

# Focus German Employment Law

**MANNHEIMER SWARTLING  
FOCUS GERMAN  
EMPLOYMENT LAW**

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## Dear Reader,

We hereby present the second edition of our “Focus on German Employment Law”, which shall give you as reader outside Germany an impression on developments of German Labor Law, which is often regarded as complicated and very formal.

In this edition we have a look on the European perspective on anti discrimination law with the famous case *S. Coleman /. Attridge Law*, in which the European Court of Justice came with a landmark decision on “indirect discrimination”. Important from an international perspective is also the introduction of so called codes of conduct or codes of ethics in enterprises of foreign, particularly US based groups. Co-determination rights of German works councils may trigger irritations in such international enterprises with the ambitions to introduce worldwide uniform codes. The Federal Labor Court ruled on the principles of such rights of works councils. We continue further our article on service contracts with managing directors or “Geschäftsführer” of German affiliated GmbHs.

We hope very much indeed, that you find our Focus on German Employment Law as useful and interesting. The first edition is available on our homepage [www.mannheimerswartling.se/en/News/Newsletters](http://www.mannheimerswartling.se/en/News/Newsletters)

*Kind regards,  
Dr. Christian Bloth*



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# Protection against discrimination for employees with disabled dependants

The protection against discrimination for disabled persons under the Directive 2000/78/EG (the German Act on Equal Treatment [“Allgemeines Gleichbehandlungsgesetz”/“AGG”] is partially based on that Directive) relates not only to those who are themselves disabled, but may also protect those persons with handicapped dependants, if such circumstances somehow have an impact on their employment.

On 17 July 2008 (C-303/06, S. Coleman *./.* Attridge Law, Steve Law) the European Court of Justice decided that it is contrary to the prohibition of direct discrimination under the mentioned Directive, where an employer treats an employee who is not himself disabled less favourably than another employee that is, has been or would be treated in a comparable situation, and the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee. The same applies with respect to the provisions regarding the prohibition of harassment: employees may rely on these provisions, where it is established that the harassment is related to the disability of their child.

The European Court of Justice broadened the protection against discrimination for disabled people to people without any disability, if they have disabled dependants they take care for.

The circumstances of the case were the following: the claimant Ms Coleman, worked as a legal secretary for the defendant, a lawyer's office in London since 2001. In 2002, she gave birth to a son who suffers from apnoeic attacks and congenital laryngomalacia and bronchomalacia. Her son's condition requires specialised and particular care by the claimant. In March 2005, Ms Coleman accepted “voluntary redundancy”, which brought her contract of employment with the defendant to an end. In August 2005, she brought a claim

before an Employment Tribunal in London, alleging that she had been subject to unfair constructive dismissal and treated less favourably than other employees because she was the primary carer of her disabled child. She claimed that this treatment caused her to stop working for her former employer, the defendant.

The Employment Tribunal considered that the case before it raised questions of interpretation of Community law, decided to stay the proceedings and to refer for a preliminary ruling.

The European Court of Justice ruled that the principle of equal treatment is not limited to people who are themselves disabled. The Directive seeks to prevent from any kind of discrimination, if direct or indirect, because of disability.

The principle of equal treatment that is part of the Directive does not apply to a certain category of people, but to certain grounds, mentioned and enumerated in the Directive.

What effects this interpretation of the Directive 2000/78/EG will have for German employment contracts, remains to be seen. We assume that the employer will have to consider any treatment of employees in connection with disabled dependants more precisely and thoroughly, in particular whether such actions somehow may be regarded as “caused” by this employee's special circumstances. Furthermore, we assume that the European Court of Justice may expand the protection against discrimination to other discrimination features listed in the Directive and the AGG, like race or ethnic origin, gender, religion or belief, age or sexual orientation. And after all it is very likely, that we are still in the process of developing anti-discrimination law and that we are far away from being on “stable grounds” in this field of law.

