Employment Tracker

June 2021

GÖRG
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Stay up to date with us

With our Employment Tracker we regularly look into the "future of labour law" for you! At the beginning of each month we present the most important decisions expected for the month from the Federal Labour Court (BAG) and the European Court of Justice (ECJ) as well as other courts. We report on the results in the issue of the following month. In addition, we point out upcoming milestones in legislative initiatives by politicians, so that you know today what you can expect tomorrow.

Upcoming decisions

With the following overview of upcoming decisions in the following month, you will be informed in advance about which legal issues will be decided shortly and what consequences this may have for legal practice!

Subject	Date/AZ	Remark/ note for the practice
Federal Labour Court		
Warning letter to an editor for secondary employment **(Publication of an article rejected by the editorial office in a competing newspaper)**	**15.06.2021** **- 9 AZR 413/18 -**	The Federal Labor Court decides whether the plaintiff can demand the removal of a warning letter from his personnel file. The plaintiff works for the defendant as an editor. The employment relationship is governed by the collective agreement for magazine editors in the version of November 4, 2011, according to Sec. 13 No. 3 of which an editor requires the written consent of the publisher to otherwise process, utilize and pass on news and documents of which he has become aware in the course of his work for the publisher. The employment contract contains an essentially identical provision; however, instead of the publisher's consent, that of the editor-in-chief is required. In 2017, the plaintiff traveled to the U.S. on official business to report on the opening of a factory of a German entrepreneur. The corresponding report on an event of the company also contained descriptions of an incident according to which the hosting entrepreneur vigorously pinched the plaintiff's hips at the buffet. This passage of the report was deleted by the editors and the report was published without a description of the incident, although the plaintiff requested that the incident be published after all (in the context of the #MeToo debate). After giving notice, the plaintiff published the full article without obtaining consent from a

		competing newspaper. The defendant then issued a warning to the plaintiff. However, the lower courts considered the warning to be justified and dismissed the action. In his appeal, the plaintiff continues to challenge the warning.
Admissibility of personnel secondment in the public sector **Scope exception in Sec. 1 (3) No. 2b AÜG** **Compatibility with the Temporary Agency Work Directive**	**16.06.2021** **- 6 AZR 390/20 -**	The Federal Labor Court rules on the admissibility of a personnel secondment in the public sector. A personnel secondment is a permanent employment with a third party under continuation of the existing employment relationship. According to the exception in Sec. 1 (3) No. 2b AÜG, such a personnel secondment is permissible on the basis of a collective bargaining agreement of the public sector and does not violate the German Personnel Leasing Act (*Arbeitnehmerüberlassungsgesetz*). The collective agreement for the public service (TVöD) applies to the employment relationship of the plaintiff. Since February 2018, the plaintiff had been employed in the mailroom/archive/library area. In summer 2018, the defendant founded a limited liability company (GmbH) and transferred the mailroom/archive/library area to it, among other things. The plaintiff was informed of the transfer of operations triggered by this and objected to the transfer of his employment relationship, which therefore continues to exist vis-à-vis the defendant. The defendant therefore continues to employ him and transfers him to the GmbH within the framework of a secondment pursuant to Sec. 4 (3) TVöD-VKV. In his action, the plaintiff seeks a declaration that the secondment is unlawful. He is of the opinion that the permit provision of Sec. 1, Subsection 3, No. 2b, AÜG, is unlawful under European Union law. The lower courts ruled in favor of the plaintiff. In his appeal, the plaintiff continues to pursue his claim.
Collective Bargaining Ability of the Trade Union "DHV-Die Berufsgewerkschaft e.V."	**22.06.2021** **- 1 ABR 28/20 -**	The Federal Labor Court decides on the collective bargaining capacity of "DHV-Die Berufsgewerkschaft e.V." (DHV). The DHV is an employee association organized in the Christian Trade Union Federation of Germany (CGB). After its foundation in 1893, it was reestablished in 1950 as a trade union for merchants' assistants. According to its statutes, which have been in force since 2002, it sees itself as a trade union for employees in areas characterized by commercial and administrative professions. As a result of several amendments to its statutes, some of which were invalid, its most recent claim to jurisdiction extends to employees in various sectors (including private banks, retail stores, inland wholesale, rescue services, workers' welfare, German Red Cross, meat industry, tour operators, IT service companies). The applicants (including the DGB trade unions IG Metall, ver.di and NGG) claim that the DHV lacks the

		necessary power and capacity to be an employee association with collective bargaining capacity. They are therefore seeking a declaration that the DHV is incapable of negotiating collective agreements. The proceedings were already the subject of the decision of the BAG of June 26, 2018 - 1 ABR 37/16. At that time, the BAG had overturned the decision of the Hamburg Regional Labor Court, which had rejected the application, and referred the matter back to the Regional Labor Court for further clarification of the facts. The main issues to be clarified were the number of members of the DHV and the respective degree of organization. After hearing the parties once again, the Hamburg Regional Labor Court determined that the DHV has not had collective bargaining capacity since April 21, 2015. The DHV is challenging this decision with its appeal on points of law.
European Court of Justice		
Equal pay for men and women for work of equal or equal value? **Reference for a preliminary ruling from the Watford Employment Tribunal (United Kingdom)**	**03.06.2021** **- C-624/19 -**	On June 3, 2021, the European Court of Justice will decide whether Article 157 of the Treaty on the Functioning of the European Union (TFEU) is directly applicable to actions based on the fact that the plaintiff performs work of equal value to the comparable person. Article 157 TFEU regulates the principle of equal pay for men and women for equal work or work of equal value. In addition, in the event that the former is to be affirmed, the European Court of Justice decides whether the so-called "single source test" for comparability in Art. 157 TFEU (the question of whether the differences can be traced back to the same source) is different from the question of equivalence and, if so, whether this test is directly applicable.
Age limit for access to the notarial profession **Reference for a preliminary ruling from the Consiglio de Stato (Italy)**	**03.06.2021** **- C-914/19 -**	The European Court of Justice decides whether Art. 21 of the Charter of Fundamental Rights of the European Union, Art. 10 TFEU and Art. 6 of Directive 2000/78/EC preclude a Member State from setting an age limit for access to the profession of notary in so far as they prohibit discrimination on grounds of age in access to the profession.

