

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		
Shaking of the evidential value of a certificate of incapacity for work	08.09.2021 - 5 AZR 149/21 -	<p>The Federal Labor Court decides under which circumstances the probative value of a certificate of incapacity for work is shaken.</p> <p>The employee herself had given notice of termination of her employment relationship in due time. She then announced to a colleague by telephone that she would no longer be attending work. She said nothing about being unable to work due to illness. She then actually reported sick as unfit for work and also submitted a certificate of incapacity for work dated on the first day of her absence and lasting exactly until the end of the employment relationship.</p> <p>The employer then refused to continue to pay her wages. It assumed that the probative value of the submitted certificate of incapacity for work had been shaken. This follows from the employee's announcement, but also from the fact that the certificate of incapacity for work refers precisely to the period of notice. In addition, the certificate did not comply with the requirements of the incapacity for work directive.</p>

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		<p>The lower courts ordered the employer to continue paying remuneration because the employee had sufficiently proven her inability to work by submitting the certificate. The high probative value of the certificate of incapacity for work was not undermined.</p> <p>In its appeal to the Federal Labor Court, the employer continues to pursue its goal of dismissing the action.</p>
<p>Company pension scheme</p> <p>Admissibility of a maximum age for inclusion in a pension scheme</p>	<p>21.09.2021</p> <p>- 3 AZR 147/21 -</p>	<p>The Federal Labor Court decides whether company pension plans may stipulate an upper age limit.</p> <p>The employer has a pension plan. This stipulates as a prerequisite for entitlement to a company pension that the employee "must not have reached the age of 55 at the start of the employment relationship". The employee was hired shortly after her 55th birthday, which is why she was not promised any pension benefits.</p> <p>She is now suing her employer, a trade union, for company pension benefits. In this regard, she has the opinion that the age limit for inclusion in the pension scheme constitutes discrimination on the grounds of age and gender and is therefore invalid.</p> <p>The lower courts dismissed the action. In her appeal, the employee is pursuing her claim further.</p>
<p>Duty to co-determine the assignment of employees in the home office to new places of work</p>	<p>22.09.2021</p> <p>- 7 ABR 13/20 -</p>	<p>In dispute is whether the assignment of employees who work in a home office to a new place of work is a transfer in which the works council has a say.</p> <p>At the employer, there was a reorganization of operations, for which a reconciliation of interests was concluded with the central works council. In this context, the employees affected by a change of location were offered the opportunity to work in a home office, of which 34 employees took advantage. The employer assigned the affected employees to another location for organizational purposes.</p> <p>The works council then claimed that this assignment was a transfer in which it had a right of co-determination. The employer rejected this and referred the works council to the fact that a transfer subject to co-determination would only exist if the employees were to be called back from the home office in the future.</p> <p>After the labor court ruled in favor of the employer, the works council prevailed at the state labor court. Now the Federal Labor Court will decide on the employer's appeal.</p>

Federal Social Court		
<p>Social assistance</p> <p>Consideration of the needs of older people in the assumption of costs for housing and heating</p>	<p>02.09.2021</p> <p>- B 8 SO 13/19 R -</p>	<p>The Federal Social Court decides whether the special needs of older people are to be taken into account when assuming the costs of housing and heating under social welfare law.</p> <p>The plaintiffs, born in 1938 and 1944, have lived in a two-and-a-half-room apartment in Berlin since 1974, which they owned until 2005 and which has since been rented out by their daughter's partner in return for a gross rent of EUR 840. The plaintiffs receive supplementary basic benefits. Initially, the defendant state took the actual gross warm rent into account for the costs of accommodation and heating, but pointed out to the plaintiffs several times that the current gross warm rent was too high for a two-person household and that the plaintiffs were therefore obliged to reduce the costs, for example by changing their apartment. After the plaintiffs let the deadline set by the state expire without any response, the defendant state of Berlin only took into account the costs it considered appropriate for the costs of accommodation and heating instead of the actual gross warm rent. The plaintiffs therefore demand payment of the unreduced costs of accommodation and heating.</p> <p>The Social Court of Berlin dismissed the claim, but the Social Court of Berlin-Brandenburg ruled in favor of the plaintiffs and ordered the state of Berlin to pay the unreduced costs of housing and heating. One of the reasons given for the ruling was that the defendant state had not taken sufficient account of the special needs of older people. Since older people regularly stayed longer in their apartments, an increased heating requirement had to be taken into account with regard to the heating costs. The defendant state contested this in its appeal.</p>
<p>Social assistance</p> <p>Assistance for living</p> <p>Private pension insurance as realizable assets despite exclusion of realization</p>	<p>02.09.2021</p> <p>- B 8 SO 4/20 R -</p>	<p>The Federal Social Court decides on the question of whether a lump-sum settlement from a private pension insurance is to be regarded as realizable assets when granting assistance for subsistence even if an exclusion of realization has been agreed.</p> <p>The plaintiff received a temporary pension for full reduction in earning capacity from the statutory pension insurance and supplementary assistance for living expenses. The assistance for living was granted in the form of an interest-free loan. The defendant city granted the assistance for living only as a loan, because in its opinion the private pension insurance is a realizable asset. The plaintiff, on the other hand, has the opinion that the assistance for living expenses should be granted as a grant because the private pension</p>