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## Codetermination of the Works Council regarding Codes of Conduct (“Whistle Blower Clauses”)

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A considerable number of enterprises, especially those belonging to American corporate groups, have introduced so-called Codes of Conduct or Codes of Ethics due to regulations concerning stock exchange (e.g. “Sarbanes-Oxley-Act”). These guidelines regulate the conduct of the corporate management and of the employees between each other and towards clients and the general public.

A lot of those codes of conduct may sound a bit “weird” from the European viewer but are important for the parent company listed in the US and therefore have to be implemented in the foreign subsidiary companies.

Introduction of such rules in German entities can – in entities with a works council (“Betriebsrat”) – lead to co-determination rights of such work council, which may lead to irritations in the US based parent company, if a local works council claims negotiations on certain paragraphs or even on the code as such. This may be an impediment to a world wide uniform code applicable to all jurisdictions. At this it is questionable to what extent those codes of conduct are subject to the codetermination of the works council.

The duty of codetermination was put into question especially because most of the guidelines in this regard contain so-called “Whistleblower Clauses”, as it formed the basis of the particular decision of the Federal Labour Court (“Bundesarbeitsgericht”, “BAG”) on 22 July 2008 (file number 1 ABR 40/07):

“All employees have to act upon these guidelines as well as the principles and proceedings of this company and must notify presumed violations against these.”

Mainly regularised topics were the avoidance of corruption, rules about the acceptance of gifts, use of internet and rules about non-

discriminating behaviour. The court of second instance, in its decision from 18 January 2008, was still of the opinion that solely the so-called “Whistleblower Clause” according to which potential violations of the rules in general had to be notified by employees would lead to a duty to codetermination concerning the code in general. Roughly speaking the obligation to inform had a „contaminous“ impact even on the subjects with no co-determination duty, i.e. such on performance of work.

The employer – as well as probably the majority of the literature – held the view that codes of conduct had to be classified into rules which are subject to codetermination and those which are not in order to create a partial codetermination duty. The BAG subscribed to this view in its decision from 22 July 2008. It emphatically expressed that in any case the “notification”- or “Whistleblower”- clause would be subject to co-determination, but also many other clauses on the employee’s conduct as on acceptance of gifts etc. The installation of a hotline for notification of infringements for example is such a regulation. The duty to codetermination should generally apply to almost all clauses which rule the conduct of employees (Section 87 I No. 1 of the German Works Constitution Act - BetrVG) but not to those which merely concretise employment duties, the performance of work.

Details on the decision are not known yet, as it is only available as a press release. Nevertheless this decision will purport the framework of codetermination rules for the implementation of codes of conduct.

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# Employment of Managing Directors of affiliated GmbHs

