
Ramifications of German Court of Appeals Judgment on an Employer's Code of Ethics

2006-01-30

In our email alerts of [July 18, 2005](#), and [August 1, 2005](#), we reported on the decision of the Local Labor Court of Wuppertal, Germany, concerning Wal-Mart's Code of Ethics. We have now received a copy of the judgment of the Labor Court of Appeals of Düsseldorf—dated November 14, 2005—in this case. This judgment largely confirms the local court's decision and limits the ability of an employer to implement an ethics code without first consulting with the works council—a process known as "co-determination" in Germany. Under German law, all general rules governing the conduct of employees in the workplace (*Ordnungsverhalten*) must be agreed upon by the works council. By contrast, employers are generally free to impose rules about work performance (*Arbeitsverhalten*) without prior consent by the works council.

Both decisions in the *Wal-Mart* case send a mixed message to US employers. The local and appeals courts both established that many typical provisions contained within US codes can be introduced without the consent of the works council. In Wal-Mart's case, these include code provisions on financial integrity and accounting; insider trading; confidentiality and trade secrets; supplier/customer relationships; antidiscrimination; and the use of the employer's property, as well as—according to the appeals decision—press releases and statements to the media and access to employee files. However, several other typical provisions need to receive the consent of a company's works council before they become binding on employees. These include code provisions on whistleblowing; anonymous telephone hotlines; acceptance of donations and gifts; sexual harassment; alcohol and drug abuse; and—according to the local court decision—inappropriate behavior and romantic relationships.

In addition, US companies should be aware that some of these provisions—such as whistleblowing obligations and rules on private and romantic relationships with fellow workers; behavior outside the workplace; and disclosure of family members' occupation and financial investments—may infringe German employees' "personality rights" (including rights to data protection), and may therefore be unenforceable even if the works council consents. In particular, the Labor Court of Appeals has held that Wal-Mart's code provisions on inappropriate behavior and romantic relationships between employees violate German constitutional law because they infringe the employees' "personality rights" and "rights of human dignity". Therefore, it has declared these

provisions of the code void, a co-determination right of the works council notwithstanding.

The decision of the German labor court of appeals is open to appeal to the Federal Labor Court by both parties in the *Wal-Mart* case. Such an appeal could take 18 months or more to determine. In the meantime, companies wishing to introduce codes of ethics in their EU operations need to be highly attuned to local law and practice. For example, the French Data Protection Authority (CNIL) has recently come out, in two specific cases, against the use of anonymous employee hotlines for reasons of individual data protection, and—on November 10, 2005—issued general guidelines on whistleblowing systems. However, the UK Information Commissioner has so far taken a much more relaxed approach.

Codes of ethics are a fact of life for US companies after the Sarbanes-Oxley Act. The employment lawyers in our European offices have extensive experience advising on the implementation of these codes and can help companies steer a path through the minefield of regulation, identify those areas where prior consultation will be required, and develop negotiation strategies to try to secure works council consent where needed.

For more information on this or other labor and employment matters, please contact the authors listed above.