Employment Tracker

July 2021

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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		
Entitlement to compensation pursuant to Sec. 15 (2) General Equal Treatment Act (*AGG*) **Burden of proof regarding the receipt of the invitation to an interview**	**01.07.2021** **- 8 AZR 297/20 -**	The Federal Labor Court decides whether the defendant city owes the plaintiff compensation pursuant to Section 15 (2) AGG due to discrimination on the grounds of disability. The plaintiff applied for a position as treasurer advertised by the defendant city. He is severely disabled or equivalent to a severely disabled person. The letter of application, including attachments, comprised 55 pages and did not state the plaintiff's home address, but only a post office box address. According to the defendant city, the plaintiff was invited for an interview but did not appear. After conducting the interviews, the defendant city returned the application documents to the plaintiff and informed him that another person had been selected for the position. Thereupon, the plaintiff unsuccessfully demanded payment of compensation pursuant to Section 15 (2) AGG. The plaintiff claims that the defendant city discriminated against him because of his severe disability or because of the equality with a severely disabled person, because it did not invite him to the job interview contrary to Section 165 sentence 3 SGB IX. He had not received the letter inviting him to the interview. The

		defendant city must prove that he received the letter of invitation. The defendant is of the opinion that the action is already inadmissible, because the plaintiff leads the process out of hiding. The stated address is not the residential address of the plaintiff, but that of the father, who also conducts numerous AGG lawsuits. Beyond that the complaint is in any case unfounded, because the plaintiff was invited to the interview. The appropriate letter of invitation had been given to the post office by the secretary of the mayor. When the plaintiff did not appear for the interview, several attempts were made to reach the plaintiff by telephone. A possible loss of the invitation letter in the mail does not justify a presumption of discrimination. The lower courts dismissed the action. In his appeal, the plaintiff continues to pursue his claim for payment of compensation plus interest.
Entitlement to Disability benefits	**13.07.2021** **- 3 AZR 445/20 -**	The Federal Labor Court decides whether the plaintiff has a claim against the defendant for a so-called disability pension. The plaintiff is employed by the defendant and received a pension commitment for retirement, disability and survivors' benefits in 2000. According to this, the plaintiff is to receive a monthly disability pension for the rest of his life, but for no longer than the duration of his disability, in the event of an expected permanent total incapacity for work as defined by social insurance law. From June 1, 2017, to May 31, 2020, the plaintiff received a statutory pension for full reduction in earning capacity. The claim was limited in time because, in the opinion of the pension insurance company, it was not unlikely that the full reduction in earning capacity could be remedied. The plaintiff is therefore claiming disability benefits for the period from June 2017 to April 2020 inclusive. He is of the opinion that the requirements of the commitment are fulfilled because the temporary approval of the pension due to full reduction in earning capacity is harmless. According to Section 102 (2) SGB VI, the time limit is prescribed by law. The defendant is of the opinion that the requirements for the pension allowance are not met because the plaintiff's disability is not "expected to be permanent" but is only limited to three years. The Labor Court dismissed the action. The Schleswig-Holstein Regional Labor Court upheld the claim. The

		defendant has appealed against this decision.
Implementation of a collective agreement on the remuneration of employees similar to employees	**14.07.2021** **- 4 AZR 403/20 -**	The Federal Labor Court decides whether the plaintiff union is entitled to a claim against the defendant for the implementation of a collective bargaining agreement. The defendant operates a radio and television station. In 1992, the parties concluded a collective bargaining agreement for persons similar to employees as well as implementing collective bargaining agreements based thereon. Implementation Agreement No. 4 contains, among other things, a "Television Fee Framework" and a "Radio Fee Framework," in which various services are classified by so-called fee codes to which certain remuneration frameworks are assigned. The defendant remunerates all quasi-employees employed by it in accordance with this collective agreement. Since the end of 2016, however, the quasi-employees employed by the new editorial department "B.A." have been remunerated with a flat shift fee according to the fee codes 30.00 ("other cooperation fee framework radio") and 38.00 ("other cooperation fee framework television"). Only the assignments produced outside normal shift times continue to be remunerated as individual assignments. The plaintiff union is seeking the application of fee codes, which are specified in more detail, for the quasi-employees employed by the defendant in the editorial department "B.A.". In the alternative, the plaintiff union seeks the application of the named fee codes only for those quasi-employees who are members of the plaintiff union. In particular, the plaintiff union asserts that the collective bargaining agreement provides for compensation in accordance with the fee codes, but not for lump-sum compensation. The lower courts dismissed the action. In its appeal, the plaintiff union continues to pursue its claims.
Vacation pay **Consideration of variable remuneration**	**27.07.2021** **- 9 AZR 376/20 -**	The Federal Labor Court decides on the principles according to which the plaintiff's variable remuneration is to be taken into account for vacation pay. As part of a so-called step-by-step action, the plaintiff is initially seeking information regarding the quantification of the payment claims asserted. The plaintiff is employed by the defendant as a sales representative. His annual target salary is made up of 60% fixed salary and 40% variable salary components. The defendant set the sales targets for the plaintiff on the basis of an agreement reached with the works council for the respective payroll periods. During one payroll period, the defendant paid a discount of 75% on the variable

