Employment Tracker

October 2021

GÖRG
YOUR BUSINESS LAW FIRM

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 remuneration during a business closure due to an official order because of the Corona pandemic	13.10.2021 - 5 AZR 211/21 -	The Federal Labor Court decides on the question of whether employees are entitled to remuneration without work during a period in which the store is closed by official order due to the Corona pandemic. The plaintiff works as a marginal sales employee at a branch of the defendant. In the month of April 2020, the Defendant's store was closed due to a general order issued by the City because of the Corona pandemic. Therefore, the Defendant informed the Plaintiff that she did not need to show up for work for the month of April. Accordingly, the plaintiff did not receive any wage payments for the month in question. The plaintiff is therefore asserting a claim for compensation on the grounds of default in acceptance. She is of the opinion that the closure of the branch due to an official order because of the Corona pandemic is an operating risk which the defendant, as employer, must bear.

		The lower courts found in favor of the plaintiff and ordered the defendant employer to pay the agreed remuneration. The reason given for this was that the closure of the plant due to an official order was also part of the operational risk which the employer had to bear. In its appeal to the Federal Labor Court, the defendant continues to seek dismissal of the action.
Claim of the trade union against the employer for the implementation of a collective agreement on the remuneration of quasi-employees	13.10.2021 - 4 AZR 403/20 -	At issue is whether the defendant radio and television station was permitted to compensate its employees according to a flat shift fee, although the relevant implementation agreement to the collective bargaining agreement generally provides for compensation according to activities. In this regard, the plaintiff union asserts a claim for implementation of the collective bargaining agreement for all employees working for the defendant, or alternatively only for those who are union members, because it is of the opinion that the defendant violates the collective bargaining system through the flat-rate remuneration. The parties have concluded a collective agreement for persons similar to employees as well as corresponding implementation agreements. These contain a fee framework that provides for remuneration according to individual orders. For example, different remuneration is shown depending on the length of the broadcast and the type of activity. The defendant remunerates all quasi-employees employed by it in accordance with this collective agreement. In contrast, the employees assigned to a new editorial department receive a flat shift fee. For this reason, the plaintiff union is asserting that the collective bargaining agreement should be implemented, specifically that remuneration should be based on individual orders. The lower courts dismissed the claim. The Munich Regional Labor Court held that the action was inadmissible. Firstly, there was no interest worth protecting in the application of the collective agreement irrespective of the collective agreement coverage of the individual employees. Secondly, the auxiliary claims were inadmissible for lack of sufficient specificity, as the unionized employees were not named.

		On the basis of the appeal filed by the plaintiff, the Federal Labor Court will now decide on the claim asserted for implementation of the collective agreement and in particular on the admissibility of the motions filed.
Do insurance premiums on a life insurance policy (direct insurance) payable by way of salary conversion constitute attachable earned income?	14.10.2021 - 8 AZR 96/20 -	The Federal Labor Court decides whether the insurance premiums on a life insurance policy (direct insurance) to be paid by the defendant employer following an agreed salary conversion constitute attachable income within the meaning of Section 850 (2) of the German Code of Civil Procedure. The creditor and ex-husband of the employee (= debtor) initiated the garnishment of the income. The corresponding garnishment and transfer order was sent to the employee. Thereafter, the employee agreed with the defendant employer on a salary conversion for the conclusion of a company pension plan in form of a direct insurance policy. The plaintiff, the employee's ex-husband, is of the opinion that the salary conversion carried out after service of the garnishment and transfer order cannot reduce the employee's garnishable income to his detriment. Rather, there was a deliberate intent to harm because the employee only decided to arrange an additional pension in view of the garnishment of her income. Accordingly, he demanded that the defendant employer pay him the amounts that had not been transferred to him. The Labor Court dismissed the claim. The Munich Regional Labor Court, on the other hand, is of the opinion that the contributions to the direct insurance do not reduce the debtor's attachable income. Accordingly, the Munich Regional Labor Court partially upheld the plaintiff husband's claim. In its appeal to the Federal Labor Court, the defendant employer seeks to have the action dismissed entirely.
Entitlement to overtime pay for part-time employees	15.10.2021 - 6 AZR 96/20 -	The Federal Labor Court decides on the issue whether the plaintiff, as a part-time employee, is entitled to overtime pay for so-called planned and unplanned overtime on the basis of the TVöD-K.