Legislative initiatives, important notifications & applications

This section provides a concise summary of major initiatives, press releases and publications for the month, so that you are always informed about new developments and planned projects.

Subject	Timeline	Remark/ note for the practice
Directive on Transparent and Foreseeable Working Conditions in the European Union (Directive 2019/1152/EU)	Transposition into national law by 01.08.2022	Directive 2019/1152/EU is intended to create uniform minimum requirements at Union level for employers' information obligations and employees' working conditions, while at the same time ensuring an appropriate degree of flexibility for atypical employment relationships. Introduction of new information requirements, in particular ▪ Information obligations regarding working hours - In the case of foreseeable work patterns: information on the length of the standard working day or week, the modalities and remuneration of overtime and the modalities of any shift changes. - In the case of unforeseeable work patterns: information on the circumstance of the variable work schedule, the guaranteed paid hours, the compensation for additional work performed, reference days/hours as well as the minimum notice period before the start of a work assignment and - as far as possible - the period for a revocation by the employee. ▪ Duty to provide information on aspects relevant to notice of termination - The employee is to be informed about the procedure to be followed when giving notice - including the formal requirements - as well as the length of the notice periods or the modalities for determining the notice periods ▪ Obligations to provide information on qualification measures, hirer, social insurance agency ▪ Obligations to provide information in the case of secondments - In particular, about the remuneration that the employee may claim under the applicable law in the host country, any posting allowances, and regulations for the reimbursement of travel, board and lodging costs. ▪ Information still to be provided in writing in paper form, additional information in electronic form possible Legal consequences of breach of the duty to inform: ▪ Employee benefits from presumptions favorable to him/her

		▪ Employee is given the opportunity to file a complaint with a competent authority New regulations on minimum requirements for working conditions: ▪ Maximum period of 6 months for probationary period → in the case of fixed-term employment, the probationary period duration should be in proportion to the expected duration of the contract and the nature of the job ▪ Protection of employees in case of flexible working hours: - Employee is only required to perform work in the case of unpredictable work if it takes place within pre-determined reference hours/reference days and the employer has provided notice of the work assignment within a reasonable notice period - Member States are to take measures to counter abusive use of call-off contracts The directive is to be transposed into national law **by 01.08.2022**.
Third Ordinance Amending the Ordinance Implementing the Collective Agreement Act	10.05.2021	▪ The Amendment Ordinance regulates the participation by means of a video or telephone conference of persons affected by a declaration of general applicability within the meaning of Sec. 5 (2) TVG, of members of the collective bargaining committee, of representatives of the parties to the collective agreement who have submitted the application for general applicability and of representatives of the public. ▪ Furthermore, the passing of resolutions by the collective bargaining committee in the event of participation by means of video or telephone conference is regulated. ▪ As already provided for in Sec. 5 Paragraph 2 Sentence 2 TVG, participation by video or telephone conference shall be limited to justified cases.
Company Modernization Act (*Betriebsrätemodernisierungsgesetz*)	28.05.2021	▪ On May 28, 2021, the German Federal Council approved the *Betriebsrätemodernisierungsgesetz* in its second round. ▪ The Act will now be submitted to the Federal President for signature and promulgation. It will enter into force the day after promulgation. ▪ Key contents are: - The scope of application of the mandatory simplified election procedure and the simplified election procedure by agreement is extended. - Protection against dismissal to safeguard elections to the works council and onboard representation is improved.

		→ Number of invitations to election meetings specially protected against ordinary dismissal is increased from three to six → Additional introduction of special protection against dismissal for employees who document their intention to establish a works council in a notarized declaration and undertake the corresponding preparatory measures - The age limit for apprentices in the election of youth and apprentice representatives is deleted. - The general right of initiative of works councils in vocational training is strengthened and the involvement of the conciliation board for mediation is made possible. - It is specified that the involvement of an expert in the use of AI is considered necessary for the works council. - It is clarified that the rights of the works council in the design of the working environment and work processes also apply if artificial intelligence is to be used in the company. - It is ensured that the rights of the works council in setting guidelines on personnel selection also apply if these guidelines are created exclusively or with the support of AI. - Works councils are given the option of holding meetings by means of video and telephone conferencing. - In the future, works agreements can be concluded with a qualified electronic signature. - Sec. 87 (1) of the Works Council Constitution Act (*BetrVG*) introduces a new right of co-determination in the design of mobile work. - Sec. 8 (1) of the German Social Code, Book VII (*SGB VII*) states that insurance coverage under the statutory accident insurance scheme for mobile work is the same as for work performed at the company's premises.

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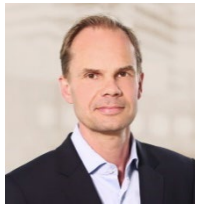

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