Practical Ramifications of German Case Law on Termination for Suspected Wrongdoing

INTRODUCTION

In many cases the facts on which an employer seeks to justify termination for conduct-related reasons are not readily available before notice is given. However, labor courts have held that under certain conditions even strong suspicion that a criminal offense or other serious wrongdoing has been committed may justify termination of employment – in some cases even without notice. To prevent that innocent employees become a target of such termination for suspected wrongdoing, courts have established a series of requirements – some of which are procedural – that must be satisfied before employment may be terminated on those grounds. Already during the preparatory phase of a termination for suspected wrongdoing, it is easy for an employer to make mistakes that may render the notice of termination invalid. In what follows, we therefore provide a summary of recent German court decisions dealing with termination for suspected wrongdoing.

DUE PROCESS HEARING
DECISION OF FEDERAL LABOR COURT
DATED MAY 24, 2012 - CASE NO. - 2 AZR 206/11

Because there is a real risk that innocent employees will be terminated for suspected wrongdoing, German case law requires, among other things, that the employer makes all reasonable efforts to investigate the facts before providing an employee with notice of termination on those grounds. Such efforts include, in particular, providing the employee with an opportunity to respond to the charges. In practice, swift action will be required as otherwise the two-week time period provided for in § 626 para. 2 of the German Civil Code (BGB; hereinafter "Civil Code") may expire barring termination for good cause. In some cases, employees may well "play for time" to protect themselves from imminent termination of employment for good cause. Recently, the Federal Labor Court had another opportunity to rule on a case in which an employee initially had declined to respond to the charges that had been leveled against him by the employer:

In the case decided by the Federal Labor Court the employee was strongly suspected of corruption. A preliminary investigation by public prosecution was launched. When the employer learned of the charges (on a Wednesday), the employer placed the employee on leave on the next day, inviting the employee to a personal meeting on the following Monday to discuss the charges. By letter from his legal counsel, the employee however declined to attend the meeting, requesting instead that the employer submits a questionnaire and allows the employee to respond to the questions in writing. The employer did not draft a questionnaire, but merely provided the employee with an opportunity to respond to the charges in writing until "close of business" on Monday, enclosing a search order by the court. On Monday the employee delivered a written statement in which he denied the charges without any further explanation. The employer then terminated the employee for good cause on grounds of suspected wrongdoing.

The Federal Labor Court denied the employee's appeal, holding that the employee had been given sufficient opportunity to respond to the charges. In particular, the court found that the invitation to a personal meeting was provided in a timely manner and that the charges that had been leveled against the employee had been communicated to the employee with sufficient clarity. Moreover, it is noteworthy that while the Federal Labor Court regarded the time period for a written response (Friday until "close of business" on Monday) as short, the court regarded the time period as sufficient under the circumstances of that particular case and, in addition, did not regard the right of the employee to associate an attorney as a reason for granting a longer time period to respond in that case.

Finally, the Federal Labor Court clarified that submission of a questionnaire is neither necessary nor appropriate for a written response, because the employee is supposed to have an opportunity to respondent to the charges as unbiased as possible and that drafting specific questions is inconsistent with this purpose. The Federal Labor Court did not address the question of whether the phrase "close of business" identified the deadline for a written response with sufficient specificity. To avoid any unnecessary ambiguities, it is however advisable that employers use specific dates and times.

SUSPECTED CRIMINAL OFFENSE
DECISION OF FEDERAL LABOR COURT
DATED NOVEMBER 22, 2012 - CASE NO. AZR 732/11

In a decision dated November 22, 2012 the Federal Labor Court addressed the issue of when the two-week period provided for in § 626 para. 2 of the Civil Code starts to run – and may be restarted – in cases involving termination without notice for suspected wrongdoing. To begin with, the court affirmed its prior decisions holding that an employer is not required to provide notice of termination as soon as the first suspicion of wrongdoing arises, but rather may await the continuation and outcome of the criminal investigation and that, if new facts or reasons for suspicion are discovered, the two-week

time period provided for in § 626 para. 2 of the Civil Code may be restarted. Especially if a criminal proceeding ends with a conviction of the employee, this should be sufficient to restart the two-week time period. In addition, the Federal Labor Court clarified that the start of the two-week period depends not necessarily on the date the conviction is announced, but rather on the date the employer learns of the conviction – e.g., when the employer receives the court's statement in support of the judgment. Then is the employer in a position to review in detail whether the criminal conviction provides grounds for providing the employee with (another) notice of termination for suspected wrongdoing.

ANALYSIS

The above decisions by the Federal Labor Court provide practical guidance for preparing and executing terminations for suspected wrongdoing. We welcome the finding by the Federal Labor Court that drafting specific questions is not necessary for providing the suspected employee with an opportunity to respond to the charges in writing and even is inconsistent with the purpose of doing so. However, the employer must provide the suspected employee with a clear and full description of the facts on which the employer's suspicion is based and to which the employee is supposed to respond. We also welcome the finding by the Federal Labor Court that even a relatively short time period for the employee's response is acceptable. This only makes sense: after all, courts also hold that an employer generally has only one week to investigate the facts in the preparatory phase of a termination for suspected wrongdoing. After this period has expired, the two-week period provided for in § 626 para. 2 of the Civil Code begins to run, no matter what.

The Federal Labor Court did not fully answer the additional question of what an employer is supposed to do if an employee who has been invited to a personal meeting to discuss charges suddenly "becomes sick" and notifies the employer that the employee will not be able to respond to the charges anytime soon. In particular if the employee fails to ask for an extension and/or plausibly explain why he cannot respond to the charges either in person or in writing due to sickness, it is a must for the employer in many cases to provide the employee with notice of termination for suspected wrongdoing on the basis of the facts as they are already known, notwithstanding the lack of response from the employee. We further recommend to provide the employee with an opportunity to respond to the charges in writing from the outset.

With respect to the second decision by the Federal Labor Court regarding new facts that provide grounds to suspect wrongdoing and that come to light in the course of a criminal investigation, we note that the employer generally has no right to receive the statement in support of the court's judgment or the record of the trial in a criminal proceeding. However – if the employer itself is an aggrieved party of the criminal offense – the employer has a right under § 406e para. 1 of the German Code of Criminal Procedure (StPO) to have an attorney review the criminal investigation files. An employer has the requisite rightful interest in doing so, in particular, if the employer wishes to review whether a criminal proceeding may have any consequences under civil law for the accused.

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