Discrimination against part-time employees in case of non-granting of overtime pay?		The plaintiff is employed as a part-time nurse by the defendant. The parties' employment relationship is governed by the collective bargaining agreement for the public service sector in hospitals (*TvöD-K*). Among other things, it stipulates that overtime bonuses are granted. The plaintiff worked both unplanned and planned overtime. These working hours were remunerated without overtime pay. With regard to the planned overtime, the plaintiff performed more than the contractually owed work in each case, but still fell short of the working hours of a full-time employee. The plaintiff is seeking overtime pay for both the unplanned and the planned overtime. She relies in particular on a ruling of the Federal Labor Court of March 23, 2017 (Ref.: 6 AZR 161/16). The Federal Labor Court ruled that part-time employees were already entitled to overtime bonuses within the meaning of the collective agreement standard if they worked overtime in excess of their part-time quota, even if this did not exceed the regular working hours of a full-time employee. Any other interpretation would violate the prohibition of part-time discrimination set forth in Sec. 4 (1) TzBfG. The Nuremberg Regional Labor Court, as the lower court, awarded the plaintiff overtime for part of the unplanned overtime claimed. With regard to the planned overtime, the Regional Labor Court rejected the claims for overtime pay, because the ruling relied on by the plaintiff did not apply to planned overtime. In the case of planned overtime, different treatment of full-time and part-time employees is justified because the supplement is intended to compensate for special burdens that arise when the collectively agreed working hours are exceeded. In her appeal to the Federal Labor Court, the plaintiff seeks payment of overtime bonuses for both planned and unplanned overtime.
Mass dismissal **Invalidity of a termination due to breach against the obligation to transmit the notification to the**	28.10.2021 - 6 AZR 155/21 -	In dispute is another detail of the mass dismissal notification proceedings. According to Sec. 17 (3) sentence 1 KSchG the employer is obliged to forward a copy of the notification to the works council to initiate the consultation proceedings to the employment agency. The Federal Labour Court has to decide whether it

works council to the employment agency from Sec. 17 (3) Sentence 1 KSchG		leads to the invalidity of the mass dismissal notification and as a consequence to the invalidity of all mass dismissal terminations if the employer omits to forward the copy to the employment agency. Insolvency proceedings were opened against the employer's assets due to insolvency and overindebtedness. At the same time, the defendant was appointed as insolvency administrator. The insolvency debtor agreed a reconciliation of interests with a list of names and a social plan with the works council set up at the company. The plaintiff - like all other employees - is included on the list of names as an employee to be dismissed. After issuing a mass dismissal notice pursuant to Sec. 17 KSchG, the insolvency debtor gave ordinary notice of termination of the plaintiff's employment. The insolvency debtor did not forward a copy of the notification to the works council pursuant to Sec. 17 (2) KSchG to the Employment Agency, contrary to Sec. 17 (3) sentence 1 KSchG. For this reason, the plaintiff considers the termination to be invalid. The lower courts are of the opinion that the termination in dispute is not invalid due to a breach of the obligation under Section 17 (3) sentence 1 KSchG because it is merely a secondary obligation outside the notification procedure. Accordingly, the lower courts dismissed the action. The plaintiff contests this with his appeal to the Federal Labor Court.
Compensation under Section 15 (2) AGG for non-payment of overtime surcharges **Gender discrimination**	28.10.2021 - 8 AZR 370/20	The Federal Labor Court decides whether the plaintiff is entitled to compensation pursuant to Sec. 15 (2) AGG due to the non-payment of overtime pay. The plaintiff works part-time as a nurse for the defendant. The collective bargaining agreement referred to in the employment contract provides that overtime is subject to a surcharge of 30%. However, only those hours worked in excess of the monthly working time of a full-time employee are considered overtime. The plaintiff worked overtime on several occasions. However, she did not receive any overtime pay for these overtime hours - neither in the form of a time credit on her working time account nor as a monetary payment. Accordingly, the plaintiff filed a lawsuit seeking, among other things, compensation for the overtime bonuses

