

The Big Breakthrough?

The Federal Government's Program for Economic Re- covery and Employment

Introduction

On 2 July, the German federal government presented its program for economic recovery and employment. As the title suggests, the program also announces a number of “relief measures” for employers. Of course, it remains to be seen what exactly will come out of the legislative process. Precisely for that reason, however, it is worth making a few comments on selected points.

Facilitating Fixed-Term Employment Contracts Without Objective Grounds

For employees hired on or before 31 December 2030, fixed-term employment contracts without objective reasons are to be permitted for a maximum duration of 48 months, instead of currently 24 months, with up to six extensions, instead of currently three. The proposal also aims to allow renewed “initial hires” by the “same employer.” This sounds like a deviation from the

prohibition on fixed-term contracts without objective reasons for employees who have previously been employed by the same employer. However, it remains unclear under what conditions this will apply and whether it will be limited to the above maximum. In the interest of facilitating employment, it would certainly be preferable to reset the position to “zero” as of a specific cut-off date and to permit new fixed-term contracts without objective reasons even with employees who had already been employed by the employer at some point in the past.

Whether and to what extent this is possible in light of the EU Fixed-Term Work Directive and the case law of the Court of Justice of the European Union on abuse in the context of successive fixed-term contracts is, unfortunately, unclear.

Restrictions on Dismissal Protection

In addition, for employees with very high salaries, it shall be possible in the



future for the employment relationship to be dissolved upon the employer's application against payment of severance, without any further justification being required. Based on the reference to the rules applicable to risk takers in credit institutions, it can be inferred that the calculation of severance is also intended to be based on Sections 9 and 10 of the German Dismissal Protection Act (Kündigungsschutzgesetz – KSchG). However, this option is to be limited to employees with annual income of more than approximately EUR 175,000 and is therefore likely to be relevant only in individual cases. It also remains to be seen whether this threshold will include only fixed compensation or also variable compensation components.

The difficulty is that Sections 9 and 10 KSchG do not provide for a fixed severance amount, but instead give the courts discretion which, depending on age and length of service, is capped to a maximum of eighteen months' salary in the worst case. A more predictable and economically reasonable provision would be preferable here.

Certificates of Incapacity for Work

In view of the increase in sickness-related absences over recent years, the option of obtaining medical certification of incapacity for work by telephone is also to be abolished. However, unless the video consultations offered by various providers, which have now become widespread, are also restricted, this is likely to remain a matter of "symbolic politics" than an effective means of preventing abuse. The same applies to the further aspect that employees will in the future be required to submit a medical certificate of incapacity for work from the first day of illness. In addition to the questions this raises for existing divergent provisions in employment

contracts or collective agreements, this will also create additional administrative work for employers. The core of the problem remains that the number of potential continued pay claims for different illnesses in any given year is still not capped. As a result, continued pay claims far exceeding six weeks per year remain possible. It would be desirable for the German federal government to take up proposals to limit the entitlement to continued pay to six weeks per year, in order to place a clearer limit on excessive periods of continued pay.

Written Form Requirement for Fixed-Term Contracts

In this context, however, the planned abolition of the outdated written form requirement for fixed-term contracts is to be welcomed without reservation. We assume, however, that in the future, as is already the case for fixed-term arrangements upon reaching the statutory retirement age under Section 41(3) of the German Social Code Book VI (SGB VI), at least text form, for example conclusion by email, will be required for a fixed-term contract to be valid. A more substantial step would certainly be to address the written form requirement more fundamentally, as it still applies in many other areas. In the case of notices of termination in particular, employers continue to face considerable cost and administrative effort as a result of the formal delivery of written documents.

Outlook

Although it is encouraging that the German federal government is in fact seeking to reduce barriers to employment, much remains to be done.

In this respect, it will also be important to monitor whether the social partners, as desired by the German federal government, can agree on further areas in

which deviations from statutory provisions by collective bargaining agreement will be possible in the future. Examples mentioned include fixed-term contracts with objective reasons and occupational health and safety.

There is an urgent need for action in relation to co-determination regarding software and software updates, which — based on the case law of the labor courts — has completely spiraled out of control. The fact that the German federal government is merely asking the social partners for proposals on how simplifications and acceleration could be achieved in this area, for example in works constitution law, casts doubt on whether a true "big breakthrough" can really be expected here. It would certainly be needed!



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