GLI GLOBAL LEGAL INSIGHTS

Employment & Labour Law

2021

Ninth Edition

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glg global legal group

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Germany

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General labour market and litigation trends

In 2020/2021, the German labour market and German labour law, like all public life and other areas of law, were under the impact of the COVID-19 pandemic. In the labour market and in labour law, the pandemic reinforced a development that is in any case at the centre of developments in labour law: digital and mobile working, especially in its manifestation of working from home.

a) Core development: remote and digital work

The pandemic has forced companies that have so far remained rather distant from digital and mobile working to enable it. Legislators, too, were effectively forced to address changes in the law that had been on the table and long demanded, at least temporarily. After the first lockdown in March 2020, most companies were forced to enable their employees to work from home digitally. Most companies organised under private law implemented this in a remarkably short time. Many public authorities and institutions organised under public law followed suit in the course of 2021.

In October 2020, the Federal Ministry of Labor and Social Affairs (BMAS) presented a draft bill on mobile work, which provided a right for employees to work from home for 24 days a year. After this draft law was stopped by the Federal Chancellery, a new draft was published in January 2021. Instead of a right to work from home, this draft provides for a negotiated solution, according to which the employer must discuss an employee's request for mobile work. In case of a (timely) refusal to negotiate, mobile work should be deemed to be established according to the employee's wishes by law. The draft bill has not yet been adopted and is still subject to political discussions.

However, as part of the COVID-19 legislation and an occupational health and safety ordinance, the German federal legislature then obliged employers to allow their employees who perform office work to work from home if there are no compelling operational reasons to the contrary. As part of an amendment to the Infection Protection Act, this obligation was incorporated into German federal law for a limited period until June 30, 2021, and supplemented to the effect that employees must accept the offer to work from a home office if there are no reasons to the contrary on their part. It is to be expected that even after the pandemic has subsided and these legal regulations have expired, many companies will continue to offer their employees the opportunity to work from their home offices. The factual situation of the past year, in which hundreds of thousands of employees successfully worked from home offices, will not be reversed. Rather, it is to be expected that even traditional companies and public authorities, which have been skeptical of the home office up to now, will enable their employees to work remotely, at least in part, in the future.

Of course, the pandemic has also revealed the downsides of remote working: many employees are now increasingly complaining about the physical distance between them and their colleagues. Companies must make greater efforts to counteract this alienation and offer solutions. The first companies have already created the position of a manager for remote working.

b) Court proceedings and conciliation bodies
It has also been made easier to hold court hearings and conciliation board proceedings by video. For example, honorary judges can be called in by video. The legal framework is therefore in place to ensure social distancing in court proceedings and conciliation proceedings as well. However, it has become apparent here that the vast majority of judges are unable to keep pace with developments in the rest of society. Throughout 2020, many court hearings were cancelled in many places and judges were unwilling to make use of the opportunities created by the law. In many places, there were complaints that even when judges were informed about the legal innovations, they did not make use of them but vehemently rejected them. It will presumably take a few years before the new reality has also arrived in the courtrooms.

c) Crowdworking
Another more recent form of work, crowdworking, was the subject of a supreme court decision by the Federal Labor Court (*Bundesarbeitsgericht*; "BAG"). The activity of crowdworkers, who mostly obtain their orders via internet platforms (crowdsourcers) that make these orders available to all registered users of the platform, was previously considered self-employed. Specifically, the dispute involved the user of the defendant crowdworking platform, which specialised in checking the presentation of branded products in retail stores and gas stations on behalf of its customers. The platform had this verification activity carried out by crowdworkers, with each of whom it concluded a basic agreement applying general terms and conditions. The crowdworkers, including the plaintiff, take photos of the product presentation for the defendant and answer questions about the advertising of products. As soon as a crowdworker accepted such an individual order, he or she had to regularly complete it within two hours and according to precise specifications provided by the defendant. Successfully completed orders also led to a credit of "experience points" in favour of the respective crowdworker, which from a certain level enabled him to accept several orders at the same time and thus effectively increase his own hourly wage. The plaintiff carried out 2,978 orders within 11 months before the defendant informed him that it would not offer him any further orders. After an overall assessment of the circumstances, in particular, the organisational structure of the defendant, the court came to the conclusion that the contractor was not free to organise his activities in terms of place, time and content and thus performed work in a manner typical of employees, bound by instructions and determined by others in personal dependence. It therefore considered the crowdworker to be an employee.