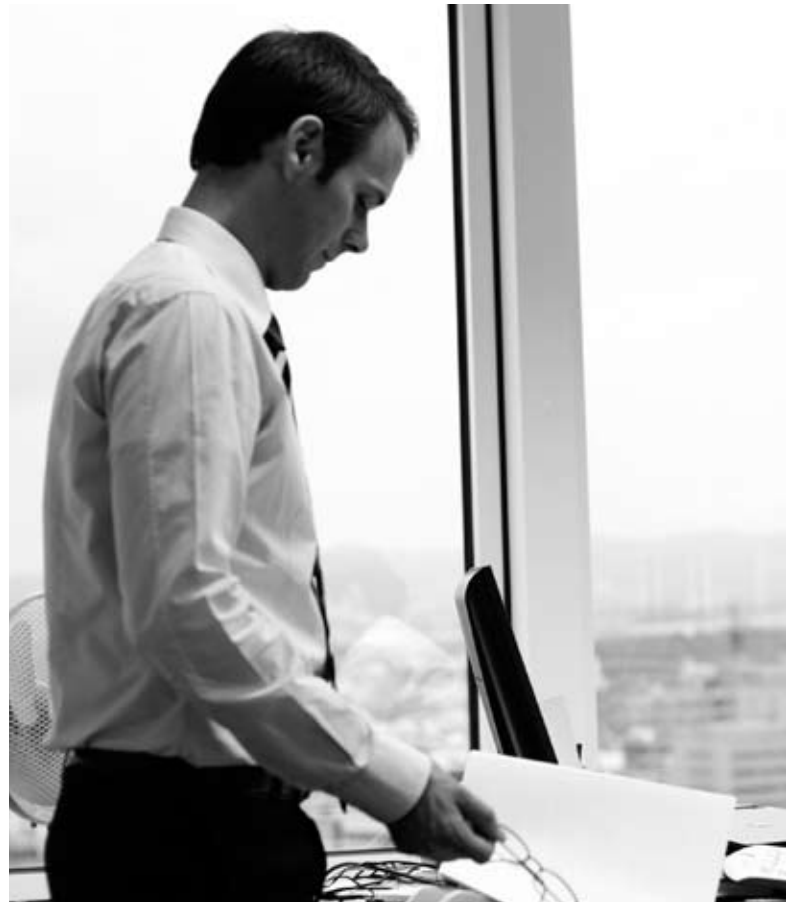
## PART 2: CONTENTS OF SERVICE CONTRACT

If a Managing Director (MD) is employed at a German affiliated GmbH of a foreign parent company, the service contract is usually – if not provided otherwise – ruled by German Law and its contents differ from ordinary employment contracts. As it has been described in Part 1 of this article, the employee protection law is in general not applicable on MDs, at least if the MD has entered into a MD service contract.

The demand of a separate service contract results of particularities of German Law. If an employee is promoted and such employee is appointed MD, but the employment contract concerning the MD has not been changed, this very likely would lead to a resurgence of employee rights such as under the Act against Unfair Dismissal. An advancement of an employee without changing the underlying contract implies considerable risks on the company's side. Nonetheless, if an employee is granted only a title as "Director", even if he exercises management functions without being company organ, he is a principle regarded as employee and replacement of his employment contract has not the same impact as if he would be appointed "Geschäftsführer" (MD).

Since the MD is not regarded as "employee" under German employment law, the civil court (chamber for commercial matters at district court) decides disputes, not any labour court jurisdiction. The "protection" of the MD therefore does not consist in dismissal protection, but in longer termination periods and higher salaries including bonuses – and fringe benefits – as compensation for his higher risk in relation to being an employee.

In case of a promotion of an employee to MD, increasing just the MD's salary – and improving other benefits – without replacing his employment contract would give the MD probably the best of "two worlds": Higher remuneration as company organ and protection as an employee. Such additional provisions are usually included in service contracts of MDs. Additionally, the parties could agree on – which is not often the case, particularly not in smaller and medium sized entities – severance payments for the case of a dismissal of the MD by the company (perhaps also limited due to termination connected to a change of ownership in the company). Furthermore, a time limitation, which is generally allowed without restrictions in service contracts, contrary to employment contracts, could be included in the contract. However, the company binds in such situations itself to a longer period without being in a position to terminate the contract within an ordinary notice period, for whatever reason (with



exception of immediate termination for important reason, as severe violation of contract). Any notice prior to the fixed termination date would inevitably lead to payment of income for the period between the date on which notification is given and legal expiration date, e.g. severance payment.

Additionally, non-competition clauses, which shall ensure the interests of the company after a termination of the contract, may appear useful, if the MD can be regarded as an important "know-how" bearer. Otherwise, the MD might use confidential knowledge and secrets of the company immediately for a new job with a competitor after revocation of his appointment. Such clauses – which limit the MD's rights in professional freedom – are regarded as valid only under certain circumstances. Since such rules have been established by legal practice, not by statutory law, the contract wording of such clauses is difficult. Experience tells that in other jurisdictions than Germany applied clauses are mostly to broad and limit the MD's rights "unreasonably", which then applied in a German environment would lead to their invalidity.

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