Certain Rulings by the BAG Suggest Support of the ECJ's Decision in *Schulte*

Although the consequences of *Schulte* are not entirely clear, the German Federal Labour Court (the *Bundesarbeitsgericht* or BAG) has issued rulings that arguably support the ECJ's decision in *Schulte* in two contexts: employment contracts and terminations of employment in the context of collectively bargained agreements.

Employment Contracts. The BAG addressed the *Schultz-Hoff* ruling with a May 2010 decision³ that supported the ECJ's ruling in

Schulte. Accordingly, the BAG ruled that a leave entitlement that exceeds the statutory minimum entitlement may expire if the applicable employment contract satisfies certain requirements. In particular, the explicit definition of days, which exceed the statutory minimum annual vacation leave for a given year, is required in the employment contract, so that in any case and according to the Act, the additional leave expires by March 31 of the following year.

Terminations of Employment & Collective Bargaining. Currently, the principle that minimum annual vacation leave is not subject to expiration does not apply to payments in lieu of vacation entitlements in the event of the termination of the employment relationship. In this regard, the BAG stated in its August 2011 decision that a mere monetary claim, such as a payment in lieu of vacation entitlement, may be subject to exclusion and/or expiration periods in accordance with collectively bargained agreements.

Conclusion

The German legislature did not act to adopt the statutory expiration deadline of March 31 with respect to vacation not taken due to illness. The BAG just ruled that the Act can be construed in such a way that it provides for expiration of minimum annual vacation leave after a carryover period of at least 15 months.⁵ Employers should therefore be aware that a forfeiture can be expected after 15 months at the earliest. In any event, employment contracts should explicitly distinguish between the statutory minimum leave entitlement and additional leave, so that at least the additional leave expires on March 31 of the following year. In light of the evolving legal landscape, German employers should partner with their attorneys in order to stay abreast of developments on this issue by courts, legislators and the parties to the collective bargaining agreements. ■

Endnotes

- ¹ Case C-350/06, Schultz-Hoff v. Deutsche Rentenversicherung Bund, 2009 E.C.R. I-179.
- ² Case C-214/10, KHS AG v. Schulte, 2011 E.C.R. I-0000.
- ³ Bundesarbeitsgericht [BAG] [Federal Labour Court] May 4, 2010, 9 AZR 183/09.
- ⁴ Bundesarbeitsgericht [BAG] [Federal Labour Court] Aug. 9, 2011, 9 AZR 365/10.
- ⁵ Bundesarbeitsgericht [BAG] [Federal Labour Court] Aug. 7, 2012, 9 AZR 353/10.

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