Jobg8 Summit

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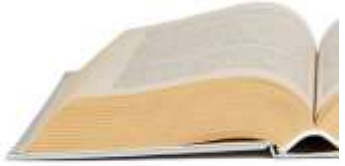
Overview – Legal Update on Labour Law in Europe and Germany

I. The New German Labour Leasing Act
II. Differentiation Between Freelancing And False Self-Employment
III. Impact of EU General Data Protection Regulation (GDPR)
IV. The New Transparency on Remuneration Act
V. Reform of the Maternity Protection Act
VI. Potential Effects on Labour Law in Germany After The Elections of 2017
VII. The Reform of the Labour Market in France
VIII. The “Taylor Review “ into Modern Work Practices in the UK

I. Labour Leasing - Definition

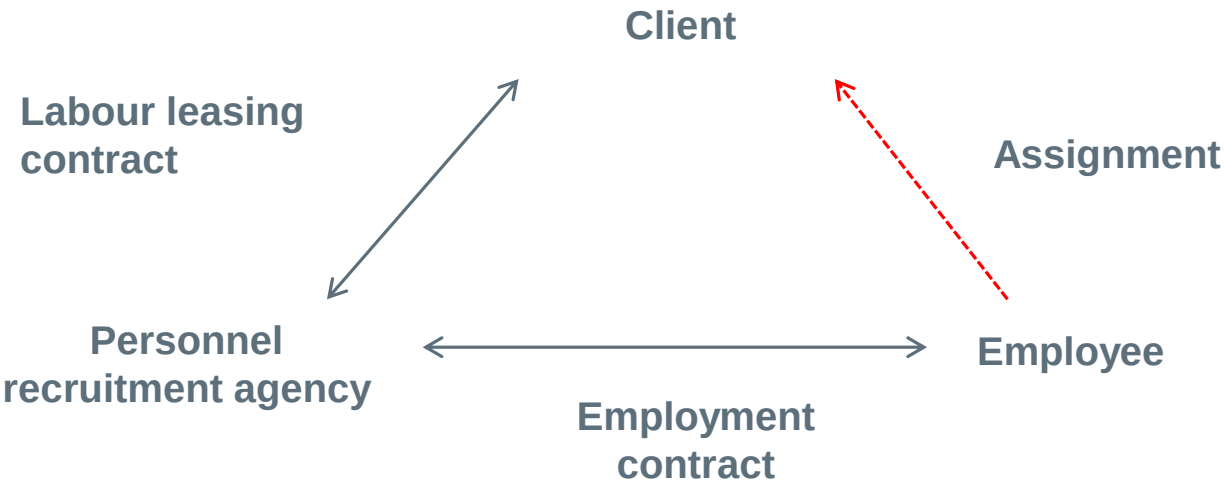
- Labour leasing is the temporary leasing of an employee to work at the business of a third party, i.e. the “hirer”.
- The terms “**temporary work**” or “**agency work**” are often used instead of the term “labour leasing”.
- In the case of labour leasing, the location of the employment contract is different from the location where the work is performed because the leased employee has an employment contract with the “agency” but works at the “hirer”.



I. Labour Leasing – Forms of Deployment of Specialised Personnel by Agencies

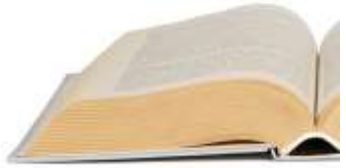
- In practice essentially three methods have been established by which recruitment agencies can legally deploy specialised personnel to other companies:
  - Permanent personnel placement, whereby the client requires personnel on a permanent basis and such personnel is recruited for the client (**NO** labour leasing);
  - The agency assigns specialised personnel employed by the agency to a third party, and thus leases such personnel to the third party (**labour leasing**);
  - Specialised personnel is assigned to the client on a freelance basis (**NO** labour leasing).

