Orrick World:
A Quarterly Report of Global Employment Law Issues for Multinationals

Germany Employment Law Update

Sick or Not Sick, That is the Question: Employer's Spying on Employee Found Illegal

In a verdict on February 19th, 2015 (8 AZR 1007/13), the Federal Labour Court in Germany (*Bundesarbeitsgericht*) decided that the covert observation of an employee by a private investigator is illegal if the employer has no "legitimate reasons" for carrying out such observation.

In this particular case, the monitored employee had been on sick leave for approximately two months. Despite the fact that the absence was supported by several medical certificates issued by her general practitioner and orthopaedic specialist, the employer had doubts as to the validity of her sickness claims. The employee changed the reasons for her leave and the healthcare providers she was using; while, initially, she claimed bronchial ailments, she later alleged to suffer from back pain. Notably, the illness started shortly after a serious dispute between the employee and her superior. Against this background, the employer had doubts about the veracity of the employee's illness, and instructed a private investigator to observe the employee. The investigator carried out video surveillance which captured the employee with her family in and outside her home. He provided the employer with evidence that the employee was acting in a manner inconsistent with the reasons she gave for her leave, which was held up against the employee and used as the basis for penalizing measures against the employee.

The employee filed a claim with the Regional Labour Court stating that the actions of the employer were unlawful and requested compensation amounting to EUR 10,500 for psychological damage caused by the surveillance. The court found that the employer did not have a sufficient degree of suspicion to commence the surveillance. The judges considered the use of video footage in such spying endeavours as an unfair breach of privacy. While they rejected the asserted EUR 10,500 claim of the employee, they upheld an award of damages equal to EUR 1,000. The Court argued that damages for unjustified surveillance would be appropriate even if it was shown that the employee was lying about the reason for the leave. The Court, however, did not comment any further on the specific facts which would legally justify such monitoring. It remains possible to justify surveillance when supported by hard facts which give rise to serious doubts as to the provided reasons for the respective employee's absence from work. Thus, employers should take a cautious approach to the monitoring of employees.

New Legislation: Germany Introduces Quota for Women in Top-level Management

On March 27th, 2015, the German legislator finally passed the Bill on Equal Participation of Women and Men in Leadership Positions (*Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen*). This Bill attempts, to increase the number of women in top-level management for certain companies.

The Bill provides either for a fixed quota of 30% or a self-defined quota, subject to which of the following two groups a company belongs to:

Companies in the first group are those that are listed on a stock exchange and subject to the parity co-determination (50% employee representatives) on supervisory boards. In practice this affects every listed company employing more than 2,000 employees. From January 2016 onwards, these companies

must implement a 30% quota for women on supervisory boards. If the quota is not achieved, the seats reserved for women remain vacant. The companies are required to publish whether the quota has been met and, if not, the reasons for this failure.

Companies in the second group are those that are either listed on a stock exchange or are subject to part or one-third co-determination on supervisory boards. In practice, every company employing more than 500 employees is affected. They are obliged to define targets to increase the number of women in supervisory boards, management boards and the upper management level. A minimum target/quota is not defined by the new legislation; rather, the companies can set them under consideration of their current structure. However, the companies have to set, by September 30th, 2015, at the latest, a term during which they want to achieve the self-defined quota of women; this term shall end no later than June 30th, 2017. The companies must publish their targets and deadlines, success in reaching the targets and, if they failed, the respective reasons.

Whilst only approximately 100 companies belong to the first group, the second group comprises around 3,500 companies. Given the rather tough deadline for setting and publishing the self-defined quota, companies belonging to the second group are well advised to start with the preparations.

Finally, it should be noted that companies employing less than 500 employees are not affected by the new legislation.

Orrick's German Employment Law and Litigation Team:

Ulrich Fülbier, *Of Counsel*
Munich
ufuelbier@orrick.com

Lutz Hoheisel, *Of Counsel*
Frankfurt
lhoheisel@orrick.com

Katharina von Rosenstiel, *Senior Associate*
Berlin
krosenstiel@orrick.com