Redundancies, business transfers and reorganisations

The COVID-19 pandemic has led to many insolvencies, particularly in the retail and tourism sectors. This led to employee layoffs. Even companies that were not affected by insolvency carried out redundancies as turnovers went down.

Further, redundancies were avoided thanks to a generous German social security policy. In 2020, the German Federal Employment Agency granted short-time working allowances on an unprecedented scale. Provided that jobs can be preserved in perspective, the Federal Employment Agency granted short-time allowance to employees who cannot be employed or cannot be fully employed. The allowance is usually 60% of the usual net salary, or 67% for

employees with children. During the COVID-19 pandemic, these amounts were increased to 80% and 87%, respectively, from the fourth month onwards, so that even employees who could not be employed at all by their employers due to the pandemic, for example in the hotel and catering industry, and who would therefore normally have been at risk of loss of pay or unemployment, hardly suffered any financial loss.

The requirements for receiving short-time allowance were also significantly eased, so that many companies that would otherwise not have been able to receive short-time allowance could receive it during the pandemic. This affected the advertising and event industry, for example, but also temporary employment.

According to the established case law of the BAG, employers were previously obliged, in the event of a partial transfer of a business and the closure of the remaining business, to carry out a business-related social selection in the context of the closure-related dismissals. Consequently, all comparable employees of the business as a whole were to be included in the selection decision, i.e. also the employees assigned to the transferred part of the business. However, in decisions dated February 27, 2020 and May 14, 2020, the 6th and 8th Senate of the BAG have now made it clear that, against the background of the mandatory nature of Section 613a (1) sentence 1 of the German Civil Code (*Bürgerliches Gesetzbuch*; "BGB") and the case law of the European Court of Justice (ECJ) on Directive 2001/23/EC, according to which the protection of the latter applies – exclusively – to the employees employed in the part of the business being transferred, the requirement of establishment-related social selection is no longer to be adhered to in the future. In this respect, the BAG clarifies that only the employment relationships of the employees assigned to the transferred part of the business are transferred *ipsu iure* to the acquirer. A lack of assignment of the employee cannot be substituted by a company-related social selection, and certainly not by a subsequent social selection. Against this background, the requirements for the formation of business units in the context of M&A sales have changed considerably.

Business protection and restrictive covenants

Since the Trade Secrets Act came into force on March 31, 2019, which is based on the corresponding EU Directive of 2016, companies regulate the obligation to maintain confidentiality about certain aspects in much greater detail and scope than was the case before the Act came into force. The awareness of having to do everything necessary to protect trade secrets has grown. The level of detail of confidentiality agreements used today sometimes extends into the area of post-contractual non-competition agreements, which under German law can only be executed against payment of a waiting allowance amounting to 50% of the last remuneration received and for a maximum period of two years after the end of the employment relationship. Confidentiality obligations usually apply for an unlimited period after termination of the employment relationship. Only those secrets that are not already accessible and known to the respective group of addressees can be protected.

Discrimination protection

The labour court jurisdiction in Germany remains strict when employers commit errors in job advertisements and the application process. Employers continue to be punished for negligence in the application process. In a ruling of January 23, 2020 (8 AZR 484/18), the BAG most recently ordered the state of North Rhine-Westphalia to pay compensation under Section 15 (2) AGG because it had not even invited an applicant to an interview who was not obviously unsuitable from a technical point of view and who had the same status as a severely disabled person.

The labour courts also continue to deal with alleged discrimination against part-time employees, particularly with regard to compensation issues. In this regard, the German BAG recently submitted a reference for a preliminary ruling to the ECJ, as in its view collective agreement provisions that make additional remuneration dependent on the same number of working hours being exceeded without distinguishing between part-time and full-time employees raise questions on the interpretation of EU law (BAG, ruling dated November 11, 2020 – 10 AZR 185/20). In essence, the question referred for a preliminary ruling is primarily about which method is to be used to determine whether discrimination has in fact taken place or not.