I. Labour Leasing – Labour Leasing Contract



I. The New German Labour Leasing Act – Legislative Procedure

- After a comprehensive reform process, the German Federal Parliament (*Bundestag*) adopted the “Draft Law amending the Labour Leasing Act and other Acts” (Bundestag printed paper no. 18/9232) on 21 October 2016.
- After a long dispute, the Law updating the legislation on labour leasing and contracts for work and services now applies as of **1 April 2017**.
- On the one hand, the aim of the amendment was to maintain labour leasing as a flexible instrument for using personnel. On the other hand, it should be ensured that labour leasing only serves to meet a temporary demand for personnel.



I. The New Labour Leasing Act – Main aspects

Maximum Leasing Period

- Temporary employees may not be leased to the same client for more than **18 months**.
- After 18 months at most, the leased employee must be removed from his assignment at the hirer.
- If the maximum leasing period is exceeded, the leased employee automatically becomes an employee of the hirer (**fiction of employment relationship**)

Employee's Right to Object Fiction of Employment

- of the contractor should, however, have the possibility to insist on the continuation of their employment relationship with the contractor by way of a so-called "adherence declaration"

I. The New Labour Leasing Act – Main aspects

Wages of Temporary Workers

- During leasing period, leased employees must generally be paid the same wages as employees in comparable positions at the hirer (i.e. **equal pay principle**).
- This does not apply if the agency applies a collective bargaining agreement for the temporary employment industry and the leased employee is therefore paid according to the collective bargaining agreement
- of 1 April 2017, agencies may only deviate from the equal pay principle during the first **nine months** of the assignment, so equal pay is mandatory as of the tenth month of the assignment
- Individual exceptions can be agreed in collective bargaining agreements, however, for a period of no more than **15 months**

I. The New Labour Leasing Act – Main aspects

Prohibition of Chain Leasing

- **Chain leasing**" exists if the agency leases the employees of a third party instead of its own employees.
- This is now legally prohibited and has serious legal consequences for the parties involved.
- Chain leasing is especially a problem that is often overlooked if contractors and subcontractors are involved on the basis of service contracts or contracts for work and services.

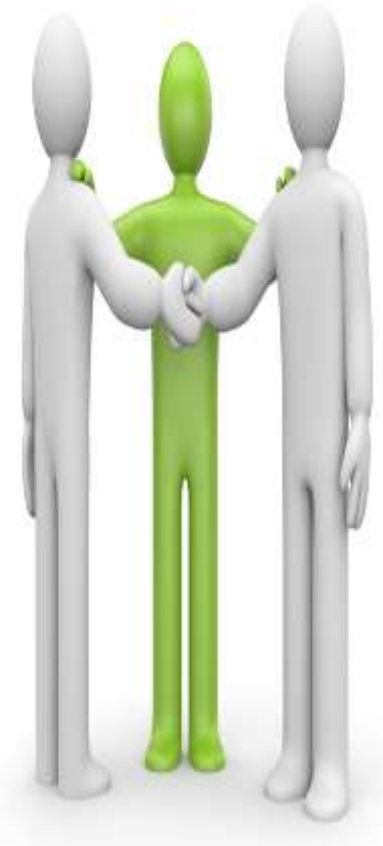
II. Differentiation Between Freelancing And False Self-Employment

Basis

- Certain specialists are required, but only offer their services as independent contractors on the labor market, not as regular employees.
- There is actually no way to “purchase” this expertise on the market in form of hiring temporary employees.
- Consequently, the only option is to choose self-employed experts to meet your needs.

Problem

If a Freelancer is integrated into business operations and receives instructions by the client, the contractual relationship may be classified as False Self-Employment



II. Differentiation Between Freelancing And False Self-Employment

❖ **Differentiating dependent employment and self-employment**

– The differentiation is of decisive importance for the obligation to pay contributions to social security and the application of statutory Labour Law provisions

– The characteristic of a self-employed (entrepreneurial) activity fundamentally distinguishes the freelancer from a personally-dependent employee who performs his/her services in the context of an employment relationship with a third party's organization.

– Employees perform their services directed by the orders of others and differ from self-employed in that they are bound by directives.