		as time credits and payment of compensation pursuant to Sec. 15 (2) AGG. She is of the opinion that the defendant discriminated against her as a part-time employee because of her gender. The Labor Court dismissed the action. The Regional Labor Court of Hessen upheld the plaintiff in part and ordered the defendant to provide the requested time credit. With regard to the claim for compensation under Section 15 (2) AGG, the Regional Labor Court was of the opinion that the defendant had discriminated against the plaintiff because of her gender, but the court considered a compensation payment to be inappropriate in the specific individual case. In her appeal to the Federal Labor Court, the plaintiff is still seeking compensation in accordance with Section 15 (2) AGG.

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 the practice
Federal Labour Court		
Shaking of the evidential value of a certificate of incapacity for work	08.09.2021 - 5 AZR 149/21 -	**If an employee terminates his or her employment relationship and is certified as unfit for work on the day of termination, this may undermine the probative value of the certificate of incapacity for work, in particular if the certified incapacity for work precisely covers the duration of the notice period.** Facts 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 coming to work. She did not mention any incapacity 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. 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. The lower courts ruled that the employer must continue to pay 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. The decision of the Federal Labor Court The Federal Labor Court ruled in favor of the defendant. The plaintiff initially proved her alleged incapacity for work with a certificate of incapacity for work. However, the probative value of the certificate of incapacity for work is shaken, for example, if the certified incapacity for work covers exactly the period of the notice period. If the employer succeeds in shaking the probative value, the employee must substantiate and prove that he was actually incapacitated for work. The evidence can be provided in particular by questioning the attending physician after appropriate release from the duty of confidentiality. The plaintiff was unable to demonstrate with sufficient specificity that she was actually incapacitated for work. Accordingly, the claim was to be dismissed.
Company pension scheme **Admissibility of a retirement clause in a pension plan**	21.09.2021 - 3 AZR 147/21 -	**A pension provision may effectively exclude employees from company pension benefits who have already reached the age of 55 at the start. This maximum age limit constitutes neither unjustified discrimination on grounds of age nor discrimination on grounds of gender.** Facts The employer has a pension scheme. 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. She is now suing her employer, a trade union, for company pension benefits. She is of the opinion

		that the age limit for inclusion in the pension scheme constitutes discrimination because of age and gender and is therefore invalid. The lower courts dismissed the action. The decision of the Federal Labor Court The plaintiff's appeal was unsuccessful. The Federal Labor Court ruled that the age limit provided for in the pension regulation is not invalid as inadmissible age discrimination under Section 7 (1) AGG. Rather, the discrimination because of age was justified by a legitimate objective. Also, according to the Federal Labor Court, the selected age limit does not lead to an inadmissible indirect discrimination of women because of their gender. The difference in the average years of insurance between women and men is not that large that women are unreasonably disadvantaged by the effects of the age limit.
European Court of Justice		
Break as working time within the meaning of the Working Time Directive (Directive 2003/88/EC) **Reference for a preliminary ruling from the Obvodní soud pro Prahu 9 (Czech Republic)**	02.09.2021 - C-107/19 -	**The rest break granted to an employee during his daily working time, during which he must be ready for action within two minutes if necessary, is to be classified as "working time" within the meaning of the Working Time Directive if an overall assessment of the relevant circumstances shows that the employee is significantly restricted in the free organization of his "rest breaks" due to the way they are structured.** Facts The plaintiff in 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 claimed payment of wages also for the uninterrupted rest breaks because they were to be regarded as working time. 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. Since the court entrusted with the decision is of the opinion that the rest breaks in dispute constitute working time within the meaning of the Working Time Directive, the European Court of Justice was asked to clarify this and other issues. The decision of the European Court of Justice The European Court of Justice has ruled that the concept of "working time" covers all periods of on-call time, including on-call time, during which restrictions are imposed on the employee of such a nature that, objectively speaking, they significantly impair his ability to freely organize the time during which his professional services are not required. In particular, a period of on-call time during which the time imposed on the employee to take up his work is only a few minutes is, in principle, to be regarded in its entirety as 'working time' within the meaning of the directive.