It was also the ECJ that most recently found in its ruling of November 18, 2020 (C-463/19) that additional leave under collective agreements following the statutory maternity protection periods may be reserved exclusively for women under certain conditions. In any case, this does not constitute impermissible discrimination against men if the special leave thereby serves the special protection of female employees with regard to the consequences of pregnancy or their maternity.

With regard to application procedures, ways and means of making them anonymous are increasingly being discussed. German lawmakers have not yet been able to bring themselves to create legal requirements in this regard; instead, the focus is still on voluntary action and convincing companies. In German practice, however, certain IT providers are already working on digital filters to minimise the effort required by employers to anonymise applications, for example by automatically making the applicant's profile picture unrecognisable and reducing the name to just the initials.

Protection against dismissal

The German Dismissal Protection Act (*Kündigungsschutzgesetz*) grants extensive protection against unfair dismissal for employees of companies with more than 10 employees in Germany. In principle, protection against dismissal only exists after six months of employment. In general, only "socially justified" dismissals are lawful if employees are under protection against dismissal (section 1 *Kündigungsschutzgesetz*). A dismissal is socially justified if the dismissal is due to the employee's person or conduct or if there are urgent operational requirements. In the event of a conduct-related dismissal, the dismissal in general is only effective if the employer has previously effectively warned the employee for a similar conduct.

The dismissal of employees with special protection against dismissal such as pregnant women, employees on parental leave or severely disabled persons is extremely challenging since the dismissal is null and void in these cases without the prior consent of the competent authorities.

Furthermore, the protection against dismissal is only granted to "employees", meaning persons who are regularly integrated into the operational processes of the company and are bound by its instructions, but not to self-employed freelancers or other third parties who work on the basis of other contractual relations outside of an employment relationship. In this context, it is not decisive how the parties classify their contractual relationship. It is decisive how the contractual relationship has been put into practice on a regular basis.

Whether an employment relationship in this sense and thus unfair dismissal protection exists was also the subject of various decisions by the BAG in 2020. Besides this, there have not been many outstanding new developments in the jurisprudence on protection against unfair dismissal in the previous year.

Nevertheless, the BAG has continued its case law with regard to pregnant women whose special protection against dismissal goes even beyond that of the above-mentioned Dismissal Protection Act. According to section 17 of the Maternity Protection Act (*Mutterschutzgesetz*), the termination of a woman's employment by the employer during a pregnancy and until the expiration of four months after delivery is only possible in absolutely exceptional cases and upon prior consent of a specific authority. According to a ruling of February 27, 2020 (2 AZR 498/19), this special protection even applies in the period between the conclusion of the employment contract and the start of employment. In this context, the court argued that the purpose of the special protection is to comprehensively protect the pregnant woman against the loss of her job. This justifies special protection against dismissal even before the beginning of the work.

According to a verdict from the Regional Labor Court Baden-Württemberg from September 17, 2020 (17 Sa 8/20), a termination for cause with immediate effect can be lawful if an employee deletes data to a considerable extent (here: 7.48 BGB) from the employer's server following a personnel interview in which the employer expressed the wish to part with the employee.

However, protection against dismissal also has its limits. In individual cases, even the theft of low-value items can result in termination without notice and without the need of prior warning. In this particular case, an employee had stolen a bottle of disinfectant. Even though the disinfectant was of particular importance to the employee against the backdrop of the rampant pandemic, the court followed previous case law on the theft of low-value goods from the employer and considered the termination to be justified (Regional Labor Court, *Landesarbeitsgericht, Düsseldorf*, January 14, 2021 – 5 Sa 483/20).

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

When will the obligation to record working time come into effect?