II. Differentiation Between Freelancing And False Self-Employment

❖ **The Freelancer‘s remuneration as a criterion**

– Decision of Federal Social Court (BSG) of 31 March 2017 – B 12 R 7/15 R – **Basic content:**

– In the context of an overall weighing of all circumstances for differentiation between employees and freelancers the paid fee is of special importance

– where the agreed fee is significantly higher than the salary of a comparable employee subject to social security contributions, this is an important indication of self-employed activity

– First (false/overhasty) reaction of the branch: assumption of self-employment being acquired by simply agreeing a “fee serving for self-provision”

II. Differentiation Between Freelancing And False Self-Employment

❖ **The Freelancer‘s remuneration as a criterion**

– Decision of Federal Social Court (BSG) of 31 March 2017 – B 12 R 7/15 R – **Impact of the decision:**

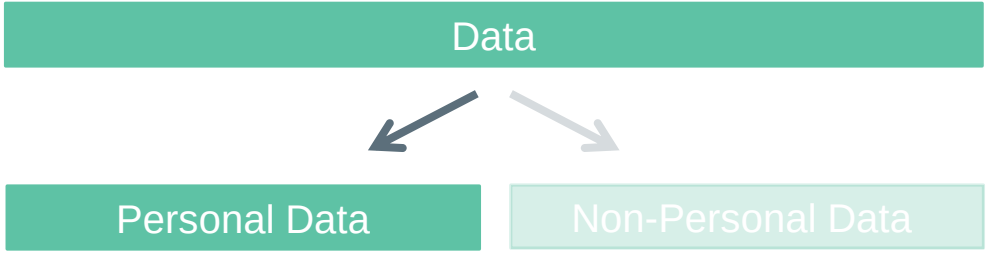
– amount of remuneration paid is now to be taken into account as, but still necessary is an overall weighing of all circumstances

– the payable fee is only an additional criterion to the existing catalogue of circumstances previously recognized (e.g. the employer’s right of direction, no freedom to dispose of own working capacity)

– comprehensive assessment has to conclude that the characteristics speaking for self-employment (including comparably higher remuneration) predominate

III. Impact of EU General Data Protection Regulation (GDPR)

❖ Application only to „personal data“



- What is Personal Data?
  - According to the GDPR: “***Any information relating to an identified or identifiable natural person.”***
- Examples:
  - Name, address, phone number, credit card data, social security number.
  - But also potentially: IP and device addresses, cookies, browser-fingerprints, mobile phone data, products with RFID chips.

III. Impact of EU General Data Protection Regulation (GDPR)

❖ Organizational requirements

- **Data Breach Notifications, Art. 33, 34**
  - The supervisory authority shall generally be informed within 72 hours.
  - In case of high risks data subjects will have to be informed without undue delay.
- **Implementation of Technical and Organizational Security Measures, Art. 32**
  - Appropriate and reasonable state of the art technical and organizational measures must be implemented.
- **Privacy by Design and by Default, Art. 25**
  - Implementation of appropriate technical and organizational measures to ensure data-protection principles, (e.g. pseudonymisation, data mimisation)
- **Information rights, Art. 12-14**
  - Transparent and much broader notice than before must be provided to data subjects

III. Impact of EU General Data Protection Regulation (GDPR)

❖ Material requirements of data processing

- **General requirements**
  - Processing of personal data will require either valid data **subject consent** or a **legal justification.**
  - **Depending on the specific countries, interpretation of data protection obligations will change dramatically**

- **Consent:**
  - Higher requirements than before.
  - Must generally be “opt-in”, not implicit.
  - Problem: Is a consent in the workplace voluntary?

