

September 2016 | 06

## Employment law – in brief ...

Law relating to standard business terms: Need for changes to standard employment contracts starting from 1 October 2016

Starting from 1 October 2016 stricter statutory provisions apply for standard business terms. Employers must for that reason revise their standard employment contracts. Otherwise disadvantages may arise during court disputes.

### **§ 309 nr. 13 German Civil Code (new version) (GCC n.v.): Notifications and declarations now only in textual form**

Starting from 1 October 2016, as a result of § 309 nr. 13 GCC n.v. pre-formulated contract terms through which notifications and declarations to the contractual partner are bound to a "stricter form than the textual form" are invalid. Up to now the standard business terms were invalid pursuant to § 309 nr. 13 GCC (old version) if they bound declarations to a "stricter form than written form". In the future, users of clauses may therefore only request in their standard business terms that the contractual partner provide declarations in textual form.

### **Distinction written form – textual form**

If a statute requires written form, this form is in general only complied with if a declaration is signed in person in the original. The signature in person can be replaced by the declaring party through a notarially certified signature by mark or through the qualified electronic signature in the case of an electronic declaration which states his name (§§ 126, 126a GCC). An email or telefax does not satisfy the statutory requirement of written form. The statutory textual form requirement is fulfilled where a person makes a legible declaration which states the name of the declaring party on a permanent data carrier, i.e. writes an email or computer fax.

If the parties agree in an (employment) contract that declarations require written form, in general the strict requirements of §§ 126, 126a GCC apply. If, however, no different intention of the parties is apparent, it is sufficient to transmit the declaration to the contractual partner by means of telecommunications. Declarations which are archivable or printable thus fulfil the agreed written form requirement (§ 127 para. 2 GCC).

The fact that a declaration in textual form is sufficient if an (employment) contract requires a "written" declaration is not known – according to the provided reasons for the legislation – to many consumers and employees. § 309 nr. 13 GCC is therefore intended to force users of standard business terms to describe to the other contracting party also in the contract what is already the situation by law. For valid "written" declarations it is sufficient to comply with the requirement of textual form. A letter signed in person is not necessary.

### **Legal assessment: What you should keep in mind**

For the legislator the change from the written form to the textual form in § 309 nr. 13 GCC n.v. is only of a clarifying nature. Employers however must review their standard employment contracts at the latest by 1 October 2016 as to which form of the declaration they request from the employee.

### **I. Necessary revision of contractual cut-off periods**

The new statutory provision also has an effect on cut-off periods which almost every standard employment contract contains. Cut-off periods aim to swiftly clarify claims arising from the employment relationship. Two-stage cut-off periods are usual in employment contracts and collective bargaining agreements. In the first stage

both parties must assert to the contractual partner their (alleged) claims within a certain time limit. Three months is reasonable in this connection. The claims are extinguished after the expiry of the time limit. In the (optional) second stage the claims must be filed in court if the contractual partner rejects the claims or does not respond within a time limit.

For cut-off periods in employment contracts an employer must adjust the form of notifications in the first stage. The clause can no longer validly require of the employee the "written assertion" of alleged claims.

## **II. Time window until 30 September 2016**

The stricter requirement in § 309 nr.13 GCC n.v. only applies to contractual obligations which arise after 30 September 2016 (Article 229 § 37 Introductory Act to German Civil Code n.v.). Employment contracts which have been concluded by that date do not have to be revised by the employer.

It is however an open issue whether the jurisprudence will not also assess subsequent changes of existing employment contracts as newly created contractual obligations. For the purpose of certainty, the employer should treat each contractual change starting from 1 October 2016 as a new conclusion of the contract.

## **III. Dual disadvantage in the event of a lack of adjustment**

If the employer does not adapt his future contract template, he faces a dual disadvantage in the case of cut-off periods. Their previous usual wording conflicts with § 309 nr. 13 GCC n.v.. The contractual extinguishment mechanism is invalid. For that reason employees can subsequently assert their claims and file them in court up to the three-year limit of the statutory limitation period.

Own claims of the employer however continue to be extinguished after the expiry of the contractually stipulated time limit if the employer does not assert them before then in writing to the employee. The employer may not have recourse to the invalidity of clauses which are detrimental for him. He is bound by what he included in the pre-formulated employment contract.

## **IV. Written form clauses / collective bargaining cut-off periods / notice of termination**

The new statutory provision does not have any effect on written form clauses in employment contracts according to which additions and changes to the employment contract are only possible "in writing". § 309 nr. 13 GCC n.v. does not apply for the form of declarations through which parties conclude (additional) contracts, but rather only for declarations through which the parties protect their rights. As long as the employer clarifies that individual agreements always have priority, he can continue to request the statutory written form for contract changes. Similarly, cut-off periods in collective bargaining agreements are invalid if after 1 October 2016 they require the assertion of claims "in written form". The collective bargaining parties are not bound by rules for standard business terms such as § 309 nr. 13 GCC n.v..

For the widely used employment contract clause according to which terminations may only be issued in writing, the legislative change also has no effect. Through the clause the employer only repeats the written form requirement in § 623 GCC which applies for terminations and termination agreements. In order that termination notices and termination agreements are valid, the strict statutory written form in §§ 126, 126a GCC remains in place, which as a rule require an original signature in person for the declaration(s) of the parties.

An employer must overcome many obstacles in order to validly formulate his employment contract clauses. Through § 309 nr. 13 GCC n.v. the legislator sets up an additional obstacle. New employment contracts should clarify starting from 1 October 2016 that the employee can also make certain declarations in textual form, but that for other declarations the employee must continue to comply with the written form. Primarily contractual cut-off periods should therefore be revised.

Sincerely,

**CMS Hasche Sigle**  
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