According to the decision of ECJ dated May 14, 2019, the Member States must obligate the employers to introduce an objective, reliable and accessible record of working time (ECJ, D. f. May 14, 2019 – C-55/18). Even almost two years later, the German legislator has still not implemented this ruling into national law. According to the Working Time Act, employers are still only obliged to record the working time exceeding eight hours per day. For employees working in the meat industry, the obligation to electronically record working time has been introduced with effect from January 1, 2021. At present, no draft bill even exists to implement the ruling, whilst the prevailing opinion is that without a national law, there is no direct obligation for employers to record working time. However, a local labour court has decided in two individual cases in favour of the employees which brought about individual payment claims against the employer, hereby arguing that the respective employer did not meet its legal burden of proof and presentation due to the absence of an existing system to record working time and relying on the ECJ verdict from May 14, 2019. Thus, courts begin to outrun the German legislator.

Current developments on the expiry of leave entitlements

This year, the ECJ once again must decide two fundamental questions on the expiry of holiday entitlements. According to the Federal Holiday Act, employees have statutory holiday entitlements of 24 days in a six-day week. In general, the holiday entitlement is limited to the current calendar year. If the holiday is not taken during the year, it expires. An exception does only apply in case it was not possible to take the holiday due to urgent

operational or personal reasons. In 2019, the BAG decided that another exception applies in case the employer did not inform the employee in good time of the impending expiry of the leave entitlement (BAG, D. f. February 19, 2019 – 9 AZR 423/16). Now, it has passed the follow-up question to the ECJ of whether holiday entitlements, which are not expired due to the lack of such information notice, are subject to the regular limitation period of three years (BAG, September 29, 2020 – 9 AZR 266/20 (A)).

The BAG passed the follow-up question of whether the employer must also inform long-term-ill employees who are not able to take holidays due to illness about the impending expiry or whether the holiday entitlement expires after 15 months even without such information, also to the ECJ (BAG, July 7, 2020 – 9 AZR 401/19 (A)).

Worker consultation, trade union and industrial action

Digital works council meetings & right of co-determination in the organisation of mobile work

According to German law, works councils must in principle still meet physically, and video or telephone conferences were prohibited for the purpose of discussing matters relating to works council constitution law and passing resolutions. Thus, up until the beginning of the COVID-19 pandemic, the Works Constitution Act (*BetrVG*) did not provide for a possibility of holding works council meetings virtually and valid resolutions required a majority of the votes of the members "present". This long-outdated regulation has been causing considerable problems for many companies for many years, as works councils are now frequently organised and staffed on a supra-local basis. For reasons of infection control, section 129 BetrVG was inserted in 2020 to make digital works council meetings possible, at least for a limited period of time – currently until June 30, 2021. The government draft for a Works Council Modernisation Act which should be entered into force in summer 2021 provides for the implementation of works council meetings by means of video and telephone conferences to be permanently anchored in law. If this law enters into force, virtual works council meetings will remain possible even after the pandemic, while maintaining the priority of face-to-face meetings. This would be an important step towards making works council work more flexible. In addition, the draft bill provides for an explicit co-determination right of works councils regarding the organisation of mobile work. Such regulation would clarify the currently disputed legal situation whether such right of co-determination exists.

Current decisions on the law on industrial action

In a decision from June 2020, the Federal Constitutional Court (*BVerfG*) confirmed the validity of section 11 (5) of the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*) which prohibits to make use of temporary workers as so-called strike breakers (BVerfG, O. f. June 19, 2020 – 1 BvR 842/17). According to this, employers may not make use of temporary workers if the company is directly affected by an industrial dispute. The BVerfG ruled that the standardised prohibition is compatible with the freedom of association pursuant to Article 9 (3) of the German Constitution (GG), as it provides freedom of association in a proportionate manner. Otherwise, the strike would lose its power of enforcement, as its consequences could be mitigated by the use of temporary workers.

Secondly, the BVerfG had to decide on a decision of the BAG from 2018. The BAG had ruled that trade unions also have the right to address employees directly in front of the company premises in order to motivate them to participate in a strike. The BAG also held such mobilisation campaigns as permissible in the parking lot of the employer on strike, at least if it was a matter of a situational use of small areas limited in time and place (BAG,

D. f. November 20, 2018 – 1 AZR 189/17). The BVerfG did not accept the company's constitutional complaints against the BAG ruling for decision (BVerfG, O. f. July 9, 2020 – 1 BvR 719/19, 1 BvR 720/19). According to the BVerfG, the employer's fundamental rights to property and freedom of action were not violated by the ruling. However, it is important for practice that not every action of trade unions in every place is still covered by the protection of Article 9 (3) GG. The BVerfG also emphasises that the specific local circumstances are decisive. So, it depends on the local circumstances and the extent to which the company-owned land is used in each individual case.