IV. The New Transparency on Remuneration Act

❖ **Main objective:** enforcement of women‘s right to equal remuneration

- **Social Background of the Law**
  - **Existing gap of remuneration between men and women in comparable positions of approximately up to 21 %**
- **Commencement of the Law**
  - **Act entered into effect as of 6th July 2017**
  - **Application of the Act after a transition period as of 6th January 2018**
- **Main regulations:**
  - **Individual right to information on remuneration structures of female employees in companies with more than 200 employees**
  - **In companies bound by collective bargaining agreements the right to information is be exercised by works councils**

IV. The New Transparency on Remuneration Act

- **Main objective:** enforcement of women‘s right to equal remuneration

- **Main regulations:**
  - **Introduction of operational procedures for the verification of equal pay in private companies of more than 500 employees**
  - **such companies with more than 500 employees are encouraged to regularly check their remuneration structure on compliance with the equal pay requirement using company audit procedures**
  - **Introduction of reporting obligations in companies with more than 500 employees including the report on measures taken in the company concerning general equality and equal pay for women**

IV. The New Transparency on Remuneration Act

- **Main objective:** enforcement of women‘s right to equal remuneration

- **Criticism:**
  - **The Law creates a very high bureaucratic burden**
  - **The main objective of equal remuneration may not be reached because of remaining loopholes I the law**
    - **e.g. pursuant to section 7 of the Act the obligation of equal pay only applies if work performances are either the same or equivalent**
    - **This equivalence may be avoided if job advertisements specify the different position individually and in detail**

- **Recommended Action**

Employers concerned should prepare themselves with due care especially to fulfill their obligations of information and reporting

V. Reform of the Maternity Protection Act

- **Commencement of the Law**
  - Application of the Act after a transition period as of 1st January 2018
- **Main regulations:**
  - Remuneration
    - No changes with regard to the remuneration during the periods of maternity leave
    - The reimbursement system of the Employer's financial expenses apportionment procedure is maintained
  - Field of Application
    - Maternity Protection Law will be applicable also to such Managing Directors, who hold no or only the minority of shares of the company (implementation of ECJ-jugdement "Danosa")
    - Application also on trainees, apprentices, volunteers, trainee-like persons

V. Reform of the Maternity Protection Act

- **Main regulations:**
  - **Health Protection Regarding Working Hours**
    - New Law shall grant pregnant nursing women the opportunity to arrange their work more flexibly.
    - In particular, there should be no work prohibitions against the will of pregnant women except for periods of protection before and after birth (employment bans).
    - The reform of the law therefore stipulates a liberalization with regard to overtime hours and night employment as well as employment on Sundays and public holidays
  - **Restrictions on Dismissal**
    - General principle of the prohibition of dismissal of pregnant women is maintained
    - Prohibition of dismissal shall also include preparatory measures of the employer after the reform
    - What preparatory measures are included remains unclear

V. Reform of the Maternity Protection Act

- **Main regulations:**
  - **Additional obligations for the employer in occupational health protection**
    - **Employment ban according to health protection only possible as *ultima ratio* after the reform to prevent discrimination against pregnant women in working life.**
    - **Priority on the Employers obligation to redesign workplaces of pregnant women to avoid adverse effects on health**
    - **Only if an “irresponsible danger” to the pregnant or breastfeeding woman can not be avoided, an employment ban may be taken into consideration**
- **Conclusion:**
  - **In particular, the expansion of the protected group of people and the redesign of occupational health protection may create new challenging effects for companies**
  - **the term "irresponsible danger", which is unknown for occupational safety and health law, creates legal uncertainty and opens up scope for interpretation**

VI. Possible Effects on Labour Law in Germany after the Elections of 2017

Facts on 2017's Elections

- Both governing parties lost a lot of votes
- Labour Party decided not to be part of a New Government but to join the Parliamentary Opposition
- Actually the only conceivable option for a Government seems to be a coalition of three parties, namely
  - The Conservative Union Party of Chancellor Merkel
  - The Liberal Party
  - The Green Party
- At the moment the potential so-called "Jamaica-Coalition" is holding first exploratory talks prior to the opening of real coalition negotiations