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
First Amendment Ordinance on the Revision of the SARS-CoV-2 Occupational Health and Safety Ordinance	01.09.2021	The Corona Occupational Health and Safety Ordinance has been extended and amended up to and including November 24, 2021. The amendments became effective on September 10, 2021. Regulations in detail: • New is the obligation of employers to inform employees about the risks of COVID-19 disease and existing options for vaccination, to support company physicians with company vaccination offers, and to release employees to take advantage of vaccination offers. • Otherwise, the existing occupational health and safety regulations continue to apply: ▪ Company hygiene plans must be drawn up and updated as before, implemented and made accessible in an appropriate manner. For this purpose, the SARS-CoV-2 occupational health and safety regulations and the industry-specific practical aids of the accident insurance institutions must continue to be used. ▪ Employers remain required to provide rapid or self-testing opportunities in their facilities at least twice per week for all employees in attendance. ▪ The employer may take the vaccination or recovery status of employees into account when determining the necessary protective measures, but there is no corresponding obligation on the part of the employees to provide information. ▪ Company-related contacts and the simultaneous use of rooms by several persons must continue to be reduced to the necessary minimum. Home offices can also make an important contribution to this.

		▪ Employers must at least provide medical face masks where other measures do not provide sufficient protection. ▪ Protection against infection must also be ensured during breaks and in break areas.
Law on the employer's right to ask about vaccination and recovery status	14.09.2021	The law announced on 14.09.2021 (BGBl. I, p. 4152) provides an amendment to Section 36 (3) of the Infection Protection Act (*IfSG*): • According to this, the employer is to be entitled to a right to ask about the vaccination and recovery status in care and nursing facilities as well as community accommodations as long as an epidemic situation of national scope exists and as far as this is necessary to prevent the spread of COVID-19. • Previously, such a right to ask questions pursuant to Section 23a IfSG existed only in medical facilities as defined in Section 23 (3) IfSG.
Fourth Ordinance Amending the Short-Time Workers' Allowance Ordinance	15.09.2021 Government draft	The Short-Time Workers' Compensation Ordinance will be extended and supplemented until December 31, 2021. Regulations in detail: • The requirements for access to short-time allowance will remain lowered until December 31, 2021, even if the company introduced short-time work after September 30, 2021: ▪ The number of employees who must be affected by the loss of work remains lowered from at least one-third to at least 10 percent for these companies and ▪ the build-up of negative working time balances prior to the granting of cyclical short-time working allowance and seasonal short-time working allowance will continue to be completely waived. • Temporary workers will continue to have access to short-time allowance until December 31, 2021, even if the temporary employment agency introduced short-time work after September 30, 2021. • Employers will continue to be fully reimbursed for social security contributions beyond September 2021 until December 31, 2021, even if short-time work does not begin until after September 30, 2021.

No more compensation for non-vaccinated people in quarantine from November on	22.09.2021	At the Conference of Health Ministers of the Federal States, it was decided that non-vaccinated persons should no longer receive compensation in accordance with Section 56 (1) of the Infection Protection Act (*IfSG*) for loss of earnings due to ordered Corona quarantine from November 1, 2021. Content of the resolution in detail: • From November 1, 2021 at the latest, the states will no longer grant compensation benefits pursuant to Section 56 (1) IfSG to persons who are unable to demonstrate complete vaccination protection in the event of an officially ordered quarantine due to COVID-19, although a public recommendation for protective vaccination pursuant to Section 20 (3) IfSG is available for them. • Exceptions apply to persons who cannot be vaccinated for medical reasons and can prove this with a medical certificate or for whom there is no public recommendation for vaccination against COVID-19.

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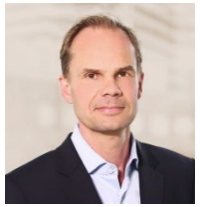

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