Employee Status for External Managing Directors – Coming Changes!

Dr. Heiko Reiter **Frankfurt, 22.04.2016**

Since the Danosa decision of the European Court of Justice (ECJ, judgment of 11 November 2010 – C-232/09), there is more uncertainty than ever before as to whether the external managing directors of private limited companies (directors that hold no shares in the company) qualify as employees under labor law. It is to be sure impossible to make a categorical affirmation, but that does not change the fact that the status of external managing directors has changed in recent years. In the case of the Danosa decision cited above, the ECJ ruled that a pregnant managing director may not be recalled if the decision to do so is essentially based on her pregnancy, reasoning that this would be incompatible with the principles contained in the Pregnant Workers Directive (92/85/EEC).

In two recent decisions, the ECJ pursued this line of reasoning, finding that external managing directors must be counted for the purpose of determining compliance with legal thresholds for collective redundancy (98/59/EC) (ECJ, judgment of 9 July 2015 – C-229/14 (*Balkaya*)) and that external managing directors can also qualify as employees within the meaning of Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (ECJ, judgment of 10 September 2015 – C-47/14 (*Holterman*)).

What these decisions have in common is that each is based on either a directive or a regulation that defines the term 'employee' under European Union law. For the purposes of provisions of national law that do not implement European law, external managing directors will therefore not, as a rule, qualify as employees.
Employers would in any case be well advised to pay very careful attention to developments in the case law regarding the status of external managing directors. There is good reason to think that external managing directors of private limited companies will in the future be considered employees in other constellations involving the application of legislation protecting employee rights based on the definition of employee status under European law.

Recommended Course of Action

Before undertaking any action involving an external managing director that could have implications under labor law, it is advisable to examine carefully whether the applicable provisions of national law are intended to implement European law. If that should be the case, it is necessary to determine whether the external managing director is covered by the respective definition of employee status pursuant to European Union law.

Any error in this regard may not only render the action taken against the external managing director invalid, but in the 'worst case' all measures regarding other employees affected as well (e.g., in the case of failure to file proper notification of collective dismissal as required by § 17 of the Protection against Dismissal Act (*Kündigungsschutzgesetz* – KSchG) despite the fact that the applicable threshold is reached only after including the external managing director).

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Heiko Reiter on +49 69 170000-220 or by email to hreiter@goerg.de. For further information about the author visit our website www.goerg.com.

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