VI. Possible Effects on Labour Law in Germany after the Elections of 2017

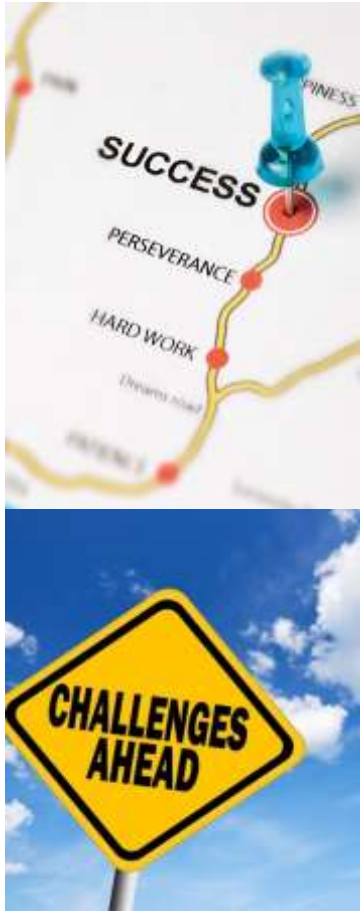
Possible Effects on Labour Law

- It may be expected that the new Government may take position with a more liberal and less socially orientated position
- The fact that the Federal Ministry of Labour And Social Affairs will no longer be led by a member of the Labour Party and that the Liberal Party will be part of the new government may result in a decrease of new restrictions on Employers
- The influence of Employer's Associations may increase

VII. Reform of the Labour Market in France

Background and objective of the reform

- The reform of the labour market in France is the most important and at the same time most controversial project of the new head of state Emmanuel Macron
- On 31 August 2017, Prime Minister Edouard Philippe and Labor Minister Muriel Pénicaud presented the long awaited details of the **5 regulations** with a total of **36 measures** created in a fast-track procedure to reform and modernize French Employment and Labour Law
- Main objectives of the planned labour market deregulation are to **reduce unemployment** and **strengthen the French economy**
- Reform came into effect on 22 September 2017



VII. Reform of the Labour Market in France

Main regulations

- Fewer institutions of employee representation

- Previously existed 3 institutions of employee representation in a company, divided in
  - Staff committee (mandatory in companies of more than 11 employees)
  - Enterprise committee (to be elected in companies of more than 50 employees)
  - Committee on occupational hygiene, occupational safety and working conditions (mandatory in companies of more than 50 employees)
- After the reform the aforementioned committees will be merged to one single “Social and Economic Committee” in all companies with at least 11 employees
- This shall simplify the cooperation between Employer and the employee’s representatives

VII. Reform of the Labour Market in France

Main regulations

- Simplification of dismissal for operational reasons

- Previously internationally active Group companies were only allowed to dismiss employees for operational reasons if the business concerned was in economic difficulties throughout the whole Group, including business in countries outside of France.
- In practice, this considerably impeded dismissals for operational reasons in international group companies
- The reform removes this restriction, hence in the future, a company will only have to prove a difficult economic situation in France.

- Standardization of periods for dismissal protection

- Previously the periods varied between 12 month and 2 years according to the reason for dismissal
- After this reform the period is equally 12 month

VII. Reform of the Labour Market in France

Main regulations

- Legal Restriction of the amount of compensations

- Previously the amount of a compensation and the criterions for a calculation in case of a successful dismissal protection at the Labour Court were not legally regulated
- The Labour Judge determined the amount of the compensation at his own discretion
- After the reform the compensation for unjustified dismissal
  - is restricted to one month's salary (or 0.5 monthly salaries in companies 11 employees or less) if the employee is employed in the enterprise for less than 1 year
  - and may not exceed 20 months' salary for a period of employment of 29 years and more
- The legal compensation (payable also in case of justified dismissal is increased from 20% to 25% of a monthly salary per year of employment

VII. Reform of the Labour Market in France

Main regulations

- Introduction of “dismissal plans”

- After the reform, so-called "plans of voluntary departure” may be concluded by mutual agreement between employer and employees as a company agreement.
- This option is introduced to allow employees voluntarily to terminate the employment for the respective payment of a compensation

- Relaxation of regulations on fixed-term work

- Previously French Law only allowed a maximum duration of fixed-term contracts of 18 month (including 2 extensions)
- After the reform the parties of collective bargaining agreement may deviate from these strict legal requirements, e.g. by increasing the maximum fixed-term period or allowing further extensions.