		<p>insurance is subject to an exclusion of realization until 2025 and therefore should not be regarded as realizable assets.</p> <p>The lower courts dismissed the claim for a subsidy instead of a loan because the private pension insurance was to be regarded as realizable assets at least if the claim matures within 15 years.</p> <p>In his appeal to the Federal Social Court, the plaintiff continues to pursue his claim for a subsidy.</p>
European Court of Justice		
<p>Break as working time within the meaning of the Working Time Directive (Directive 2003/88/EC)</p> <p>Reference for a preliminary ruling from the Obvodní soud pro Prahu 9 (Czech Republic)</p>	<p>02.09.2021</p> <p>- C-107/19 -</p>	<p>The European Court of Justice has to decide whether the duration of a break during which the employee must be available to the employer within 2 minutes in the event of a sudden assignment is to be considered "working time" within the meaning of Art. 2 of the Working Time Directive.</p> <p>Further, the European Court of Justice decides whether it is relevant for the previous question that an interruption in the case of a sudden assignment is merely accidental and unpredictable and, if so, how often such an interruption occurs.</p> <p>Finally, the European Court of Justice answers the question of whether the court of first instance may deviate from a fundamentally binding decision of a higher-ranking court if this is in conflict with union law.</p> <p>The plaintiff of the original proceedings, who worked as a firefighter, worked in a shift rhythm with a day shift and a night shift. His daily working hours included two meal and rest breaks of 30 minutes each. During the breaks, the plaintiff was required to carry a radio and be ready for action within two minutes if necessary. The rest breaks were only counted towards his working time and paid if they were interrupted by an assignment. In his action in the main proceedings, the plaintiff demanded payment of wages also for the uninterrupted rest breaks because these were to be regarded as working time.</p> <p>The first two lower courts ruled in favor of the plaintiff. However, the Supreme Court set aside the judgments of the lower courts and referred the case back to the first instance for a substantive decision.</p>

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		<p>Since the court entrusted with the decision has the opinion that the rest breaks in dispute are working time within the meaning of the Working Time Directive, the European Court of Justice was asked to clarify this and other issues.</p>
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Recent decisions

With the following overview of current decisions of the past month, you are informed which legal issues have been decided recently and what impact this may have on legal practice!

Subject	Date/AZ	Remark/ note for he practice
Federal Labour Court		
No press releases		
European Court of Justice		
No press releases		

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
<p><u>Act to Supplement and Amend the Regulations for the Equal Participation of Women in Leadership Positions in the Private Sector and the Public Sector (Leadership Positions Act)</u></p>	<p>12.08.2021</p>	<p>The most important provisions of the FüPoG II are:</p> <p>In private sector companies</p> <ul style="list-style-type: none"> ▪ A minimum participation requirement of one woman applies to management boards with more than three members of listed companies and companies with equal codetermination. This will affect 66 companies, of which 21 currently have no women on their boards. ▪ In future, companies will have to justify why they have set themselves the target of not appointing any women to the board. Companies that do not report a target figure or do not give a reason for the zero target figure will be sanctioned more effectively in the future. <p>In companies in which the federal government holds a majority stake and in corporations under public law</p> <ul style="list-style-type: none"> ▪ The federal government takes its role model function seriously and sets strict targets for its companies. The fixed gender quota of 30 percent on supervisory boards has been extended to companies in which the federal government holds a majority stake. For these companies, currently 94 in number, a minimum of one woman has also been introduced on boards with more than two members. ▪ In public corporations such as health insurance funds, pension and accident insurance providers and the Federal Employment Agency, a minimum of one woman was also introduced on boards with more than one member. In future, the minimum participation requirement will apply to around 155 social insurance institutions. <p>In the federal civil service</p> <ul style="list-style-type: none"> ▪ The federal government has also set itself the goal of achieving equal participation of women in management positions within the scope of the Federal Equal Opportunities Act by the end of 2025.

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		<ul style="list-style-type: none">More equality is also achieved by expanding the requirements of the Federal Appointments Act. This means that bodies with only two members are already covered by the regulation. Currently, around 107 additional federal bodies must be adequately staffed with women in the future.
<u>Ordinance Amending the Ordinance Implementing the Works Constitution Act and the Election Regulations for the Postal Service</u>	25.08.2021 Government draft	<p>Implementation of the amendments to the Election Regulations and the Maritime Election Regulations required as a result of the <i>Betriebsrätemodernisierungsgesetz</i>. In particular:</p> <ul style="list-style-type: none">Creation of a legally secure possibility for the electoral board to hold meetings via video and telephone conferencingPossibility of correcting the electoral list on the day of the election until voting is completedIn future, the works council will be elected in person without ballot envelopesProcessing of votes cast in writing only after the vote has been cast at the beginning of the public meetingSending of election documents by the election committee without a separate request if employees will not be present at the company for a longer period of time and thus cannot become aware of the electionAdoption of the conditions established by case law under which the election committee can determine the deadline by which it can receive declarations that are subject to a time limit.

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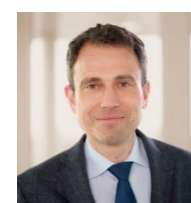
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