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German Tax and Legal News

Statutory changes to sec. 309 no. 13 German Civil Code - Impact on Forfeiture Regulations in Employment Contracts

Changes to sec. 309 no. 13 German Civil Code as of October 2016 require amendment of forfeiture regulations in employment contracts.

Little-noticed in practice, the Act on the Improved Civil Law Enforcement of Customer Protection Rules under German Data Protection Law that became effective on February 24, 2016 also contains changes to sec. 309 no. 13 German Civil Code as of October 1, 2016 that will impact the wording of forfeiture regulations in German employment contracts.

Current legal framework
Currently, sec. 309 no. 13 BGB states that any notices or declarations that are to be made towards a user of general terms and conditions [...] may not be bound to a stricter form requirement than written form [...] in general terms and conditions. Accordingly, forfeiture regulations in standard employment contracts – which generally qualify as such general terms and conditions – usually provide that any claims have to be asserted in writing within a certain period.

New legal framework
According to the amended sec. 309 no. 13 BGB, notices or declarations that are to be made towards a user of general terms and conditions [...] may not be bound to a stricter form requirement than text form. This alteration shall resolve uncertainties of consumers going along with the term “written form”.

Implementation and impact on existing employment contracts
If and to which extent the revised sec. 309 no. 13 BGB impacts forfeiture regulations in employment contracts mainly depends on the employment contracts’ conclusion date:

The revised regulation will become effective as of October 1, 2016. It will only apply to contractual obligations concluded after September 30, 2016. The predominant opinion of German legal scholars is therefore that it will only apply to employment contracts entered into after September 30, 2016. Forfeiture regulations in employment contracts entered into after this key date may not provide for a form requirement requesting a stricter form than text form to assert claims.

Written form requirements in forfeiture regulations contained in employment contracts entered into before that key date remain – according to the current view – valid.

What has not been clarified, yet, is whether existing employment contracts that are amended after September 30, 2016 also require a revised forfeiture regulation. In case existing contracts are amended after that date, we therefore advise to also amend any form requirements in forfeiture regulations to the new legal basis as a precautionary measure.

Recommendation
Forfeiture regulations in employment contracts entered into after September 30, 2016 should in any case be adapted to the new legal framework. They may not contain a form requirement that requires the assertion of claims in a stricter form than text form. In order to prevent further uncertainties on the employees’ part, we advise to list examples of an appropriate text form in the relevant provision.

Beyond that influence on forfeiture regulations in employment contracts, further amendments as to contractual arrangements might become necessary. From an HR perspective, this could e.g. affect sample additional agreements to employment contracts or even managing director service agreements with third party managing directors.

We are happy to discuss with you whether the adaption of your sample contracts to these new standards is recommendable.

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