VII. Reform of the Labour Market in France

Main regulations

- Strengthening of negotiations on company level

- With the reform the importance of bargaining agreements is increased
- Regulations on the distribution of working time and work organization, on safety regulations and on the composition of wages may be negotiated far more often on company level (previously this was very limited)
- Bargaining agreements may be concluded also in smaller companies, even if there are no trade union representatives (which is very often the case in France).
- The provisions of such a works agreement take precedence over the employment contract regulations and an employee's refusal of the accept the provisions may result in dismissal
- Companies with fewer than 20 employees may directly negotiate with trade unions on all tariff issues with the prior consent of their employees

VIII. “Taylor”-Review into modern working practices

Background and main objective

- On 11th July 2017 Prime Minister Theresa May and her counsel Mathew Taylor presented the so-called “Taylor Review”, a pathfinding report on prosepective employment strategy in the UK
- This opinion paper outlines the current position of the British gouvernment with regard to the organization of work and employment in the future
- Instead of a radical reform for employment relationships, an approach to realize "good work“ is adopted
- Main intention is to modernize the British understanding of a worker as a "dependent contractor" in order to better meet the requirements of flexible work patterns in the age of “The Forth Industrial Revolution”
- With the realization of a "good labor market“, international investment in the UK shall be promoted and conflict potential with EU labor law standards shall be decreased

VIII. “Taylor”-Review into modern working practices

Direction of travel: a distinctive British strategy

- With Brexit, there is a pressing need to think ahead of the curve and set out a sustainable approach to the Fourth Industrial Revolution.
- With the realization of a "good labor market“, international investment in the UK shall be promoted and conflict potential with EU labor law standards shall be decreased
- Retaining and modernizing the UK’s distinctive worker status with the “dependent contractor” tag may help the UK provide a good labour market to compete for international investment, without risking European trade sanctions for undermining EU rules or worker rights.
- The report recommends a focus on control as a clean way to measure who is a “dependent contractor”.
- Rights would not be removed or increased – there would be a series of measures aimed to provide clarity

VIII. “Taylor”-Review into modern working practices

Applying the law

- Since most businesses value certainty, there are long term gains from providing written terms to contractors, and to employees
- The proposals call for free, non-binding, status guidance to be provided online
- Employment tribunals will provide more clarity through early hearings without delay, while still letting models be tested if litigation is necessary
- The current low level of employment tribunal claims is likely to be maintained, even if tribunal fees are ultimately reduced (a measure outside the scope of the Taylor Review).

VIII. “Taylor”-Review into modern working practices

Participation

- The Taylor Review argues for greater feedback and engagement practices but contains no strong proposal for union rights
- It proposes lower thresholds for workplace councils (just 2%, not 10%, of employees would need to consent), which could more easily affect businesses of hotels, fulfilment centres and the public sector

Pay, rights and remedies

- Rolled up holiday pay (an allowance paid in addition to wages, rather than specifying the number of days which the individual is entitled to take as paid holiday), is currently unlawful under EU law
- The report proposes that dependent contractors would be entitled to rolled up holiday pay, meaning that an additional of 12.07% could be added to each pay packet instead of holidays.

VIII. “Taylor”-Review into modern working practices

Pay, rights and remedies (continuation)

- The right to paid holiday is a health and safety measure, so checks would have to be put in place to prevent dependent contractors from working 52 weeks of the year
- Agency workers would have the right to request engagement with the end-user, and zero hours workers would have the right to request fixed hours – in each case after 12 months of service
- Separately, it is proposed that HM Revenue & Customs should add holiday pay (for the lowest paid workers only) to its existing duty to enforce the national minimum wage and statutory sick pay, as well as a new obligation to stamp out exploitative unpaid internships.

