

## Transfers – Is an Unjust Direction Binding?

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### Employers' Right to Issue Instructions to Employees

As a rule, an employee's contract of employment will contain a description of the work he or she has to perform as well as the details of the place of performance and the hours of work. Nonetheless, an employer may in the exercise of its reasonable discretion unilaterally specify further terms over and above those in the employment contract regarding the work to be performed as well as the place and hours of such work.

The exercise of the employer's reasonable discretion presupposes that the essential circumstances of the individual case are weighed and the respective interests of both employer and employee are appropriately taken into account. Accordingly, it is necessary to consider, on the one hand, the employee's personal situation and, on the other hand, the business concept underlying the employer's transfer plans.

A valid transfer directly alters the work obligations owed by the employee. Consequently, the employer may respond to a failure to accept a transfer with the usual remedies available under employment law, ranging from a disciplinary notice to termination of employment.

According to the case law of the Fifth Senate of the Federal Labour Court, the following principles apply in the case of an invalid transfer: The employee must provisionally comply with an unjust transfer direction, which

is not otherwise invalid, until such time as a legally binding court decision has been issued.

Nonetheless, it seems that the case law could be changing in this respect. The Tenth Senate adopts the view that employees do not have to comply with a transfer direction even if no legally binding decision to such effect has been issued (Federal Labour Court, Order of 14 June 2017 – 10 AZR 330/16). However, there are no signs yet of a common approach that the Grand Senate of the Federal Labour Court will take.

### Implications for Practice

Employee transfers are part of day-to-day operations in the field of human resources. It is not unusual for there to be some doubt as to whether a transfer is just. Until the Grand Senate of the Federal Labour Court resolves this issue, it will not be possible to know whether an employer can insist that an employee comply with its instructions during the period leading up to the issue of a legally enforceable court decision on the matter. However, this state of affairs also increases the risk that an employee may unjustifiably fail to comply with the obligations laid down in his or her employment contract in circumstances in which the legal situation is ambiguous and thus become liable to disciplinary measures for dismissal by his or her employer.

# Legal Update

## 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 Pia Pracht on + +49 221 33660-524 or by email to ppracht@goerg.de. For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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