Employee privacy

While German employees are entitled to request information (or copies from such information) from their employers with regard to their person-related data collected and stored by the employer pursuant to Art. 15 GDPR, the scope of data to be made available, the requirements for providing copies and also the restriction due to conflicting rights of third parties have not yet been clarified to the highest degree. Current and more recent decisions of the courts of instance do attempt to limit the claim to a practically manageable extent, either by allowing an increased interest in information, a precise naming of the data, considerations of abuse of rights or actual excessive demands to flow into the weighing process, or by not extending the claim to the provision of copies to the provision of e-mails and other documents. However, the BAG is likely to be the first to issue a final clarification, especially since, contrary to the "trend in labour law" described above, some civil courts do indeed affirm a right to information to the extent of an almost US-American "discovery". Just recently, the BAG has ruled that enforcement of law is impossible if the respective claim for the provision of a copy of e-mails is not "sufficiently precise" within the meaning of German civil procedure regulations; such claim must be designated so precisely that it is undoubted in the enforcement proceedings to which e-mails the sentence relates (BAG from April 27, 2021 – 2 AZR 342/20). With regard to the range of penalties, labour courts have sanctioned the immaterial damage caused by incorrect fulfillment of the right to information alone with low to mid four-digit amounts, particularly in recent times.

In other recent decisions, in the area of employee data protection, the BAG has for the first time commented on the right to information to which employees are entitled *vis-à-vis* the employer within the framework of the so-called Remuneration Transparency Act (*Entgelttransparenzgesetz*) and stated that, in individual cases, persons similar to employees can also assert the claim. If the works council serves as the employees' contact for the fulfillment of the right to information, the employer must provide appropriately designed remuneration lists.

Furthermore, the BAG grants the employer a claim to information on the placement proposals submitted by the Employment Agency and the Job Center against an employee who claims remuneration due to default of acceptance. The basis for the request for information is a secondary obligation arising from the employment relationship pursuant to Section 242 BGB.

Other recent developments in the field of employment and labour law

The most recent developments in the area of labour law in Germany as greatly influenced by the COVID-19 pandemic, further included numerous, mostly temporary relief measures for short-time work, taken measures to enable the advance of digitalisation in the area of labour and labour jurisdiction, created specifications for hygiene concepts and their operational implementation, and, where this is not yet the case, both practitioners and courts alike have

endeavoured to adapt the existing regulatory framework to the completely new challenges that have arisen as a result of the pandemic, such as with regard to compensation issues when employees must go into quarantine after returning from a risk area and are thus no longer available to the employer, or at least no longer available in the company, or employees are unable to work in whole or in part because they have to look after their school-age children for weeks or months due to lockdown measures.

The Act on the Regulation of a General Minimum Wage (MiLoG) established a nationwide minimum wage per hour worked across Germany from January 1, 2015. This was initially EUR 8.50 gross and most recently increased to EUR 9.50. The increase on January 1, 2021, already provides for an increase in the minimum wage in further steps to EUR 9.60 on July 1, 2021, to EUR 9.82 on January 1, 2022, and to EUR 10.45 on July 1, 2022.

The "Act to Promote Works Council Elections and Works Council Work in a Digital World of Work", which has already been passed by the German government but has not yet come into force, is intended, among other things, to simplify the procedures for electing works councils and further improve protection against dismissal for election initiators, strengthen works council rights in the introduction of information and communications technology, create a right of initiative for the works council with regard to qualification measures, and create co-determination rights for the works council with regard to the design of mobile work.

In contrast, practice is still waiting for the already announced legal changes with regard to the implementation of additional restrictions on the conclusion of fixed-term employment contracts, the implementation of the EU directive on whistleblowing, and the already mentioned law on recording of working hours; these are likely to be important tasks for the new government to be elected in September 2021 at the latest.

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