VIII. “Taylor”-Review into modern working practices

Health and Happiness

- Quality work is strongly linked to better health outcomes for individuals
- The report somehow adopts an approach (more common in the US), with greater roles for city mayors and local organizations to take responsibility for health at work
- Proposals about social security benefits show a direction of travel towards reducing the difference between the treatment of the employed and the self-employed
- Statutory sick pay and holiday pay (at present not available to the very lowest paid), shall become a day one right under the report accruing according to length of service
- Employees absent due to a long period of illness shall have a right to return to the same job (similar to those on family leave)

VII. Your Questions Please

Your Contact

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> **Labour and Employment Law**

As a specialist lawyer for labour and employment law, Sebastian Buder has been advising national and international enterprises on all issues relating to individual and collective labour law for more than 12 years. One particular area of his focus is advising domestic and foreign personnel service providers/companies in the recruitment sector on matters pertaining to labour law, social security law and civil law. He specialises in designing the contractual and actual structure for using flexible personnel reserves (freelancers, contractors, contracts for work and services, temporary employment).

Sebastian's work additionally focuses on providing structural advice during the implementation of all types of restructuring measures (including all issues relating to transfers of businesses and outsourcing) as well as so-called post-merger advice, i.e. the integration of various personnel structures after completion of a transaction.

He regularly represents employers before the labour courts of the first and second instance as well as before the Federal Labour Court. His practice especially also includes negotiating with works councils and trade unions.

Sebastian Buder studied law at the Freien Universität Berlin and also took the second state examination in law in Berlin. He obtained his doctorate of law (*Dr. jur.*) in 2002.

Prior to joining TaylorWessing, he worked at a leading US law firm in Berlin and Frankfurt am Main, where he was also a partner as of 2012.

He publishes articles and gives presentations on various areas of employment law on a regular basis. He is a frequent speaker at events held by APSCo.

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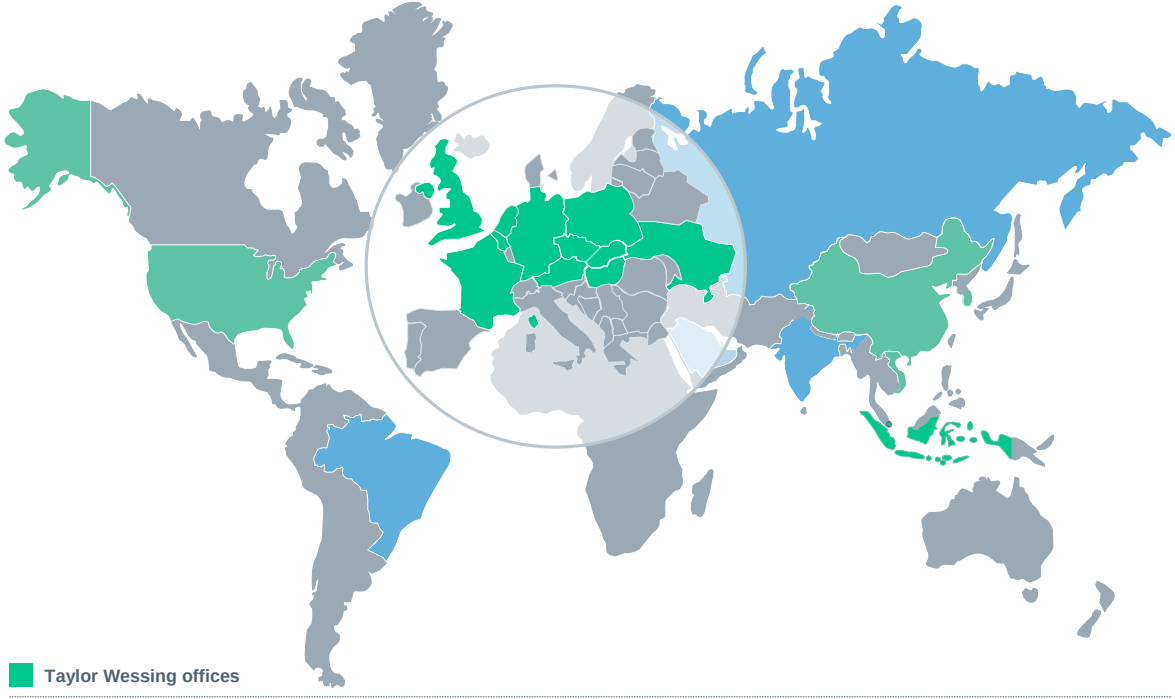

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