		salary component. In the month following the end of the payroll period, the respective difference was calculated on the basis of target achievement. The plaintiff is of the opinion that the defendant wrongly did not take into account the variable remuneration earned 13 weeks before the start of the vacation in the calculation. This is a commission within the meaning of Section 87 (1) of the German Commercial Code (*HGB*) which, according to a ruling of the European Court of Justice of May 22, 2014 (C-539/12), must be included in the vacation pay pursuant to Section 11 (1) of the German Federal Vacation Act (*BUrlG*). The defendant counters that the variable remuneration is not a commission within the meaning of Section 87 of the German Commercial Code (*HGB*), but target remuneration for fixed reference periods. It is about the achievement of targets, the amount of which has already taken into account the plaintiff's vacation. The inclusion of the variable remuneration in the average calculation pursuant to Section 11 (1) of the German Federal Vacation Act (*BUrlG*) would lead to a double burden. The lower courts dismissed the action for disclosure as unfounded because the claim for payment pursued by it did not exist. In his appeal, the plaintiff continues to pursue his claim.
European Court of Justice		
Discrimination on the grounds of religion or gender by an instruction of the employer? **Reference for a preliminary ruling by the Hamburg Labor Court**	**15.07.2021** **- C-804/17 -**	On July 15, 2021, the European Court of Justice will rule on the question whether a unilateral instruction of the employer prohibiting the wearing of any sign of political, ideological or religious convictions constitutes a direct disadvantage on the grounds of religion within the meaning of Article 2 (1) and (2) (a) of Directive 2000/78/EC compared to employees who follow certain clothing rules due to religious covering requirements. In addition, the European Court of Justice has to decide whether such an instruction indirectly discriminates against an employee on the grounds of religion and/or gender who wears a headscarf because of her Muslim faith. Furthermore, it will be decided whether a disadvantage due to religion and/or gender can be justified by the subjective wish of the employer to pursue a policy of political, ideological and religious neutrality, if the em-

		ployer thereby wishes to comply with the subjective wishes of its customers. Finally, the European Court of Justice decides on the question of whether Directive 2000/78/EC or the fundamental right of freedom to conduct a business under Article 16 of the Charter of Fundamental Rights of the European Union precludes a national regulation according to which a ban on religious clothing can only be justified on the basis of a sufficiently concrete danger, in particular a concrete threat of economic disadvantage for the employer or an affected third party.

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
Third Ordinance Amending the Short-Time Workers' Allowance Ordinance	22.06.2021	• Facilitated access to short-time allowance and full reimbursement of social security contributions will be extended until September 30, 2021. • The reimbursement of social security contributions will be excluded in principle after the filing of the insolvency petition until the court has ruled on this petition or until the insolvency petition is withdrawn.
New version of the SARS-CoV-2 occupational health and safety regulation	28.06.2021	• Corona Occupational Health and Safety Ordinance is extended and amended for the duration of the pandemic situation, up to and including September 10, 2021 • Key Contents: - Employers remain required to offer rapid and self-testing opportunities in their establishments at least twice a week for all persons working in attendance. → Exceptions for fully vaccinated or recovered individuals - Company hygiene plans are to be drawn up, implemented and made accessible in an appropriate manner as before. - The mandatory requirement of a minimum area of 10 m2 per person in multiply occupied rooms is no longer applicable. Operational contacts and the simultaneous use of rooms by several persons must nevertheless be kept to the necessary minimum. - At a minimum, employers must provide medical face masks where other measures do not provide adequate protection. - Infection protection must also be maintained during break times and in break areas. • Effective date: July 1, 2021
Home office obligation expires	30.06.2021	• The provisions of Section 28b IfSG expire on June 30, 2021. • Among other things, this also means that the obligation regulated in Section 28b (7) IfSG, according to

		which companies must offer their employees the opportunity to work in a home office, will no longer apply.

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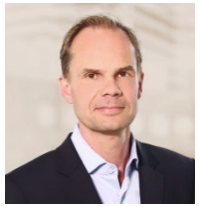

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